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COMMENTS CONCERNING THE APPLICATION INTO JUDICIAL PRACTICE OF THE PROVISIONS OF ART. 4, FROM LAW NO. 143/2000 ON COUNTERING THE ILLICIT DRUG USE AND TRAFICKING

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Lamya-Diana AL-KAWADRI[**]

Abstract

By studying the legal practice in the field of criminal provisions application regarding the prevention of and fight against illegal trafficking and consumption of drugs, the authors observe that in art. 4 of Law 143/2000 regarding the illegal drug holding for personal use, the interpretation made by the legal organs is not unilateral, two points of view taking shape. Thus, it is considered, from one point of view, that the infringement stipulated by art.4 of Law no. 143/2000[1] *regarding the illegal holding does not subsist when a person who acknowledges that he/she is a drug consumer is caught by the police when he/she wishes to buy drugs for personal use, and prohibited substances subject to national control are not found on him/her. According to the other point of view, it is considered that this infringement subsists even when a drug consumer admits having consumed such substances subject to the national control, even if such substances where not found by the police on him/her or at the personal residence. The authors analyze the two points of view and give a series of solid arguments showing that the interpretations based on which it is considered that the lack of existence of the material object of the infringement regarding the illegal holding, the act does not meet the constitutive elements of the infringement stipulated by art. 4 of Law 143/2000 is correct and legal.*

Keywords: *Law no.143/2000, art. 4, possessing drugs, own use, not being caught with the drugs.*

Introduction

Concerned about preventing and fighting against drug use and illegal drug trafficking, in order to protect public health and the individual against drug addiction, the Romanian legislator decided by Law no. 143/2000[2] to accomplish this through two means. On one hand, through medical measures, on the other, through criminal law measures.

Therefore, according to art. 27, paragraph (1), Law no. 143/2000, "doping with drugs under national control, without medical prescription, is forbidden on the territory of Romania", and

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[1] 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.

according to paragraph (2) from the same article, "the person who illegally uses drugs which are under national control can be included, with one's agreement, into an integrated program for assisting drug addicted people".

As an expression of the provisions from art. 27, paragraph (2), Law no. 143/2000, the Government of Romania, by Decree no. 1.102/September 18, 2008[3], approved 'The National Program concerning medical, psychological and social assistance of drug addicted for 2009-2012'. Through the introduction of this National Program, the fundamentals of a complex integrated set of medical psychological and social services have been established for treatment and social re-integration of drug addicted in our country.

Accordingly, at present, Romania has an adequate legal framework to solve medical and social problems which occur inevitably when drug consumers or addicted people are taken into account.

But, as we have stated, the Romanian legislator, by means of Law no. 143/2000, has introduced legal provisions through art. 4, from the above mentioned law, in order to protect public health and the individual against the danger of drug addiction.

As it has been emphasized in the doctrine, the incrimination from art. 4 has been conceived by the legislative power as an obstacle offence, to make the addressees of the criminal law not to use drugs which are under national control and to discourage them, by provisions of criminal penalties from practicing this bad habit.

By incriminating facts like growing plants which contain drugs, the production, fabrication, preparation or drug transformation, the legislator has done nothing else than to stop the addicted from carrying on activities which could help them obtain their own means or other ways, like buying them[4].

Also, by incriminating such deeds, the legislator exerts a pressure on the drug addicted (or future drug addicted) to restrain from developing banned activities which could help one produce above the drugs for one's own use. If one still buys and possesses drugs, one will have to answer in front of the law for such penalty[5].

Studying legal practice of the field after the year 2000, we have concluded that the interpretation given about applications of art. 4, from Law no. 143/2000, made by some legal authorities, is not unitary, and there are different points of view. Consequently we are going to present two concrete cases from the legal practice, the way they have been solved by legal authorities, and then we will give some theoretical explanatory notes about the specific features of the offence stipulated for in art. 4, Law no. 143/2000, about **possessing drugs for own use, without being allowed to.**

1. Through legal decision no. 336 from March 16th 2005, the Law Court from Bucharest disposed discharge for P.M., the defendant, proceeding from art. 11, point 2, letter a), connected with art. 10, par. (1), letter d) Code of legal procedure, for having committed the offence mentioned in art. 4, Law no. 143/2000. In order to pass this sentence, the court of first instance memorized the following situation:

On June 16th, 2003, at a search at C. I.' s place of residence, known as a heroine dealer, the policeman identified the so-called P.M. in the apartment. Questioned, the above mentioned P.M.,

[3] The Government Decision no. 1.102/2008 regarding the approval of 'The National Program concerning medical, psychological and social assistance of drug addicted for 2009-2012', published in the Official Gazette of Romania, Part I, no. 675 of 1/10/2008.

[4] Traian Dima, *Infracţiuni contra sănătăţii publice prevăzute în legi extrapenale (cu referire la droguri)*, Editura Lumina Lex, Bucureşti, 2002, p. 144.

[5] *Idem*, p. 145.

who had the sum of 50 RON on her declared she bad come to C.I.'s place of residence in order to buy heroine, as she was a consumer, and that she had bought heroine from him many times before, for her own use. When she was found and identified, the above mentioned P.M. did not possess any kind of drug bought from the above-mentioned C.I.

The above mentioned P.M. was sent to court by the Prosecutor's Office from The Law Court of Bucharest for the offence of **drug possession** without being allowed to use any drugs for herself. In the bill of indictment, the Prosecutor's office motivated sending in court for the defendant P.M., for the above mentioned offence, although she had not been found with any forbidden substances about herself when she was detained, with the reason that 'the above mentioned, being a consumer of such substances, **drug use necessarily supposes possession**'.

To this situation, the Law Court of Bucharest disposed the discharge of the defendant on the basis that the case lacks the material evidence of the offence dealt with in art. 4, Law 143/2000, as this above mentioned person was not found illegally possessing drugs.

Displeased with the discharge solution passed by the Court, the Prosecutor's Office from the Law Court of Bucharest pronounced appeal, criticizing the unjust discharge of the above mentioned P.M. Through decision no. 687, from 15.09.2005, the Law Court of Bucharest, Criminal Department II – rejected the appeal of the Prosecutor's Office, using as an argument the same motivation of the Court which discharged the above mentioned.

Displeased with the rejection of the appeal, the Prosecutor's Office from the Court of Appeal, Bucharest, introduced last appeal, for the same reason. Judging the last appeal, The Supreme Court of Justice rejected it as unfounded. Motivating the rejection of the last appeal, through legal decision no. 7051 from December 14th 2005, The Supreme Court of Justice gave the following arguments:

'The accomplishment of the constitutive content of the offence dealt with in art. 4 from Law no. 143/2000 supposes the achievement of one or more actions stipulated in the text of the law, as it follows: to grow, produce, make, experiment, extract, prepare, transform, buy or possess drugs, the existence of the offence being conditioned, in any of the normative acts, by consuming without being allowed to.

The circumstance that the defendant is a drug addict is not enough to accomplish the offence as it is stipulated in art. 4, from Law no. 143/2000, as long as the accusation did not give essential proof of the objective side connected with the offence deduced from evidence, henceforth the discharge, based on art. 11, point 2, letter a) linked with art. 10, par. (1), letter d) Legal Procedure Code, is well-grounded and legal.'

'The argument that drug addiction implies their possession cannot guide us to pronounce sentencing, since sentencing a person cannot be done in the absence of evidence.'

'The offence stipulated in art. 4, Law 143/2000, requires among other facts the achievement of drug possession for one's own consume, without being allowed to. Therefore, the circumstance that the defendant is a drug addict is not enough to prove the existence of this offence, as long as drugs possession, without the right to own them, is not demonstrated with evidence. In this case, the discharge on the basis of art. 11, point 2, letter a) from art. 10, alin. (1) letter d) Code of legal procedure, is legal since the objective part of the offence is not accomplished.'

2. Through legal decision no. 154/02.02.2006, given by The Law Court of Bucharest, Criminal Department I, defendant N.M. was sentenced to three years and six months imprisonment, for committing the offence of drug dealing – high risk drugs – stipulated and punished by art. 2, par. (1) and (2) from Law no. 143/2000, with the application of legal provisions, stipulated in art. 74, lit. a) and c), connected with art, 76, letter a) Criminal Code. On the basis of art. 11, point 2, letter a) relating with art. 10, let b) Code of Criminal Procedure, the

defendant was **discharged** for the offence of possessing high risk drugs for his own consume (use, stipulated in art. 4, alin. (1) and (2), from Law no. 143/2000.

To pass this decision, the Bucharest Law Court, Criminal Department I sentenced the defendant N.M. to three years and a half imprisonment, for the offence of dealing with high risk drugs, stipulated and punished by art. 2, par. (1) and (2) from Law no. 143/2000 with the application of legal provisions from art. 74 lit. a) and c) relating with art. 76 let a) Criminal Code. On the basis of art. 11, p. 2, lit. a), relating to art. 10, lit. b), Code of Criminal Procedure discharge the defendant for possessing high risk drugs for his own use, stipulated in art. 4, par. (1) and (2), Law no. 143/2000.

To pass this decision, the Bucharest Law Court presented the following situation:

As a result of the denunciation made by ANV., a witness, investigated in a criminal cause concerning drugs, an act was organized to catch the above mentioned N.M., about whom there were data and information that he was a dealer and a drug addict, drugs under national control. With 90 RON, marked money ANV, the denouncer witness went to NIM's place of residence and in his apartment he negotiated buying six measures of heroine.

The denouncer witness, while talking with NM, the dealer, conditioned buying the six measures only if together they were to consume four measures in NM's apartment, the next two being for a future occasion NM, the dealer, agreed, but in his turn he asked for a favor from the buyer, that was, to use only three measures together, and to offer one to a friend of his, FIV, and to consume the measures in FIV's apartment.

The denouncer witness agreed with NM's proposal, gave him 90RON in 10 RON banknotes, chemically treated, and in exchange he received the six measures of heroine. After the transaction, the denouncer witness and NM went to FIV's place, consuming the four measures of heroine together.

After they had finished the heroine, the denouncer and NM, the dealer left FIV's place, and went to their own place.

When they got out from FIV's block, the two people were stopped by the policemen who were involved in the act. At the bodily search, the nine banknotes of 10 RON each were found on NM, the dealer, the same banknotes chemically treated and seriated in a report already written by the policemen, but there were no drugs about NM. The denouncer witness was found with the two measures of heroine, bought from NM. There was a research at NM's place, but the result was negative, no forbidden substances being found. After being caught red-handed, NM admitted the offence – illegal drug dealing.

In the indictment, the Prosecutor's Office sent NM to court also for the offence of drug possession, without being allowed to, for his own use, motivating that 'as he had used drugs illegally, he had also possessed those drugs'.

As we have stated, the Law Court of Bucharest discharged the defendant for drug possession, for his own use, offence he had been sent to court for motivating that 'the defendant did not have drugs about himself, and the drug consume as such, the one he had taken part to, at FIV's place, was not incriminated by our criminal legislation, art. 4 punishing only drug possession for one's own use, not the use itself'.

The Prosecutor's Office from the Law Court of Bucharest, Criminal Department I declared appeal criticizing the decision of the first instance for the mistaken discharge of NM, who had also committed the offence stipulated by art. 4, Law no. 143/2000.

The Court of Appeal, Bucharest admitted the last appeal of the Prosecutor's Office and, reconsidering, through criminal decision no. 247/29.03.2006, sentence the defendant to one year and six months imprisonment, for the offence stipulated by art. 4, Law no. 143/2000, for possession of drugs for personal use, without having the right to.

The defendant made a last appeal against this decision, asking for the decision taken by the first instance, concerning his discharge for the offence already mentioned, stipulated by art. 4, Law no. 143/2000.

The Supreme Court of Justice rejected, through decision no. 324 from May 29th, 2006, the appeal of the defendant as being ungrounded. To motivate the rejection of the appeal, the The Supreme Court of Justice gave the following reason:

'To assert that drug consume as such cannot be punished (*as the law court who discharged the defendant asserted*), but only possession, with a view to using, would mean that the action – aim (the use as such), although accomplished, should remain unpunished, and the middle action (possession), although less dangerous, should be punished as such.'

As it can be established from the two cases presented, the two panels of judges from the The Supreme Court of Justice that solved the appeals were on antagonistic positions, having different ideas as far as the application of the provisions from art. 4, Law 143/2000 was concerned, that is about possessing drugs, illegally, for personal use. This very difference of interpretation for the provisions of art. 4, Law 143/2000 concerning illegal drug possession for personal use by the judiciary committee made us elaborate this study/report and express our point of view, which is, in our opinion, legal and grounded.

We consider that the point of view expressed by the The Supreme Court of Justice though criminal decision no. 7051 from December 14th, 2005 is the **grounded and legal** one, in the idea that the case does not achieve the objective part of the offence stipulated in art. 4, Law 143/2000, and the jury was right in discharging the defendant. In this respect, other arguments in favor of provision no. 7051 from December 14th, 2005 of the HCCL will be introduced.

In the juridical literature of specialty it has been underlined the fact that, with some exceptions, the offences stipulated by Law no. 143/2000 have drugs as a material object, drugs of risk or great risk. The material object for those offences constitutes itself as an essential legal request for their existence.

The non-existence of this material object (drugs) for those offences leads to lack of offence[6].

The material object for the offence stipulated by art. 4, Law no. 143/2000, as far as possession is concerned is drugs with risk or high risk, which are under national control, stipulated in the Table Charts for Law no. 143/2000.

On the other hand, for a correct juridical framing of the deed, a technical – scientific and chemical finding is necessary, to settle if the drugs illegally possessed for personal use are of 'risk' or 'great risk', the punishment for the defendant depending on this. But, if the drugs illegally mentioned technical and scientific finding cannot be made and, as a consequence, the correct juridical framing could not be made either.

The fact that the defendant admitted having possessed and used illegally, for example, hashish or heroine is not a proof as such, in the absence of the drug itself which should have been found about the defendant or at his place, in order to be accused of illegal possession of drugs for personal use.

In the interpretation of the Prosecutor's Office for the case presented in **1**, all drug consumers, without a medical prescription, who, addicted to drugs, come willingly at a qualified Sanitary institution in order to attend a treatment for disintoxication, should go to the Prosecutor's Office first, since they illegally possessed drugs for personal use, for the elaboration of a criminal file, and only then attend medical treatment[7].

As far as the point of view stated by the HCCL is concerned, through criminal provision no. 3241 from May 29th 2006, stipulated in the case from 2, we express our surprise and disappointment, at the same time.

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[6] Traian Dima, *op. cit.,* p.74.

[7] Traian Dima, Alina-Gabriela Păun, *Droguri ilicite (legislaţie şi practică judiciară comentată)*, Editura Universul Juridic, Bucureşti, 2010, p. 277.

We are surprised by the solution offered by the HCCL for the last appeal on trial in the case introduced station that, in 2005, there had already been outlined a correct point of view from the HCCL, in such a circumstance through the provision of case no. 7051 from December 14th, 2005.

The disappointment comes from the fact that, for jury that solved the appeal, the **offence of illegal drug possession**, for personal use, stipulated in art 4, Law 143/2000, also **continues** when the person in question is a drug consumer, and about that person or in one's place drugs illegally possessed cannot be found, an idea we cannot agree with, since in our opinion, in this interpretation the supreme court has expanded the use of criminal law beyond the requests of the incriminating text.

On the other hand, from the way the HCCL motivated the sentence given for the defendant NM, by the Court of Appeal, Bucharest, it goes without saying that in Romania drug consume is punished as being offence, although there is no text of law to incriminate illegal drug consume, drugs under national control.

To sanction illegal drug consume through possessing, with no legal right, of such substances possessing, with no legal right, of such substances when drugs cannot be found about the defendant, having only his confession about drug addiction, is, in our opinion, a clear violation of art. 27, alin. (2) from Law no. 143/2000, according to which people who use drugs without a medical prescription are only under medical measures.

The motivation of the Supreme Court that 'drug consume as such cannot be punished, only possession for future use' would mean that the aim (the use for personal benefit), although attained, should remain unpunished, and the middle action (possession), although less dangerous, to be the only one punished'. In our opinion, it does not fit in any way to the philosophy of the Romanian legislator about prevention and fighting against dealing and illegal consume/use of drugs, expressed in all the norms connected with the subject.

On the contrary, the legislator, by means of Law no. 522/2004[8], which completed and modified Law no. 143/2000, created for the first time in the history of drugs in Romania, through the introduction of articles 19^1 and 19^2, a mechanism on the basis of which a defendant who committed the offence stipulated in art. 4, Law no. 143/2000, can escape sentence for the offence if she accepts to be introduced into an integrated medical circuit of assistance for drug addicted people and undergoes a medical treatment.

We can clearly extract from here the philosophy of the Romanian legislator, that is for people who illegally possess drugs, for personal use, medical measures come first, not the punishment, as it was the case.

Conclusions

As a conclusion, in our opinion, the absence of drugs illegally possessed, as a material object of the offence stipulated by art. 4, Law no. 143/2000, possessing drugs without the right to, for personal use, in the case of a person addicted to such substances and the decision that the person possessed drugs bought by herself/himself, drugs which she/he used, does not satisfy the legal requests of the material existence of the objective part connected with this offence.

To admit that a person is guilty of committing the offence stipulated in art. 4, Law no. 143/2000, by illegal possession, through rebound, as it is demonstrated that she is addicted to drugs under national control, without being caught with the drugs she/he uses, but it is only shown that she/he bought and consumed those substances is, in our opinion, a major error.

[8] Law published in the Official Gazette of Romania, no. 1555 of 7/12/2004.

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OBSERVAŢII ÎN LEGĂTURĂ CU APLICAREA ÎN PRACTICA JUDICIARĂ A DISPOZIŢIILOR ART. 4 DIN LEGEA NR. 143/2000, PRIVIND PREVENIREA ŞI COMBATEREA TRAFICULUI ŞI CONSUMULUI ILICIT DE DROGURI

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Abstract

Studiind practica judiciară în domeniul aplicării dispoziţiilor penale privind prevenirea şi combaterea traficului şi consumului ilicit de droguri, autorii observă că în privinţa art. 4 din Legea nr. 143/2000 în modalitatea deţinerii fără drept de droguri pentru propriul consum, interpretarea făcută de organele judiciare nu este unitară, conturându-se două puncte de vedere. Astfel, se consideră într-un prim punct de vedere că, infracţiunea prevăzută de art. 4 din Legea nr. 143/2000[1] *în modalitatea deţinerii fără drept, nu susbzistă atunci când o persoană care recunoaşte că este consumatoare de droguri este prinsă de poliţie în momentul când doreşte să cumpere droguri pentru propriul consum, iar asupra sa nu se găsesc substanţe interzise supuse controlului naţional. Potrivit celuilalt punct de vedere se consideră că această infracţiune subzistă şi atunci când un consumator de droguri recunoaşte că a consumat astfel de substanţe supuse controlului naţional cu toate că în momentul prinderii lui de către poliţie nu avea asupra sa ori la domiciliu astfel de substanţe. Autorii analizează cele două puncte de vedere şi aduc o serie de argumente solide prin care arată că interpretarea în baza căreia se consideră că în lipsa existenţei obiectului material al infracţiunii în modalitatea deţinerii fără drept fapta nu întruneşte elementele constitutive ale infracţiunii prevăzute de art. 4 din Legea nr. 143/2000, este corectă şi legală.*

Cuvinte cheie: *Legea nr. 143/2000, consumator, deţinerea fără drept de droguri, propriul consum.*

Introducere

Preocupat de prevenirea şi combaterea traficului şi consumului ilicit de droguri în vederea protejării sănătăţii publice şi a individului, împotriva pericolului toxicomaniei, legiuitorul român a decis prin Legea nr. 143/2000[2] să facă acest lucru prin două mijloace. Pe de-o parte prin mijloace medicale, iar pe de-altă parte prin mijloace de drept penal.

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[1] Art. 4 prevede: "(1) Cultivarea, producerea, fabricarea, experimentarea, extragerea, prepararea, transformarea, cumpărarea sau deţinerea de droguri de risc pentru consum propriu, fără drept, se pedepseşte cu închisoare de la 6 luni la 2 ani sau cu amendă. (2) Dacă faptele prevăzute la alin (1) privesc droguri de mare risc, pedeapsa este închisoarea de la 2 la 5 ani."

[2] Legea nr. 143/2000 privind prevenirea şi combaterea traficului şi consumului ilicit de droguri a fost publicată în Monitorul Oficial al României nr. 362 din 03.08.2000.

Astfel, potrivit art. 27 alin. (1) din Legea nr. 143/2000, „consumul de droguri aflate sub control național, fără prescripție medicală este interzis pe teritoriul României", iar potrivit alin. (2) al aceluiaşi articol „**persoana care consumă ilicit droguri aflate sub control național poate fi inclusă cu acordul său într-un program integrat de asistență a persoanelor consumatoare de droguri".**

Ca o expresie a prevederilor art. 27 alin. (2) din Legea nr. 143/2000, Guvernul României, prin Hotărârea nr. 1.102 din 18 septembrie 2008[3], a aprobat „Programul Național de asistență medicală, psihologică şi socială a consumatorilor de droguri pentru perioada 2009-2012". Prin implementarea acestui PROGRAM NAȚIONAL s-au pus bazele unui complex integrat de servicii de asistență medicală, psihologică şi socială, pentru tratamentul şi readaptarea socială a consumatorilor de droguri din țara noastră.

Rezultă că, în prezent, România dispune de un cadru juridic corespunzător pentru soluționarea problemelor de natură medicală şi socială ce apar inevitabil în cazul persoanelor consumatoare sau dependente de droguri.

Dar aşa cum am arătat, legiuitorul român, prin Legea nr. 143/2000, în scopul protejării sănătății publice şi a individului împotriva pericolului toxicomaniei a instituit şi mijloace penale prin prevederile art. 4 din menționata lege.

Aşa cum s-a subliniat în doctrină, incriminarea din art. 4 a fost concepută de legiuitor ca o infracțiune obstacol, pentru a-i determina pe destinatarii legii penale să nu consume droguri supuse controlului național şi să-i descurajeze sub sancțiuni penale de la practicarea acestui viciu[4].

Legiuitorul incriminând fapte cum sunt cultivarea de plante ce conțin droguri, producerea, fabricarea, prepararea sau transformarea drogurilor nu a făcut altceva decât să-i oprească pe toxicomani să desfăşoare activități prin care să-şi obțină singuri drogurile pentru consum, prin posibilități proprii sau prin alte mijloace cum ar fi spre exemplu cumpărarea.

Incriminând astfel de fapte, legiuitorul exercită o presiune asupra toxicomanului (sau viitorului toxicoman) de a se abține de la efectuarea unor activități interzise de el, prin care să-şi producă singur drogurile necesare pentru consum. Dacă el totuşi va cumpăra şi va deține droguri pentru consum, va trebui să răspundă penal o astfel de faptă[5].

Studiind practica judiciară în domeniu după anul 2000, am constatat că interpretarea ce s-a făcut de către unele organe judiciare privind aplicarea dispozițiilor art. 4 din Legea nr. 143/2000, nu este unitară, existând puncte de vedere diferite. În acest sens vom prezenta două spețe din practica judiciară aşa cum au fost ele soluționate de organele judiciare, după care vom face câteva precizări teoretice cu privire la particularitățile pe care le prezintă infracțiunea prevăzută de art. 4 din Legea nr. 143/2000 în **modalitatea deținerii fără drept de droguri pentru consumul propriu.**

1. Prin sentința penală nr. 336 din 16 martie 2005, Tribunalul Bucureşti a dispus achitarea inculpatei P.M. în baza art. 11 pct. 2 lit. a) raportat la art. 10 alin.(1) lit. d) Cod procedură penală pentru săvârşirea infracțiunii prevăzute de art. 4 din Legea nr. 143/2000. Pentru a pronunța această sentință, instanța de fond a reținut următoarea situație de fapt:

La data de 16 iunie 2003, cu ocazia efectuării unei percheziții domiciliare făcute la locuința numitului C.I., cunoscut ca traficant de heroină, lucrătorii de poliție au identificat-o în apartament pe

[3] Hotărârea de Guvern nr. 1.102/2008 privind aprobarea Programului Național de asistență medicală, psihologică şi socială a consumatorilor de droguri pe perioada 2009-2012 a fost publicată în Monitorul Oficial al României, Partea I, nr. 675 din 1 octombrie 2008.

[4] Traian Dima, *Infracțiuni contra sănătății publice prevăzute în legi extrapenale (cu referire la droguri)*, Editura Lumina Lex, Bucureşti, 2002, p.144.

[5] *Idem*, *op. cit.,* p.145.

numita P.M. Cu ocazia cercetării acesteia, numita P.M., care avea asupra sa suma de 50 RON a declarat că a venit la locuinţa numitului C.I. pentru a cumpăra heroină deoarece era consumatoare şi că în mai multe rânduri a cumpărat de la acesta heroină pentru consumul propriu. În momentul depistării şi identificării, numita P.M. nu avea asupra sa nici un fel de drog cumpărat de la numitul C.I.

Numita P.M. a fost trimisă în judecată de către Parchetul de pe lângă Tribunalul Bucureşti pentru săvârşirea infracţiunii de **deţinere de droguri** fără drept pentru consumul propriu. În rechizitoriul întocmit în cauză, parchetul a argumentat trimiterea în judecată a inculpatei P.M. pentru săvârşirea infracţiunii menţionate, deşi asupra acesteia nu s-au găsit niciun fel de substanţe interzise la deţinere pe considerentul că „cea în cauză, fiind consumatoare de astfel de substanţe, consumul de droguri **presupune** în mod obligatoriu **acţiunea de deţinere".**

Faţă de această situaţie de fapt, Tribunalul Bucureşti a dispus achitarea inculpatei pe temeiul că în speţă **lipseşte elementul material** al infracţiunii prevăzute de art. 4 din Legea nr. 143/2000 în condiţiile în care aceasta nu a fost depistată deţinând ilicit droguri.

Nemulţumit de soluţia de achitare dată de instanţă, Parchetul de pe lângă Tribunalul Bucureşti a declarat apel criticând greşita achitare a inculpatei P.M. Prin decizia nr. 687 din 15.09.2005, Curtea de Apel Bucureşti, Secţia a II-a penală a respins apelul parchetului, argumentându-şi soluţia cu aceeaşi motivare a instanţei de fond care a achitat-o pe inculpată.

Nemulţumit de respingerea apelului, Parchetul de pe langă Curtea de Apel Bucureşti, cu aceeaşi motivare a introdus recurs. Judecând recursul I.C.C.J., l-a respins ca nefondat. În motivarea respingerii recursului, prin decizia penală nr. 7051 din 14 decembrie 2005, I.C.C.J. a adus următoarele argumente:

"Realizarea conţinutului constitutiv al infracţiunii prevăzute în art. 4 din Legea nr. 143/2000 presupune realizarea unei sau mai multor acţiuni dintre cele prevăzute în textul de lege şi anume: cultivarea, producerea, fabricarea, experimentarea, extragerea, prepararea, transformarea, cumpărarea sau **deţinerea** de droguri, existenţa infracţiunii fiind condiţionată, în oricare din modalităţile normative, de scopul consumului fără drept.

Împrejurarea că inculpata este consumatoare de droguri nu este suficientă pentru realizarea infracţiunii, aşa cum este prevăzută în art. 4 din Legea nr. 143/2000, atâta timp cât acuzarea nu a făcut dovada unor elemente esenţiale ale laturii obiective a infracţiunii deduse judecăţii şi ca atare, soluţia de achitare, în temeiul art. 11 pct. 2 lit. a) raportat la art. 10 alin.(1) lit. d) Cod procedură penală, este temeinică şi legală."

„Susţinerea potrivit căreia consumul de droguri implică deţinerea acestora nu poate conduce la pronunţarea unei soluţii de condamnare întrucât condamnarea unei persoane nu se poate face în lipsa probelor."

„Infracţiunea prevăzută în art. 4 din Legea nr. 143/2000 presupune, între altele, realizarea **acţiunii de deţinere de droguri pentru consum propriu fără drept**. Prin urmare, împrejurarea că inculpatul este consumator de droguri nu este suficientă pentru existenţa acestei infracţiuni, atâta timp cât acţiunea de deţinere a drogurilor fără drept nu este dovedită pe bază de probe. În acest caz, soluţia de achitare în temeiul art. 11 pct. 2 lit. a) raportat la art. 10 alin (1) lit. d) Cod procedură penală, este legală întrucât **nu este realizată latura obiectivă a infracţiunii".**

2. Prin sentinţa penală nr. 154/02.02.2006 a Tribunalului Bucureşti, Secţia I penală, a fost condamnat la 3 ani şi 6 luni închisoare inculpatul N.M. pentru săvârşirea infracţiunii de trafic de droguri de mare risc prevăzută şi pedepsită de art. 2 alin. (1) şi (2) din Legea nr. 143/2000 cu aplicarea dispoziţiilor legale prevăzute de art. 74 lit. a) şi c) raportat la art. 76 lit. a) Cod penal. În baza art. 11 pct. 2 lit. a) raportat la art. 10 li.b) Cod procedură penală **a achitat** pe inculpat pentru săvârşirea infracţiunii de deţinere de droguri de mare risc pentru consumul propriu prevăzută de art. 4 alin. (1) şi (2) din Legea nr. 143/2000.

Pentru pronunţarea acestei hotărâri, Tribunalul Bucureşti a reţinut următoarea situaţie de fapt:

În urma denunţului martorului A.N.V. cercetat într-o cauză penală privind drogurile, a fost organizat un flagrant pentru prinderea numitului N.M. despre care existau date şi informaţii că este traficant şi consumator de droguri supuse controlului naţional. Având asupra sa suma de 90 RON, marcată, martorul denunţător ANV s-a deplasat la domiciliul lui N.M. şi în apartamentul acestuia a tratat cumpărarea a 6 doze de heroină.

Martorul denunţător, cu ocazia discuţiilor purtate cu traficantul N.M. a condiţionat cumpărarea celor 6 doze numai dacă, împreună vor consuma 4 doze în apartamenul acestuia, iar două să-i rămână pentru un consum viitor. Traficantul N.M. a fost de acord cu condiţia pusă, dar la rândul său, a cerut o favoare din partea cumpărătorului, în sensul că din cele 4 doze ce urmau să fie consumate împreună, să consume numai 3, iar una să fie oferită unui prieten al său F.I.V. urmând ca, consumul să se facă la domiciliul acestuia din urmă.

Martorul denunţător a fost de acord cu propunerea lui N.M., i-a dat acestuia suma de 90 RON în bancnote de câte 10 RON, tratate chimic, în schimbul căreia a primit cele 6 doze de heroină. După efectuarea tranzacţiei, N.M. împreună cu martorul denunţător s-au deplasat la domiciliul lui F.I.V. consumând împreună cele 4 doze de heroină.

După ce au consumat heroina, deununtătorul şi traficantul N.M. au părăsit locuinţa lui F.I.V. pentru a merge fiecare la domiciliul său.

La ieşirea din blocul în care locuia F.I.V., cei doi au fost opriţi de lucrătorii de poliţie care erau angrenaţi în realizarea flagrantului. Cu ocazia percheziţiei corporale efectuate asupra traficantului N.M. s-au găsit cele 9 bancnote a 10 RON tratate chimic şi înseriate într-un proces verbal întocmit anterior de către lucrătorii de poliţie, **fără să se fi găsit însă vreun drog asupra sa**. Asupra martorului denunţător s-au găsit cele două doze de heroină pe care acesta le cumpărase de la N.M. S-a procedat la efectuarea unei percheziţii la domiciliul traficantului N.M., dar rezultatul a fost negativ, negăsindu-se nici un fel de substanţe interzise la deţinere. După prinderea în flagrant, N.M. a recunoscut fapta de trafic ilicit de droguri comisă.

În rechizitoriul întocmit, parchetul l-a trimis în judecată pe inculpatul N.M. şi pentru săvârşirea infracţiunii de deţinere fără drept de droguri pentru consumul propriu, motivând că „din moment ce a consumat ilicit droguri înseamnă că a şi deţinut ilegal drogurile consumate".

Aşa cum am arătat, Tribunalul Bucureşti l-a achitat pe inculpat pentru săvârşirea infracţiunii de deţinere fără drept de droguri în scopul consumului propriu, pentru care fusese trimis în judecată de către parchet argumentând că „asupra inculpatului nu s-au găsit droguri deţinute pentru consumul propriu, iar consumul de droguri ca atare la care acesta a participat în locuinţa lui F.I.V. nu este incriminat în legislaţia noastră penală, art. 4 pedepsind numai deţinerea de droguri pentru consumul propriu, nu şi consumul".

Parchetul de pe lângă Tribunalul Bucureşti Secţia I penală a declarat apel criticând hotărârea primei instanţe pentru greşita achitare a inculpatului N.M., sub aspectul săvârşirii de către acesta şi a infracţiunii prevăzute de art. 4 din Legea nr. 143/2000.

Curtea de apel Bucureşti a admis recursul parchetului şi, rejudecând cauza, prin decizia penală nr. 247/29.03.2006, l-a condamnat pe inculpat la 1 an şi 6 luni închisoare pentru săvârşirea infracţiunii prevăzute de art. 4 din Legea nr. 143/2000, **sub aspectul deţinerii fără drept de droguri pentru consumul propriu.**

Împotriva acestei decizii a declarat recurs inculpatul solicitând menţinerea hotărârii primei instanţe cu privire la achitarea sa pentru săvârşirea infracţiunii de deţinere de droguri fără drept pentru propriul consum, prevăzută de art. 4 din Legea nr. 143/2000.

Prin decizia nr. 324 din 29 mai 2006, I.C.C.J. a respins recursul inculpatului ca fiind nefondat. În motivarea respingerii recursului, I.C.C.J. a adus următorul argument:

„A susține că nu poate fi pedepsit consumul de droguri ca atare (***așa cum a susținut instanța de fond care l-a achitat pe inculpat*** – *s.n*), ci numai deținerea în vederea consumului ar însemna ca acțiunea scop (consumul propriu-zis), deşi realizată, să rămână nepedepsită, iar acțiunea mijloc (deținerea), deşi mai puțin periculoasă, să fie ca atare pedepsită".

După cum se poate constata din cele două spețe prezentate, cele două complete de la I.C.C.J. care au soluționat în recurs cauzele, s-au situat pe poziții opuse, având viziuni diferite în ceea ce priveşte aplicarea dispozițiilor art. 4 din Legea nr. 143/2000, în modalitatea deținerii de droguri fără drept în scopul consumului propriu. Tocmai această diferență de interpretare a dispozițiilor art. 4 din Legea nr. 143/2000 în modalitatea deținerii de droguri fără drept pentru consumul propriu, de către organele judiciare, ne-a determinat să efectuăm prezentul studiu şi să ne exprimăm puntul de vedere pe care îl considerăm legal şi temeinic.

Considerăm că punctul de vedere exprimat de ICCJ prin decizia penală nr. 7051 din 14 decembrie 2005, în sensul că, în speță nu este realizată latura obiectivă a infracțiunii prevăzute de art. 4 din Legea nr. 143/2000, iar instanța de fond a procedat corect achitându-l pe inculpat **este cel temeinic şi legal**. În acest sens, în continuare, vom prezenta şi alte argumente în sprijinul deciziei nr. 7051 din 14 decembrie 2005 a I.C.C.J.

În literatura juridică de specialitate s-a subliniat faptul că, cu unele excepții, infracțiunile prevăzute în Legea nr. 143/2000 au ca obiect material drogurile fie de risc, fie de mare risc. Obiectul material pentru acele infracțiuni se constituie într-o cerință legală esențială pentru existența lor.

Inexistența acestui obiect material (drogurile) pentru acele infracțiuni duce la inexistența infracțiunii[6].

Obiectul material al infracțiunii prevăzute de art. 4 din Legea nr. 143/2000, în modalitatea deținerii îl constituie drogurile de risc sau de mare risc, supuse controlului național prevăzute în Tabelele I, II, III Anexă la Legea nr. 143/2000.

Pe de-altă parte, pentru corecta încadrare juridică a faptei, este necesară o constatare tehnico-ştiințifică chimică, pentru a se stabili dacă drogurile deținute fără drept în scopul consumului propriu sunt „**de risc**" sau „**de mare risc**", în funcție de aceasta depinzând şi pedeapsa ce va fi aplicată inculpatului. Or, dacă nu se găsesc drogurile deținute ilegal şi care au fost consumate, nu se poate face constatarea tehnico-ştiințifică de care aminteam mai sus şi pe cale de consecință nu s-ar putea face nici încadrarea juridică corectă în cauză. Recunoaşterea inculpatului că a deținut fără drept şi a consumat spre exemplu haşiş sau heroină nu constituie o probă în sine în lipsa existenței concrete a drogului care ar fi trebuit să fie găsit asupra inculpatului sau în locuința acestuia pentru a putea fi acuzat de deținere fără drept de droguri pentru consumul propriu.

În interpretarea dată de parchet în cazul speței prezentate la punctul 1, ar trebui ca toate persoanele consumatoare de droguri fără prescripție medicală, care fiind dependente se prezintă de bună voie la o instituție sanitară abilitată pentru a urma un tratament pentru dezintoxicare, ar trebui să treacă mai întâi pe la parchet pentru că au deținut fără drept droguri pentru consumul propriu, pentru întocmirea unui dosar penal, şi după aceea aplicarea măsurilor de natură medicală[7].

Cât priveşte punctul de vedere exprimat de I.C.C.J. prin decizia penală nr. 3241 din 29 mai 2006 dată în speța prezentată la punctul 2, ne exprimăm surprinderea şi în acelaşi timp dezamăgirea.

Suntem surprinşi de soluția dată de I.C.C.J. în recursul ce l-a judecat în speța prezentată pe considerentul că, în anul 2005 se conturase deja punctul de vedere corect al I.C.C.J. într-o astfel de situație prin decizia de speță nr. 7051 din 14 decembrie 2005.

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[6] Traian Dima, *op.cit.,* p. 74.

[7] Traian Dima, Alina - Gabriela Păun, *Droguri ilicite (legislație şi practică judiciară comentată)*, Editura Universul Juridic, Bucureşti, 2010, p. 277.

Dezamăgirea provine din faptul că în concepția acelui complet de judecată care a soluționat recursul, infracțiunea de deținere fără drept de droguri pentru consumul propriu prevăzută de art. 4 din Legea nr. 143/2000, **subzistă** şi atunci când se constată că persoana cercetată este consumatoare de droguri, iar asupra sa sau în locuință nu se găsesc droguri deținute ilegal, concepție cu care nu putem fi de acord, deoarece în opinia noastră, în această interpretare instanța supremă a extins aplicarea legii penale dincolo de cerințele textului incriminator.

Pe de-altă parte, din modul în care a argumentat I.C.C.J., condamnarea inculpatului N.M. de către Curtea de Apel Bucureşti rezultă că în România consumul de droguri este pedepsit ca infracțiune deşi nici un text de lege nu incriminează consumul ilicit de droguri supuse controlului național.

A sancționa consumul ilicit de droguri prin intermediul deținerii fără drept de astfel de substanțe atunci când nu se găsesc droguri asupra inculpatului, ci doar recunoaşterea sa că este consumator, reprezintă în opinia noastră o încălcare clară a prevederilor art. 27 alin. (2) din Legea nr. 143/2000, potrivit căruia persoanele care consumă droguri fără prescripție medicală sunt supuse numai unor măsuri de natură medicală.

Susținerea instanței supreme că „nu poate fi pedepsit consumul de droguri ca atare, ci numai deținerea în vederea consumului ar însemna că acțiunea scop (consumul propriu) deşi realizat să rămână nepedepsit, iar acțiunea mijloc (deținerea) deşi mai puțin periculoasă să fie numai ea pedepsită", în opinia noastră, nu corespunde sub nicio formă filozofiei legiuitorului român cu privire la prevenirea şi combaterea traficului şi consumului ilicit de droguri exprimată în toate actele normative de profil.

Dimpotrivă, legiuitorul prin Legea nr. 522/2004[8] prin care a fost completată şi modificată Legea nr. 143/2000, prin introducerea articolelor 19^1 şi 19^2 a creat pentru prima oară în istoria drogurilor din România, un mecanism în baza căruia un inculpat care a comis infracțiunea prevăzută de art. 4 din Legea nr. 143/2000 poate să nu mai fie condamnat pentru infracțiunea comisă dacă acceptă să fie introdus într-un circuit integrat de asistență a persoanelor consumatoare de droguri şi se supune unui tratament medical.

De aici se desprinde cu claritate filozofia legiuitorului român că pentru persoanele ce dețin droguri fără drept pentru propriul consum, au prioritate măsurile medicale şi nu cele punitive cum s-a întâmplat în speță.

Concluzii

Ca o concluzie, în opinia noastră, neconstatarea existenței fizice a drogurilor deținute ilegal ca obiect material al infracțiunii prevăzute de art. 4 din Legea nr. 143/2000 în modalitatea deținerii fără drept de droguri pentru uzul propriu de către o persoană dependentă de astfel de substanțe şi stabilirea doar a faptului că a deținut droguri cumpărate de ea pe care le-a consumat, nu satisface cerințele legale ale existenței elementului material al laturii obiective a acestei infracțiuni.

A admite că o persoană se face vinovată de comiterea infracțiunii prevăzute de art. 4 din Legea nr. 143/2000 în modalitatea deținerii ilicite, prin ricoşeu, deoarece se dovedeşte că este dependentă de droguri supuse controlului național, fără a fi depistată că deține drogurile pe care le consumă dar se dovedeşte că a cumpărat şi consumat acele substanțe reprezintă în opinia noastră o gravă eroare.

[8] Această lege a fost publicată în Monitorul Oficial al României nr. 1555 din 7.XII.2004.

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DISCUSSIONS REGARDING THE CAUSES OF THE NON-UNITARY LEGAL PRACTICE IN ROMANIA

Mihai Adrian HOTCA*

Abstract

One of the most frequently invoked reasons for the lack of unity of the legal practice is the imperfection of the laws. Indeed, in the legislation in Romania, it is found that the laws are very often unclear, incomplete and use an incorrect language. The Romanian legislator may also be reproached that the modifications of the legislature are very frequent and substantial which leads in many domains such as the tax laws, to an almost objective impossibility of knowing all the legal norms necessary in order to offer court solutions according to the laws. Among the causes of the non- unitary legal practice, it is, besides the above- mentioned causes, the appropriate unpreparedness of the judges and corruption. While trying to make an almost complete review of the circumstances that lead to the inconsistency of the legal practice, besides the above- mentioned ones, we believe that it should be included also: the lack of effective instruments that would assure the unity of the legal practice, overload of the judges, lack of access in real time to the resolutions of other judges, imperfections regarding the legal organization, lack of some permanent programs of continuous training of the judges.

Keywords: *non- unitary legal practice, uniformization of the legal practice, jurisprudence, legal flaw, access to jurisprudence, overload of the judges.*

I. Introduction

Starting from the idea that justice is unique and from the undeniable reality that the legal practice of our country is far from being uniform, by means of this article, we will try to identify and analyze the causes of the practice inconsistency of legal bodies in Romania, with special concern to the solutions of the courts of law.

As it is known, at least by the law experts, the Romanian state has been condemned by the European Court of Human Rights (hereinafter called ECHR) for the lack of consistency of the legal practice for several times[1].

The need of uniformization of the legal practice does not have to be demonstrated, because the trust of the citizens in the justice act is based also on the consistency of the solutions that the judges offer in cases comparable from the legal point of view, taking into consideration the fact

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[1] For instance, in Beian vs. Romania case, ECHR retained that „it is not simple jurisprudence divergences that are the inherent consequence of any legal system that is based on an assembly of first instance courts, *but a deviation of the High Court of Cassation and Justice from carrying out its part of mediator of these conflicts* – (our underlining - s.n.)" (Resolution on December 6th 2007, delivered in the case of Beian versus Romania published in the Official Gazette no. 616 on August 21st 2008). For this criticism, see also other two resolutions, that is: Resolution on February 21st 2008 delivered in the case of Driha versus Romania; ECHR, Resolution on January 27th 2009 delivered in the case of Ştefan and Ştef versus Romania.

that the justiceable that knows that another person got a certain resolution in a case similar to its will justifiably hope that it will be the beneficiary of the same solution. And, if at the end of the trial, the justiceable will not obtain the same court solution, it will be not only deeply unsatisfied, but also a new member on the list of persons that have no trust in the legal act.

Paradoxically, basing itself on a legal precedent, neither the legal opponent of the one that has lost the trial will trust the justice, because just like its previous speaker, it also knew that, under the reserve of observing the previous legal practice, the resolution should be different. Thus, the opposing party that won the trial against the previous practice will almost certainly answer (assuming that the answer is honest) to an eventual question regarding the trust in the activity of making justice that it has so such trust.

Arguments such as the one that the rule of the judge's independence is opposing the idea can not find support in the principles of operating the legal state, at least in the cases stipulated by law, because the law must have the same meaning for all and the judge is independent of the other authorities, but not of the law.

Besides, the Constitution proclaims the principle that the judge is **subject only to the law**. Or, if the law forces it to comply with certain court orders, it means that it must obey the legal absolutions existing within it, because, otherwise, it will be considered as "**opposing the law**".

In doctrine, it was stated that: "The <<normative inflation>>, the instability and the questionable quality of some laws, the large number of pending cases, the insufficient specialization of some magistrates or the wrong understanding of the specialization, the lack of effective means for the interpretation and uniform application of the law, but especially the current organization of the courts and the distribution of the competences are some of the possible causes of the non- unitary practice"[2].

In the specialty literature, it was also pointed out the fact that the lack of unity of the legal practice "for the observers that were not fully aware of the real causes of the problem maintained a widespread presumption that the courts in Romania changed their jurisprudence randomly, due to the influence of the politics or corruption"[3].

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[2] See D. Lupaşcu, M.A. Hotca, Rolul jurisprudenței în cadrului sistemului judiciar roman, Lex et Scientia International Journal, no. XVI/2009, Vol. II, pages 222-223.

[3] Dieter Schlafen, Cologne Appeal Court, resident twinning adviser with the Superior Council of Magistrates of Romania – Bill for maintaining the unitary practice. Basics (unpublished)

II. Cause analysis of the non- unitary practice in the Romanian law

1. Introductory considerations and presentation of the cases of lack of consistency of the legal practice in Romania

When analyzing the Romanian legal practice, it is noticed that the courts often disregard the ECHR decisions regarding the assuring of the unity of the jurisprudence solutions; the case in which Romania was convicted for having breached the norms of the European Convention of the Human Rights are well-known (for instance, Pădruraru versus Romania, Beian versus Romania, etc.).

One of the ECHR decisions through which Romania was condemned for not providing a unitary legal practice is the one delivered in the case of Beian versus Romania. In this court issue, the ECHR established that the non- unitary practice of the supreme court of our country was "*against the public safety principle (....) which was one of the basic elements of the lawful state (see, mutatis mutandis, Barnowschi versus Poland, no. 28358/95, paragraph 56, ECHR 2000-III). Instead of completing its part by establishing a guiding interpretation, the High Court of Cassation and Justice has itself become the source of the legal uncertainty, thereby reducing the public trust in the legal system (see, mutatis mutandis, Sovtransavto Holding versus Ukraine, no. 48533/1999, paragraph 97, ECHR and Paduraru above quoted, paragraph 98, and, a contrario, Perez Arias versus Spain, no. 32978/03, paragraph 70, June 28, 2007*)".

The observance of the human rights and of the jurisprudence stability represents an essential pillar of the fair development of the penal and civil trials.

When trying to list the causes of the non- unitary jurisprudence, we believe that among them it should be:

- ❖ lack of effective instruments in order to assure the unity of the legal practice;
- ❖ frequent change of the normative acts and imperfections of the legal norms;
- ❖ overload of the judges;
- ❖ lack of "real time" access to the resolutions of other judges;
- ❖ imperfections regarding the legal organization;
- ❖ lack of "permanent" continuous training programs of the judges.

2. Lack of effective instruments in order to assure the unity of the legal practice

De lege lata, the only legal instrument to assure the unity of the legal practice is the institution of the appeal in the interest of the law that is regulated in the two codes of procedure - Code of Penal Procedure (art. 414^2) and Code of Civil Procedure (art. 329). The appeal in the interest of the law is an institution that is based on the basic law[4].

In the Intermediary report regarding the state of justice (March 23rd 2010)[5] in connection to the institution of the appeal in the interest of the law, it is stated that[6]: "*The procedure for appeals*

[4] According to art. 126 paragraph (3) of the Constitution: "*The High Court of Cassation and Justice* ***assures the unitary interpretation and application of the law by the other courts*** (s.n.) *according to its competence*".

[5] For the content of this report, see http://ec.europa.eu/dgs/secretariat_general/cvm/docs/com_2010_113_ro.pdf.

[6] On the adhesion date of Romania to the European Union (January 1st 2007), it was set a Cooperation and verification mechanism („CVM") in order to support Romania in the remediation of certain deficiencies in the domain of the reform of the legal system and of the fight against corruption, as well as to monitor the progresses achieved in these domains through periodical reports. Among the elements taken into consideration through CVM, there is also the consistency of the legal practice [see also Decision 2006/928/CE of the Commission on December 13th 2006 regarding the setting of a cooperation and verification mechanism of the progress achieved by Romania in reaching certain specific reference objectives in the domain of the reform of the legal system and of the fight against corruption (JO L 354, 14.12.2006, page56)].

in the interest of the law at the High Court of Cassation and Justice (HCCJ) through which it is set the jurisprudence with obligatory legal force, is still ***slow*** *(sn). However, there are simplified practices and they could be further developed*"[7]

In the above- mentioned report, the court solutions delivered in the corruption cases about which it is said to be inconsistent and dissuasive are indicated as negative examples[8].

Next, we present the current content of the institution of the appeal in the interest of the law.

According to art. 414^2 code of penal procedure: "*The general prosecutor of the Prosecutor 's Office with the High Court of Cassation and Justice, directly, or the Minister of Justice, through the general prosecutor of the prosecutor 's office with the High Court of Cassation and Justice, as well as the management boards of the appeal courts and of the prosecutor's offices with these courts* ***have the obligation*** *(sn) to ask the High Court of Cassation and Justice to rule on the cases that received a different settlement from the courts in order to assure the unitary interpretation and application of the* ***penal and penal procedure laws*** *(s.n.) throughout the entire country.*

The appeal petitions in the interest of the law are solved by the united sections of the High Court of Cassation and Justice which delivers through decisions. The decisions are published in the Official Gazette of Romania, Part I, ***as well as on the internet page of the High Court of Cassation and Justice*** *(s.n.). They are notified to the courts also by the Ministry of Justice.*

The solutions are given only in the interest of the law, have no effect on the examined judgments, nor on the situation of the parties to those trials. The clarification of the trialed law issues is obligatory for the court".

According to Art. 329 Code of civil procedure: "*The general prosecutor of the Prosecutor 's Office with the High Court of Cassation and Justice*, ex officio or upon request of the Minister of Justice, as well as the *management boards of the appeal courts* ***have the right*** (s.n.) *to ask the High Court of Cassation and Justice to rule on the cases that were differently settled by the courts in order to assure the unitary interpretation and application of the* ***law*** *(s.n.) throughout the entire territory of Romania.*

The decisions through which the complaints are settled are delivered by the United Sections of the High Court of Cassation and Justice and published in the Official Gazette of Romania, Part I.

The solutions are delivered only in the interest of the law, have no effect on the examined judgments, nor on the situation of the parties to those trials. The clarification of the trialed law issues is obligatory for the court".

Examining in comparison the texts of the two norms regarding the institution of the appeal in the interest of the law, we find that the regulation is very similar. But, this contains also certain differences. Firstly, it is found that, while for the subjects that have the procedure quality of investing the supreme court with an appeal petition in the interest of the law in the penal field, it is an **obligation**, in the case of the appeal petition in the interest of the law formulated in the other fields, it is used the word "**law**."

De lege ferenda, while reading the projects of the two codes of procedure, we find that among them, there are no differences of approaching the mechanisms that assure the unity of legal practice[9].

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[7] It is mentioned the practice of the Administrative and fiscal court of HCCJ, which, in the hypothesis of making an appeal in the interest of the law which is in the competence of the court, draws up a report for the plenum which contains possible options and solutions. In the report, it is considered that in this manner it is created the premises for discussions to which take part judges that know the subject the best. It is also carried out a great efficiency of the recourses in the interest of the law.

[8] See pages 2-3 of the report.

[9] For the content of the projects of the Code of penal procedure and of the Code of civil procedure, see www.just.ro.

In the drafts of the Code of penal procedure and the Code of civil procedure, the regulation of the appeal in the interest of the law will be substantially amended through[10]:

- broadening of the domain of person categories that can the High Court of Cassation and Justice;
- introduction of an admissibility condition that requires the proof that the law issues that are the trial object have been differently settled through definitive court resolutions that are attached to the application;
- Setting up of some regulations that detail the settlement procedure of the appeal in the interest of the law regarding the appointment of the reporting judges, the setting up of the obligatory character of the jurisprudence consultation and of the relevant doctrine in the case, regarding the opinion of some specialists in the field, regarding the drawing up of the report and of the solution draft that is suggested to be given in the appeal in the interest of the law, regarding the notification in due time of the report to the judges of the High Court of Cassation and Justice, as well as the obligation to give reasons for the decision within a short term of 30 days from delivery date.

Through the drafts of the two codes of procedure, it is suggested the creation of a new mechanism for the unification of the legal practice which should contribute, along with the appeal in the interest of the law, to the creation of predictable jurisprudence and should have as effect the shortening of the penal process duration. It concerns:

- request to settle a law issue on which the settlement of a trial depends, legal issue that was not unitary settled in the practice of the courts;
- notification of the High Court of Cassation and Justice is made ex officio or upon the request of the parties after the contradictory debates and if the conditions stipulated by law are met, through a conclusion that is not subject to any appeal possibility.
- In order to assure the efficiency of this new mechanism, the decision of the High Court of Cassation and Justice, published in the Official Gazette, will be a binding character both for the court that formulated the application of clarification of the issue and for all the other courts.

Besides these two – above- mentioned – instruments, we believe that it is necessary the regulation according to which, in the case of the legal issues that are susceptible of more solutions, before ruling, the judge before which the issue was brought, is bound to notify the general assembly of the judges of the court to which it belongs in order to reach the appropriate solution. Through this approach, it should be set general assemblies of the judges at certain time intervals (for instance, monthly) and in the agenda it should also be the clarification of some law issues that can generate inconsistent legal solutions.

In the specialty literature, this mechanism was considered as possible even by *lege lata* based on art. 5 of the Rules of internal organization of the courts[11].

3. Frequent change of the normative acts and imperfections of the legal norms

While studying the statistics published by the Legislative Council, we find that several thousand regulations are annually adopted[12]. Most of the new normative acts have as regulation

[10] See the presentation of the grounds that accompany the Code of penal procedure (www.just.ro).

[11] See G. Bălaşa, Există un mecanism simplu de stabilire a unei jurisprudenţe unitare, www.juridice.ro.

[12] For instance, in 2009, it was adopted over 6000 normative acts [391 laws, 111 emergency ordinances, 27 ordinary ordinances, 1597 government resolutions and 4583 other normative acts (orders of the ministers, rules, etc.)]. For these statistics, see www.clr.ro.

object domains that are already the object of other normative acts, so in practice, it is raised the question of the applicability domain of the new normative acts.

There are also cases when after only a few years since the implementation of a law, this is repealed and a new law is adopted. For example, in April 1999 it came into force Law no. 21/1999 regarding the money laundering prevention and sanction[13], that was amended the following year (2000)[14] and after only 2 years (in 2002) it was fully abrogated by Law no. 656/2002 regarding the money laundering prevention and sanction[15]. In its turn, this law was amended several times (2005[16], 2006[17], 2008[18]).

Although both the new law (Law no. 656/2002) and its amendments were made in order to create a legal framework that would contribute to the prevention and sanction of the money laundering deed and of the terrorist acts, by trying at the same time to harmonize the national legislation with the European one, at a close analysis of the new regulation, it is noted that the legislator did nothing but to create confusion among practitioners through the changes of the legislation.

So, certain formulations in the incriminating texts are deficient and it can not be drawn a conclusion that would be sheltered from criticism with regard to the domain of the active subjects of the money laundering infraction regarding the delimitation of the money laundering infraction from concealment and favoritism, etc[19]. Basically, we can say that the new regulation is, at best, far from being a breakthrough[20].

There are also situations when the law, although it regulates certain domains, it is unclear either because it is **antinomic** or due to other causes. Indeed, sometimes, the lack of regulation is preferable to the situation when it contains antinomies[21], because the common law could more easily apply.

For example, according to art. 23 paragraph (2) - (4) of Law no. 544/2001 regarding the free access to public interest information, the court may force the public authorities or institutions to provide the requested public interest information and to pay moral and/ or patrimonial damages. **The resolution of the tribunal is subject to the appeal**. The decisions of the Appeal court are definitive and irrevocable. But, in the same article, but in paragraph (6), it is stipulated that both **the complaint and the appeal is trialed according to the emergency procedure** and are exempt from the stamp duty.

An example of absurd regulation, at least in terms of its effects, it is art. 302^1 introduced in the Code of civil procedure through Government Emergency Ordinance no. 58/2003 (amended through Law no. 195/2004)[22]. In accordance with its provisions: "*The appeal application will contain under the penalty of nullity, the following observations:*

[13] Published in the Official Gazette no. 18 on January 21st 1999.

[14] Through Government Emergency Ordinance no. 237/2000.

[15] Published in the Official Gazette no. 904 on December 12th 2002.

[16] Through Law no. 230/2005 (this law changed including the denomination of the law that became „for the prevention and sanction of the money laundering, as well as for the setting of some measures of prevention and sanction of financing the terrorism acts").

[17] Through Law no. 36/2006.

[18] Through Government Emergency Ordinance no. 53/2008.

[19] For the criticism of this regulation, see M. Hotca, M. Dobrinoiu, Infracțiuni prevăzute în legi speciale, 2nd edition, C.H. Beck Publishing House, Bucharest, 2010.

[20] In our opinion, the previous regulation was better.

[21] The legal antinomy is the situation where two terms, two theses or two conclusions are contradictory and are apparently irreconcilable. For the notion of legal antinomy and for examples, see I. Deleanu, Ficțiunile juridice, Publishing House, Bucharest, 2005, page 293.

[22] C.-L. Popescu, Neconvenționalitatea şi neconstituționalitatea sancțiunii nulității exprese a recursului în cazul neindicării de către recurent a contului bancar al intimatului, in the Romanian Pandects no. 3/2004, page 111.

a) name, domicile or residence of the parties or, for the legal persons, their denomination and registered office, as well as, if necessary, ***the registration number with the trade register office or registration number with the register of the legal persons, sole registration code or, if necessary, tax code and bank account. If the appellant lives abroad, it will indicate also the domicile chosen in Romania where all the notifications are to be served*** *(s.n.) regarding the trial (...)".*

Article 302[1] of Code of civil procedure was declared unconstitutional, due to the findings that it was against the provisions of the fundamental law "in terms of sanctioning with absolute nullity the failure to specify within the appeal application "the name, domicile or residence of the parties or, for the legal persons, their denomination and registered office, as well as, if necessary, the registration number with the trade register office or registration number with the register of the legal persons, sole registration code or, if necessary, tax code and bank account", as well as – if the appellant lives abroad – "the domicile chosen in Romania where all the notifications are to be served (s.n.) regarding the trial"[23].

In explanation, it was indicated that "most of the elements stipulated within the contested law, namely the residence of the parties or, for legal persons, their domicile or residence of the parties or, for the legal persons, their denomination and registered office, as well as, if necessary, the registration number with the trade register office or registration number with the register of the legal persons, sole registration code or, if necessary, tax code and bank account, as well as – if the appellant lives abroad – "the domicile chosen in Romania where all the notifications are to be served (s.n.) regarding the trial, were entirely found within the documents of the file where it was delivered the resolution that is the object of the appeal, that they were essential for the identification of this resolution and that they weren't even mentioned in the contested decision".

4. Overload of the judges

Within the Intermediary report regarding the justice state in Romania, it is stated that: "Since mid 2009, there has been no actual improvement with regard to the **difficult situation of the human resources in the legal system** (s.n.). The twice as high increase of the number of pensioners among magistrates in 2009 compensated the great number of recruitments and caused a significant negative balance at the staff level which adds the system additional constraints. Moreover, the judicial protests in September worsened the delays and they are considered to have contributed to the significant increase of the number of pending cases"[24].

In 2008, the Romanian courts (with a scheme of about 4,000 positions filled in by judges) had to settle 2,042,500 cases (out of which 1,521,769 were settled), which means an average load of 500 cases per judge, which means that each judge settled an average of more than a file per day.

The number of cases that each judge was entitled to for settlement has increased each year, especially in the case of the courts, where it increased from 625 cases in 2007 to 632 cases in 2008. With regard to the military tribunals, their volume of cases in 2008 was limited to 271 cases for all the 4 courts, while the average load of files/ judge was around 25 cases (a very small figure compared to all other courts).

There are courts where the case average that each judge is entitled to for settlement exceeds 1000 cases. For example, the courts in Murgeni (1084 cases/ judge), Darabani (1071 cases/ judge), Lieşti (1018 cases/ judge) and Giurgiu (1004 cases/ judge) or the courts Suceava (1217 cases/ judge), Giurgiu (1191 cases/ judge) and Timisoara (1133 cases/ judge).

See also I. Deleanu, Tratat de procedură civilă, 4th edition, vol. II, Servo-Sat Publishing house, Arad, 2004, page 206.

[23] Decision no. 176/2005, Official Gazette no. 356 on April 27th 2005.

[24] http://ec.europa.eu/dgs/secretariat_general/cvm/docs/com_2010_113_ro.pdf.

In opposition, among the courts with the lowest load per judge, it is the Bistrita Nasaud Tribunal that registered a number of 468 cases/ judge, Calarasi Tribunal with 483 cases, etc.

5. Lack of "real time" access to the resolutions of other judges

A factor that may essentially contribute to the uniformization of the legal practice is the "real time" knowing of the court resolutions delivered by other courts in similar cases. At present, although the High Court of Cassation and Justice continues to publish the complete text and summaries of a selection of decisions on its website, as well as the quarterly newsletter of the cassation, and other public courts publish certain decisions, during the summer of 2009 and January 2010, no other court decisions have been added (report) on the national Internet portal (Jurindex)[25].

For objectivity purposes, we should state that the High Court adopted the measure of publishing apart from the Official Gazette under the form of an annual collection entitled "Appeals in the interest of the law", of all the decisions made in exercising this extraordinary way of attack[26].

The High Court of Cassation and Justice edits annually the collection "Bulletin of Jurisprudence" that contains a selection of the section practice under the form of summaries classified according to the law branches, as well as the jurisprudence of the 9 judge panel[27].

Finally, the High Court of Cassation and Justice quarterly publishes the journal "Bulletin of the Cassation for the purpose of rapidly releasing the main solutions of our court" quarterly[28].

The publication by the Supreme Court of some journals and collections of solutions in this practice is a laudable thing, but we consider that this step has to be applied by all the appeal courts, as well as by tribunals, because they are in certain matters (insolvency, labor disputes, etc.), "**courts of cassation**", which is why the territorial courts have to have access to them in real time.

6. Imperfections regarding the legal organization

Beyond the fact that, as we have seen, the share to which each magistrate is entitled very high, in practice, it is found also a number of imperfections concerning the organization of the activities of the prosecutor's office and courts.

We note here both the aspects regarding the sharing of the competences and those regarding the exercising of the appeal means. For example, we consider that the appeal is a useless means of attack, because it is a new trial of the cause of the first court and new evidences that were not administrated before the first court can be administrated. We consider that the appeal court unjustifiably prolongs the settlement of the causes and determine at the same time a part of the non- unitary legal practice.

7. Lack of "permanent" continuous training programs of the judges

In the legal system, there are very many magistrates that do honor this very important social position that assures the existence of the lawful state. However, the evolution of the society, especially in terms of legislative changes, but also of the access to the latest technological developments call for INM, CSM and other institutions to conduct permanent continuous training programs for judges, because there are very few.

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[25] See the Intermediary report.

[26] The purpose of editing the publication is, according to the officials of the Supreme Court, to systemize the jurisprudence delivered during a year in such a manner so that the judges from the lower levels should have access to our solutions in an organized and coherent way (L. Băbulescu, Asigurarea interpretării si aplicării unitare a legii, www.juridice.ro).

[27] *Idem*.

[28] The published decisions are in a resumed format, by pointing out the legal problem of the case and the extract of the solution. The magazine is not limited to just jurisprudence, but there is also a column of doctrine and communications of the international activities of the court (L. Băbulescu, quoted work).

The lack of appropriate training of some magistrates, as well as their (moral, vocational, psychological, etc.) inadequacy is the origin of the delivery of judgments that do not take into account the solutions given in similar cases.

In the doctrine, in order to reject certain judgments (with reference to the decisions of the High Court of Cassation and Justice delivered by the United Sections), it is made a distinction between the sources of the law and the law sources[29], delimitation that we find ungrounded because between the expression of "source of the law" and that of "law source" it can be places an equivalence sign, as, nevertheless, some authors ruled in the specialty literature[30].

In supporting its point of view, the author mentions also the considerations of decision no. 398/R/08.07.2008 of Pitesti Appeal Court. According to this resolution: "resolution no. 48/2007 of the High Court of Cassation and Justice (delivered in an appeal in the interest of the law – n.n.) is not a formal law source, because the Supreme Court is not entitled by the constituent legislator to issue legal norms legislature, but only to apply and interpret the law. It results even from the content of article 414^2 paragraph (1) of Code of penal procedure that the object of the appeal in the interest of the law is to assure the "unitary interpretation and application of the penal law and of the law of penal procedure throughout the country." The legislator does not recognize the competence of the supreme court to amend, complete or repeal the regulatory provisions"[31].

We have reservations about this point of view because the law provides the obligatory character of the decisions in the interest of the law. If it is admitted that any judge has the competence to "check" the constitutionality of the decisions in the interest of the law, which is unacceptable, these decisions should be considered as having guiding value. On the other side, such a thesis is not sustainable, because the decisions in the interest of the law are adopted by the United Sections of the High Court of Cassation and Justice, which is the supreme court in Romania. Or, no legal system accepts that a lower court could disregard a mandatory decision of the supreme court, which has also the attribution stipulated by the Constitution [art. 126 paragraph (3)] to uniform the legal practice.

Conclusions

In the preceding lines, we have tried to identify the causes of the lack of unity of the legal practice in Romania according to the data and powers that we dispose. The extent to which we succeeded will be decided by the readers.

We conclude, however, by saying that, in our opinion, the factors that determine various legal solutions with regard to the law issue, are multiple and can be removed or controlled only through an assembly of concerted measures of legal, administrative, etc. nature with which we intend to deal in a future study.

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[29] See M. Andreescu, Aspecte privind constituționalitatea recursului în interesul legii şi a deciziilor pronunțate în această procedură, www.juridice.ro, page 2. The quoted author points out that: „The obligativity set by the law for this category of decisions of the supreme court do not grant them the quality of law sources, but they can be considered a source of the law. For these arguments, also a source of the law, but not a law source, are also the decisions of the Constitutional Court, that according to the provisions of article 147 paragraph (4) of the din Constitution "are generally mandatory and have power only in the future". See also M. Voicu, Protecția europeană a drepturilor omului. Teorie şi jurisprudență, Lumina Lex Publishing house, 2001, page 33-34.

[30] See C. Bulai, B.N. Bulai, Manual de drept penal, Universul Juridic Publishing house, Bucharest, 2007, page 75. The authors talk about „the formal source or the legal source". For other papers that deal with the same theme, see: I. Muraru, E.S. Tănăsescu, Drept constituțional şi instituții politice, C. H. Beck Publishing House, Bucharest, 2003, vol. I, page 26. For developments upon the theme, see also R. Motica, M. Gheorghe, Teoria generală a dreptului, Alma Mater Publishing House, Timişoara, 1999, pages 101-103; N. Popa, Teoria generală a dreptului, Actami Publishing House, Bucharest, 1999, pages 75-79.

[31] In M. Andreescu, quoted work, page 6.

DISCUȚII PRIVIND CAUZELE PRACTICII JUDICIARE NEUNITARE ÎN ROMÂNIA

Mihai Adrian HOTCA*

Abstract

Una dintre cele mai des invocate cauze ale lipsei de unitate a practicii judiciare este imperfecțiunea legilor. Într-adevăr, în legislația din România se constată că legile sunt, de multe ori, neclare, lacunare şi folosesc un limbaj incorect. De asemenea, i se poate reproşa legiuitorului român faptul că sunt foarte dese şi substanțiale modificările legislației, ceea ce determină, în multe materii, cum este, de pildă, legislația fiscală, o imposibilitate aproape obiectivă de cunoaştere a tuturor normelor juridice necesare pronunțării unor soluții judecătoreşti în concordanță cu litera şi spiritul legilor. Printre cauzele practicii judiciare neunitare sunt menționate, în anumite rapoarte întocmite de diverse organisme, alături de cauzele menționate mai sus, nepregătirea corespunzătoare a judecătorilor şi corupția. Încercând să facem un inventar aproape complet al împrejurărilor care determină lipsa de consecvență a practicii judiciare, pe lângă cele de mai sus, credem că trebuie incluse şi: lipsa unor instrumente eficiente pentru asigurarea unității practicii judiciare; supraîncărcarea judecătorilor; lipsa unui acces în timp real la hotărârile altor judecători; imperfecțiuni care țin de organizarea judiciară; lipsa unor programe permanente de pregătire continuă a judecătorilor.

Cuvinte cheie: *practică judiciară neunitară, uniformizarea practicii judiciare, jurisprudență, imperfecțiune legală, acces la jurisprudență, supraîncărcarea judecătorilor.*

I. Introducere

Pornind de ideea că dreptatea este unică şi de la realitatea, de necontestat în prezent, că practica judiciară din țara noastră este departe de a fi uniformă, prin intermediul acestui articol vom încerca să identificăm şi să analizăm cauzele lipsei de consecvență a practicii organelor judiciare din România, cu specială privire asupra soluțiilor instanțelor judecătoreşti.

După cum se ştie, cel puțin de către profesioniştii dreptului, statul român a fost condamnat de Curtea Europeană a Drepturilor Omului (denumită în continuare CEDO), de mai multe ori, pentru lipsa de consecvență a practicii judiciare[1].

Necesitatea uniformizării practicii judiciare nu trebuie demonstrată, deoarece încrederea cetățenilor în actul de justiție se fundamentează şi pe constanța soluțiilor pe care judecătorii le

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[1] Spre exemplu, în speța Beian c. România, CEDO a reținut că „nu era vorba de simple divergențe de jurisprudență, care sunt consecința inerentă a oricărui sistem judiciar care se bazează pe un ansamblu de instanțe de fond, *ci de o abatere a Înaltei Curți de Casație şi Justiție de la îndeplinirea rolului său de mediator al acestor conflicte* – (sublinierea noastră - s.n.)" (Hotărârea din 6 decembrie 2007, pronunțată în Cauza Beian împotriva României, publicată în Monitorul Oficial nr. 616 din 21 august 2008). Pentru aceeaşi critică, a se vedea şi alte două hotărâri, şi anume: Hotărârea din 21 februarie 2008, pronunțată în Cauza Driha c. României; CEDO, Hotărârea din 27 ianuarie 2009, pronunțată în Cauza Ştefan şi Ştef c. României.

adoptă în speţe comparabile din punct de vedere juridic, având în vedere că justiţiabilul, care ştie că altul a obţinut o anumită hotărâre într-un caz asemănător cu al său, va spera în mod justificat că va fi beneficiarul aceleaşi soluţii. Iar dacă la finalul procesului, justiţiabilul în cauză nu va obţine aceeaşi soluţie judecătorească, el va fi nu numai profund nemulţumit, ci şi un nou membru pe lista persoanelor care n-au încredere în actul jurisdicţional.

În mod paradoxal, nici adversarul judiciar al celui care a pierdut procesul, bazându-se pe un precedent judiciar, nu va avea încredere în justiţie, deoarece la fel ca preopinentul său şi el ştia că hotărârea, sub rezerva respectării practicii judiciare anterioare, ar fi trebuit să fie alta. Astfel, partea adversă, care a câştigat procesul, împotriva practicii anterioare, la o eventuală întrebare privind încrederea în activitatea de înfăptuire a justiţiei, va răspunde aproape sigur (presupunând că răspunsul este sincer) că nu are o asemenea încredere.

Argumentele precum acela că regula independenţei judecătorului se opune ideii conform căreia precedentul judiciar, cel puţin în cazurile prevăzute de lege, nu-şi pot găsi suport în principiile funcţionării statului de drept, deoarece legea trebuie să aibă acelaşi înţeles pentru toţi, iar judecătorul este independent faţă de alte autorităţi, dar nu faţă de lege.

De altfel, Constituţia proclamă principiul că judecătorul se **supune numai legii.** Or, dacă legea îl obligă să respecte anumite hotărâri judecătoreşti, înseamnă că el trebuie să se supună dezlegărilor de drept existente în cuprinsul acestora, pentru că, în caz contrar, el va fi considerat că s-a **„opus legii".**

În doctrină s-a arătat că: „<<Inflaţia normativă>>, instabilitatea şi calitatea discutabilă a unor legi, numărul mare de dosare aflate pe rol, insuficienta specializare a unor magistraţi sau înţelegerea greşită a specializării, absenţa unor mijloace eficiente pentru interpretarea şi aplicarea unitară a legii, dar mai cu seamă organizarea actuală a instanţelor judecătoreşti şi distribuirea competenţelor constituie câteva dintre posibilele cauze ale practicii neunitare"[2].

De asemenea, în literatura de specialitate a fost evidenţiat faptul că lipsa unităţii practicii judiciare „pentru observatorii care nu sunt pe deplin conştienţi de cauzele reale ale problemei, alimentează o prezumţie larg răspândită că instanţele din România îşi schimbă jurisprudenţa în mod aleatoriu, rezultat al influenţei politicului sau al corupţiei"[3].

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[2] A se vedea D. Lupaşcu, M.A. Hotca, Rolul jurisprudenţei în cadrului sistemului judiciar roman, Lex et Scientia International Journal, nr. XVI/2009, Vol. II, p. 222-223.

[3] Dieter Schlafen, Curtea de Apel din Köln, consilier rezident de twinning la Consiliul Superior al Magistraturii din România – Proiect de lege pentru menţinerea practicii unitare. Fundamentare (nepublicat)

II. Analiza cauzelor practicii judiciare neunitare din dreptul românesc

1. Considerații introductive şi prezentarea cauzelor lipsei de consecvență a practicii judiciare din România

Analizând practica judiciară românească se observă că, de multe ori, instanțele nu țin seama de hotărârile CEDO privitoare la asigurarea unității soluțiilor jurisprudențiale, fiind de notorietate cazurile (de exemplu, Pădruraru împotriva României, Beian împotriva României etc.) în care România a fost condamnată pentru încălcarea normelor Convenției Europene a Drepturilor Omului.

Una dintre deciziile CEDO prin care România a fost condamnată pentru că nu asigură o practică judiciară unitară este cea pronunțată în speța Beian împotriva României. În această afacere judiciară, CEDO a stabilit că practica neunitară a instanței supreme din țara noastră este „*contrară principiului siguranței publice (….) care constituie unul dintre elementele fundamentale ale statului de drept* (*a se vedea, mutatis mutandis, Barnowschi împotriva Poloniei, nr. 28358/95, paragraful 56, CEDO 2000-III*). *În loc să-şi îndeplinească rolul său stabilind o interpretare de urmat, Înalta Curte de Casație şi Justiție a devenit ea însăşi sursa nesiguranței juridice, micşorând astfel încrederea publicului în sistemul judiciar* (*a se vedea, mutatis mutandis, Sovtransavto Holding împotriva Ucrainei, nr. 48533/1999, paragraful 97, CEDO şi Păduraru citat anterior, paragraful 98, şi, a contrario, Perez Arias împotriva Spaniei, nr. 32978/03, paragraful 70, 28 iunie 2007*)".

Respectarea drepturilor omului şi a stabilității jurisprudenței reprezintă un pilon esențial al desfăşurării în mod echitabil a proceselor penale şi civile.

Încercând o enumerare a cauzelor jurisprudenței neunitare, credem că printre acestea trebui să-şi găsească locul:

- lipsa unor instrumente eficiente pentru asigurarea unității practicii judiciare;
- modificarea frecventă a actelor normative şi imperfecțiunile normelor juridice;
- supraîncărcarea judecătorilor;
- lipsa accesului „în timp real" la hotărârile altor judecători;
- imperfecțiuni care țin de organizarea judiciară;
- lipsa unor programe „permanente" de pregătire continuă a judecătorilor.

2. Lipsa unor instrumente eficiente pentru asigurarea unității practicii judiciare

De lege lata, singurul instrument juridic pentru asigurarea unității practicii judiciare este instituția recursului în interesul legii, care este reglementat în cele două coduri de procedură – Codul de procedură penală (art. 414^2) şi Codul de procedură civilă (art. 329). Recursul în interesul legii este o instituție care îşi găseşte fundament în legea fundamentală[4].

În Raportul intermediar privind starea justiției (23 martie 2010)[5], în legătură cu instituția recursului în interesul legii, se arată[6] că: „*Procedura pentru recursuri în interesul legii la Înalta*

[4] Conform art. 126 alin. (3) din Constituție: "*Înalta Curte de Casație şi Justiție* ***asigură interpretarea şi aplicarea unitară a legii de către celelalte instanțe judecătoreşti*** (s.n.)*, potrivit competenței sale*".

[5] Pentru conținutul acestui raport, a se vedea http://ec.europa.eu/dgs/secretariat_general/cvm/docs/com_2010_113_ro.pdf.

[6] La data aderării României la Uniunea Europeană (1 ianuarie 2007) a fost stabilit un Mecanism de cooperare şi de verificare („MCV") pentru a sprijini România în vederea remedierii anumitor deficiențe în domeniul reformei sistemului judiciar şi al luptei împotriva corupției, precum şi pentru a monitoriza progresele realizate în aceste domenii prin intermediul unor rapoarte periodice. Printre elementele avute în vedere prin MCV se numără şi consecvența (constanța) practicii judiciare [a se vedea şi Decizia 2006/928/CE a Comisiei din 13 decembrie 2006 de stabilire a unui mecanism de cooperare şi de verificare a progresului realizat de România în vederea atingerii

Curte de Casaţie şi Justiţie (*ÎCCJ*), *prin care se stabileşte jurisprudenţa cu forţă juridică obligatorie, este în continuare* ***greoaie*** (*s.n.*). *Cu toate acestea, practicile simplificate există şi ar putea fi dezvoltate în continuare*"[7].

În raportul menţionat mai sus sunt date ca exemple negative soluţiile judecătoreşti pronunţate în cauze de corupţie, despre care se afirmă că sunt inconsecvente şi nedisuasive[8].

În continuare, prezentăm conţinutul actual al instituţiei recursului în interesul legii.

Potrivit art. 414^2 C. proc. pen.: „*Procurorul general al Parchetului de pe lângă Înalta Curte de Casaţie şi Justiţie, direct, sau ministrul justiţiei, prin intermediul procurorului general al Parchetului de pe lângă Înalta Curte de Casaţie şi Justiţie, precum şi colegiile de conducere ale curţilor de apel şi ale parchetelor de pe lângă acestea* ***au obligaţia*** (*s.n.*)*, pentru a asigura interpretarea şi aplicarea unitară a* ***legilor penale şi de procedură penală*** (*s.n.*) *pe întreg teritoriul ţării, să ceară Înaltei Curţi de Casaţie şi Justiţie să se pronunţe asupra chestiunilor de drept care au primit o soluţionare diferită din partea instanţelor judecătoreşti.*

Cererile de recurs în interesul legii se soluţionează de secţiile unite ale Înaltei Curţi de Casaţie şi Justiţie, care se pronunţă prin decizie. Deciziile se publică în Monitorul Oficial al României, Partea I, ***precum şi pe pagina de internet a Înaltei Curţi de Casaţie şi Justiţie*** (*s.n.*). *Acestea se aduc la cunoştinţă instanţelor şi de Ministerul Justiţiei.*

Soluţiile se pronunţă numai în interesul legii, nu au efect asupra hotărârilor judecătoreşti examinate şi nici cu privire la situaţia părţilor din acele procese. Dezlegarea dată problemelor de drept judecate este obligatorie pentru instanţe".

Conform art. 329 C. proc. civ.: „*Procurorul general al Parchetului de pe lângă Înalta Curte de Casaţie şi Justiţie, din oficiu sau la cererea ministrului justiţiei, precum şi colegiile de conducere ale curţilor de apel* ***au dreptul*** (*s.n.*)*, pentru a se asigura interpretarea şi aplicarea unitară a* ***legii*** (*s.n.*) *pe întreg teritoriul României, să ceară Înaltei Curţi de Casaţie şi Justiţie să se pronunţe asupra chestiunilor de drept care au fost soluţionate diferit de instanţele judecătoreşti.*

Deciziile prin care se soluţionează sesizările se pronunţă de Secţiile Unite ale Înaltei Curţi de Casaţie şi Justiţie şi se publică în Monitorul Oficial al României, Partea I.

Soluţiile se pronunţă numai în interesul legii, nu au efect asupra hotărârilor judecătoreşti examinate şi nici cu privire la situaţia părţilor din acele procese. Dezlegarea dată problemelor de drept judecate este obligatorie pentru instanţe".

Examinând comparativ textele celor două norme privitoare la instituţia recursului în interesul legii, constatăm că reglementarea este foarte asemănătoare. Însă, aceasta cuprinde şi anumite diferenţe. În primul rând, se contată că, în timp ce pentru subiectele care au calitatea procesuală de a învesti instanţa supremă, cu o cerere de recurs în interesul legii în materie penală, este vorba despre o **obligaţie**, în cazul cererilor de recurs în interesul legii, formulate în celelalte materii, se foloseşte cuvântul **"drept".**

De lege ferenda, lecturând proiectele celor două coduri de procedură, constatăm că între ele nu există diferenţe de abordare a mecanismelor prin care se asigură unitatea practicii judiciare[9].

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anumitor obiective de referinţă specifice în domeniul reformei sistemului judiciar şi al luptei împotriva corupţiei (JO L 354, 14.12.2006, p.56)].

[7] Este menţionată practica Secţiei de contencios administrativ şi fiscal a ÎCCJ, care, în ipoteza în introducerii unui recurs în interesul legii ce ţine de competenţa secţiei, pregăteşte un raport adresat plenului în care se propun opţiuni şi soluţii posibile. În raport de consideră că astfel se creează premisele pentru discuţii bine pregătite la care participă judecătorii care cunosc cel mai bine subiectul. De asemenea, se realizează o mai mare eficienţă a recursurilor în interesul legii.

[8] A se vedea p. 2-3 din raport.

[9] Pentru conţinutul proiectelor Codului de procedură penală şi Codului de procedură civilă, a se vedea www.just.ro.

În proiectele Codului de procedură penală şi Codului de procedură civilă, reglementarea recursului în interesul legii va fi substanţial modificată prin[10]:

- lărgirea sferei categoriilor de persoane care pot sesiza Înalta Curte de Casaţie şi Justiţie;
- introducerea unei condiţii de admisibilitate, care presupune dovedirea că problemele de drept care formează obiectul judecăţii au fost soluţionate în mod diferit prin hotărâri judecătoreşti definitive, care se anexează cererii;
- instituirea unor reglementări care detaliază procedura de soluţionare a recursului în interesul legii, referitoare la desemnarea judecătorilor raportori, la instituirea obligativităţii consultării jurisprudenţei şi a doctrinei relevante în cauză, la solicitarea opiniei unor specialişti în materie, la întocmirea raportului şi a proiectului soluţiei ce se propune a fi dată în recursul în interesul legii, la comunicarea în timp util a raportului către judecătorii Înaltei Curţi de Casaţie şi Justiţie precum şi la obligativitatea motivării deciziei într-un termen scurt, de 30 zile de la data pronunţării.

Prin proiectele celor două coduri de procedură se propune **crearea unui nou mecanism** pentru unificarea practicii judiciare, care să contribuie, alături de recursul în interesul legii, la crearea unei jurisprudenţe previzibile şi să aibă ca efect scurtarea duratei procesului penal. Este vorba despre:

- solicitarea rezolvării de principiu a unei probleme de drept de care depinde soluţionarea unei cauze, problemă de drept care nu a fost dezlegată unitar în practica instanţelor;
- sesizarea Înaltei Curţi de Casaţie şi Justiţie se face din oficiu sau la cererea părţilor, după dezbateri contradictorii şi dacă sunt îndeplinite condiţiile prevăzute de lege, prin încheiere, care nu este supusă nici unei căi de atac.
- pentru asigurarea eficacităţii acestui nou mecanism, decizia Înaltei Curţi de Casaţie şi Justiţie, publicată în Monitorul Oficial, va avea caracter obligatoriu atât pentru instanţa ce a adresat solicitarea de dezlegare a problemei de drept, cât şi pentru toate celelalte instanţe.

Pe lângă aceste două instrumente – prezentate mai sus – credem că se impune reglementarea potrivit căreia, în cazul problemelor de drept care sunt susceptibile de mai multe dezlegări, înainte de a se pronunţa în cauză, judecătorul, în faţa căreia problema s-a ivit, să aibă obligaţia sesizării adunării generale a judecătorilor instanţei din care acesta face parte pentru a stabili soluţia ce se impune. Pentru acest demers ar trebui ca la anumite intervale de timp (de pildă, lunar) să fie fixate adunări generale ale judecătorilor, iar pe ordinea de zi să figureze şi dezlegarea unor probleme de drept, care pot genera soluţii judiciare inconstante.

În literatura de specialitate, acest mecanism a fost considerat ca fiind posibil chiar de *lege lata,* în temeiul art. 5 din Regulamentul de organizare interioară a instanţelor[11].

3. Modificarea frecventă a actelor normative şi imperfecţiunile normelor juridice

Cercetând statisticile publicate de Consiliul Legislativ, constatăm faptul că anual sunt adoptate câteva mii de acte normative[12]. Majoritatea actelor normative noi au ca obiect de reglementare domenii care fac deja obiectul altor acte normative, astfel că în practică se ridică problema sferei de aplicare a noilor acte normative.

[10] A se vedea expunerea de motive care însoţeşte proiectul Codului de procedură penală (www.just.ro).

[11] A se vedea G. Bălaşa, Există un mecanism simplu de stabilire a unei jurisprudenţe unitare, www.juridice.ro.

[12] De pildă, în anul 2009 au fost adoptate peste 6000 de acte normative [391 de legi, 111 ordonanţe de urgenţă, 27 ordonanţe simple, 1597 hotărâri ale guvernului şi 4583 alte acte normative (ordine ale miniştrilor, regulamente etc.)]. Pentru aceste statistici, a se vedea www.clr.ro.

Sunt şi cazuri în care după numai câțiva ani de aplicare a unei legi, aceasta este abrogată şi se adoptă o nouă lege. Spre exemplu, în luna aprilie 1999 a intrat în vigoare Legea nr. 21/1999 pentru prevenirea şi sancționarea spălării banilor[13], care în anul următor (anul 2000) a fost modificată[14], iar după numai 2 ani (în anul 2002) a fost abrogată integral prin Legea nr. 656/2002 pentru prevenirea şi sancționarea spălării banilor[15]. La rândul său această lege a fost modificată de mai multe ori (2005[16], 2006[17], 2008[18]).

Cu toate că atât noua lege (Legea nr. 656/2002), cât şi modificările acesteia au fost făcute pentru a crea un cadrul legal care să contribuie la prevenirea şi sancționarea faptelor de spălare a banilor şi a actelor teroriste, încercându-se totodată şi armonizarea legislației naționale cu cea europeană, la o analiză atentă a noilor reglementări, se observă că, prin schimbările de legislație aduse, legiuitorul nu a făcut altceva decât să creeze confuzie în rândul practicienilor.

Astfel, anumite formulări din textele incriminatorii sunt defectuoase, neputându-se trage o concluzie, care să fie la adăpost de critică, în ceea ce priveşte sfera subiecților activi ai infracțiunii de spălare de bani, referitoare la delimitarea infracțiunii de spălare a banilor față de tăinuire şi favorizare etc[19]. Practic, putem afirma că noua reglementare este, în cel mai fericit caz, departe de a fi un progres[20].

Sunt şi situații în care legea, deşi reglementează anumite domenii, ea este neclară, fie din cauza faptului că este **antinomică**, fie din alte cauze. Într-adevăr, uneori, lipsa de reglementare este preferabilă situației în care aceasta cuprinde antinomii[21], deoarece s-ar putea aplica mai uşor dreptul comun.

Spre exemplu, potrivit art. 23 alin. (2)-(4) din Legea nr. 544/2001 privind liberul acces la informațiile de interes public, instanța poate obliga autoritățile sau instituțiile publice să furnizeze informațiile de interes public solicitate şi să plătească daune morale şi/sau patrimoniale. **Hotărârea tribunalului este supusă recursului**. Decizia Curții de apel este definitivă şi irevocabilă. Însă, în acelaşi articol, dar la alin. (6) se prevede că atât **plângerea, cât şi apelul se judecă în instanță în procedură de urgență** şi sunt scutite de taxă de timbru.

Un exemplu de reglementare absurdă, cel puțin din perspectiva efectelor sale, îl reprezintă art. 302[1] introdus în Codul de procedură civilă prin O.U.G. nr. 58/2003 (modificată prin Legea nr. 195/2004)[22]. În conformitate cu prevederile acestuia: "*Cererea de recurs va cuprinde, sub sancțiunea nulității, următoarele mențiuni:*

a) numele, domiciliul sau reşedința părților ori, pentru persoanele juridice, denumirea şi sediul lor, precum şi, după caz, ***numărul de înmatriculare în registrul comerțului sau de înscriere în registrul persoanelor juridice, codul unic de înregistrare sau, după caz, codul fiscal***

[13] Publicată în Monitorul Oficial nr. 18 din 21 ianuarie 1999.

[14] Prin O.U.G. nr. 237/2000.

[15] Publicată în Monitorul Oficial 904 din 12 decembrie 2002.

[16] Prin Legea nr. 230/2005 (această lege a schimbat inclusiv denumirea legii, care a devenit „pentru prevenirea şi sancționarea spălării banilor, precum şi pentru instituirea unor măsuri de prevenire şi combatere a finanțării actelor de terorism").

[17] Prin Legea nr. 36/2006.

[18] Prin O.U.G. nr. 53/2008.

[19] Pentru critica acestei reglementări, a se vedea M. Hotca, M. Dobrinoiu, Infracțiuni prevăzute în legi speciale, ed. a 2-a, Ed. C.H. Beck, Bucureşti, 2010.

[20] În opinia noastră reglementarea anterioară era mai bună.

[21] Antinomia juridică este situația în care doi termeni, două teze sau două concluzii sunt contradictorii, fiind aparent ireconciliabile. Pentru noțiunea de antinomie juridică şi pentru exemple, a se vedea I. Deleanu, Ficțiunile juridice, Ed. C.H. Beck, Bucureşti, 2005, p. 293.

[22] C.-L. Popescu, Neconvenționalitatea şi neconstituționalitatea sancțiunii nulității exprese a recursului în cazul neindicării de către recurent a contului bancar al intimatului, în Pandectele Române nr. 3/2004, p. 111. A se vedea şi I. Deleanu, Tratat de procedură civilă, ed. a IV-a, vol. II, Ed. Servo-Sat, Arad, 2004, p. 206.

şi contul bancar. Dacă recurentul locuieşte în străinătate, va arăta şi domiciliul ales în România, unde urmează să i se facă toate comunicările (s.n.) *privind procesul* (…)".

Art. 302[1] din Codul de procedură civilă a fost declarat neconstituțional, constatându-se faptul că acesta contravine prevederilor legii fundamentale "în ceea ce priveşte sancționarea cu nulitate absolută a omisiunii de a se preciza în cuprinsul cererii de recurs "numele, domiciliul sau reşedința părților ori, pentru persoanele juridice, denumirea şi sediul lor, precum şi, după caz, numărul de înmatriculare în registrul comerțului sau de înscriere în registrul persoanelor juridice, codul unic de înregistrare sau, după caz, codul fiscal şi contul bancar", precum şi - dacă recurentul locuieşte în străinătate - "domiciliul ales în România, unde urmează să i se facă toate comunicările privind procesul"[23].

În motivarea s-a arătat că "cele mai multe dintre elementele prevăzute în textul de lege atacat, şi anume domiciliul sau reşedința părților ori, pentru persoanele juridice, denumirea şi sediul lor, precum şi, după caz, numărul de înmatriculare în registrul comerțului sau de înscriere în registrul persoanelor juridice, codul unic de înregistrare sau, după caz, codul fiscal şi contul bancar, precum şi - dacă recurentul locuieşte în străinătate - domiciliul ales în România, unde urmează să i se facă toate comunicările privind procesul, se regăsesc în totalitate în actele dosarului în care s-a pronunțat hotărârea care face obiectul căii de atac, că nu sunt indispensabile pentru identificarea acestei hotărâri şi că nici nu sunt menționate în dispozitivul hotărârii atacate".

4. Supraîncărcarea judecătorilor

În cuprinsul Raportului intermediar privind starea justiției din România se menționează că: „De la jumătatea anului 2009, nu s-a putut nota nicio îmbunătățire efectivă în ceea ce priveşte **situația dificilă a resurselor umane în sistemul judiciar** (s.n.). Creşterea de două ori mai mare a numărului de pensionări în rândul magistraților în 2009 a compensat numărul mare de recrutări şi a produs un sold negativ semnificativ la nivel de personal, ceea ce adaugă constrângeri suplimentare sistemului. Mai mult, protestele judiciare din septembrie au acutizat întârzierile şi se consideră că au contribuit la creşterea semnificativă a numărului de cazuri pendinte"[24].

În anul 2008, instanțele române (cu o schemă de aproximativ 4000 posturi de judecători ocupate) au avut de soluționat 2.042.500 dosare (din care au soluționat 1.521.769), ceea ce înseamnă o încărcătură medie de peste 500 de dosare pe judecător, ceea ce înseamnă că fiecare judecător a soluționat în medie mai mult de un dosar pe zi.

Numărul de cauze ce a revenit spre soluționare fiecărui judecător a crescut în fiecare an, în special în cazul judecătoriilor, unde acesta a crescut de la 625 cauze în anul 2007 la 632 cauze în 2008. În ceea ce priveşte tribunalele militare, volumul de dosare al acestora în anul 2008 s-a limitat la 271 cauze pentru toate cele 4 instanțe, în timp ce încărcătura medie de dosare/judecător se situează în jurul a 25 cauze (o cifră extrem de redusă în raport cu toate celelalte instanțe).

Sunt instanțe la care media de cauze ce revine spre soluționare unui judecător este de peste 1000 de cauze. De pildă, judecătoriile Murgeni (1084 dosare/judecător), Darabani (1071 dosare/judecător), Lieşti (1018 dosare/judecător) şi Giurgiu (1004 dosare/judecător) sau tribunalele Suceava (1.217 cauze/ judecător), Giurgiu (1.191 cauze/ judecător) şi Timiş (1.133 cauze/judecător).

La polul opus, dintre instanțele cu încărcătură mai mică pe judecător se remarcă Tribunalul Bistrița Năsăud, care a înregistrat un număr de 468 cauze/judecător, Tribunalul Călăraşi cu 483 cauze etc.

[23] Decizia nr. 176/2005, Monitorul Oficial nr. 356 din 27 aprilie 2005.
[24] http://ec.europa.eu/dgs/secretariat_general/cvm/docs/com_2010_113_ro.pdf. În raport se

5. Lipsa accesului „în timp real" la hotărârile altor judecători

Un factor care poate contribui în mod esențial la uniformizarea practicii judiciare îl reprezintă cunoașterea „în timp real" a hotărârilor judecătorești pronunțate de alte instanțe în spețe similare. În prezent, deși Înalta Curte de Casație și Justiție publică în continuare textul integral și rezumatele unei selecții de decizii pe site-ul său de internet, precum și buletinele trimestriale ale casației, iar alte instanțe publică anumite decizii, în intervalul cuprins între vara anului 2009 și luna ianuarie 2010, pe portalul internet național (Jurindex) nu au mai fost adăugate alte decizii judecătorești (raport)[25].

Pentru obiectivitate, trebuie să precizăm că Înalta Curte a adoptat măsura publicării separate de Monitorul Oficial, sub forma unei culegeri anuale, intitulată „Recursuri în interesul legii", a tuturor deciziilor pronunțate în exercitarea acestei căi extraordinare de atac[26].

De asemenea, Înalta Curte de Casație și Justiție editează anual culegerea „Buletinul Jurisprudenței", care cuprinde, în mod selectiv, practica secțiilor, în format rezumat, sistematizată pe ramuri de drept, precum și jurisprudența Completului de 9 judecători[27].

În fine, Înalta Curte de Casație și Justiție editează trimestrial revista „Buletinul Casației, în scopul difuzării cu rapiditate a principalelor soluții ale instanței noastre[28].

Publicarea de către instanța supremă a unor reviste și culegeri de soluții din practica acesteia constituie un lucru lăudabil, dar considerăm că acest demers trebuie urmat de către toate curțile de apel, precum și de către tribunale, deoarece aceste sunt în anumite materii (insolvență, contravențional, litigii de muncă etc.) **„instanțe de casație"**, motiv pentru care instanțele din raza lor teritorială trebuie să aibă acces la ele în timp real.

6. Imperfecțiuni care țin de organizarea judiciară

Dincolo de faptul că, așa cum am văzut, încărcătura ce revine unui magistrat este foarte mare, în practică se constată și anumite imperfecțiuni care țin de organizarea activității parchetelor și instanțelor judecătorești.

Notăm aici atât aspectele referitoare la împărțirea competențelor, cât și cele privitoare la exercitarea căilor de atac. De pildă, considerăm că apelul este o cale de atac inutilă, deoarece este o nouă judecată a fondul cauzei, putându-se administra probe care nu au fost administrate în fața primei instanțe. Credem că instituția apelului duce prelungirea nejustificată a soluționării cauzelor și determină, totodată, o parte a practicii judiciare neunitare.

7. Lipsa unor programe „permanente" de pregătire continuă

În sistemul judiciar sunt foarte mulți magistrați care fac cinste acestei funcții sociale foarte importante, care garantează existența statului de drept. Însă, evoluția societății, în special sub aspectul modificărilor legislative, dar și al accesului la ultimele progrese tehnologice, impun ca INM, CSM și alte instituții să organizeze programe permanente de pregătire continuă a judecătorilor, deoarece se resimte o lipsă a acestora.

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[25] A se vedea Raportul intermediar.

[26] Scopul editării publicației este, conform oficialilor instanței supreme, acela al sistematizării jurisprudenței pronunțate pe parcursul unui an, în așa fel încât judecătorii de la nivelele inferioare să aibă acces într-un mod organizat și coerent la cunoașterea soluțiilor noastre (L. Băbulescu, Asigurarea interpretării si aplicării unitare a legii, www.juridice.ro).

[27] *Idem*.

[28] Deciziile publicate sunt în format rezumat, cu arătarea problemei de drept a speței și extrasul soluției. Revista nu e limitată doar la jurisprudență, având și o rubrică de doctrină și comunicări ale activității internaționale a curții (L. Băbulescu, op. cit.).

Lipsa de pregătire corespunzătoare a unor magistraţi, precum şi inadecvarea lor (morală, profesională, psihologică etc.) se află la originea pronunţării unor hotărâri judecătoreşti care nu ţin seama de soluţiile pronunţate în cauze similare.

În doctrină, pentru a respinge teza că anumite hotărâri judecătoreşti (cu referire la deciziile Înaltei Curţi de Casaţie şi Justiţie, pronunţate de Secţiile Unite) se face o delimitare între sursele dreptului şi izvoarele dreptului[29], delimitare pe care noi o găsim neîntemeiată, deoarece între expresia de „sursă a dreptului" şi cea de „izvor al dreptului" se poate pune semnul egalităţii, aşa cum, de altfel, s-au pronunţat unii autori în literatura de specialitate[30].

În susţinerea punctului său de vedere, autorul menţionează şi considerentele deciziei nr. 398/R/08.07.2008 a Curţii de Apel Piteşti. Conform acestei hotărâri: „decizia nr. 48/2007 a Înaltei Curţi de Casaţie şi Justiţie (pronunţată într-un recurs în interesul legii – n.n.) nu este izvor formal de drept, deoarece instanţa supremă nu este abilitată de legiuitorul constituant să emită norme juridice, ci numai să aplice şi să interpreteze legea. Rezultă chiar din conţinutul art. 414^2 alin. (1) Cod procedură penală, că obiectul recursului în interesul legii este acela de a asigura „interpretarea şi aplicarea unitară a legii penale şi a legii de procedură penală pe întreg teritoriul ţării". Legiuitorul nu recunoaşte competenţa instanţei supreme de a modifica, completa sau abroga dispoziţii normative"[31].

Avem rezerve faţă de acest punct de vedere, deoarece legea prevede caracterul obligatoriu al deciziilor în interesul legii. Dacă se recunoaşte că orice judecător are competenţa să „verifice" constituţionalitatea deciziilor în interesul legii, ceea ce este de neacceptat, ar trebui ca aceste decizii să fie considerate că au valoare orientativă. Pe de altă parte, o asemenea teză nu este sustenabilă, deoarece deciziile în interesul legii se adoptă de către Secţiile Unite ale Înaltei Curţi de Casaţie şi Justiţie, care este instanţa supremă în România. Or, nici un sistem judiciar nu acceptă că o instanţă inferioară poate nesocoti o hotărâre obligatorie a instanţei supreme, care are şi atribuţia, prevăzută de Constituţie [art. 126 alin. (3)] de a uniformiza practica judiciară.

Concluzii

În rândurile ce preced am încercat să identificăm, conform datelor şi competenţelor de care dispunem, cauzele lipsei de unitate a practicii judiciare din România. Măsura în care am reuşit va fi stabilită de cititori.

Conchidem, însă, prin a spune că, în opinia noastră, factorii care determină soluţii jurisdicţionale diferite, cu privire la aceeaşi problemă de drept, sunt multipli şi nu pot fi înlăturaţi sau controlaţi decât printr-un ansamblu de măsuri concertate, de natură legală, administrativă etc., despre care intenţionăm să ne ocupăm într-un studiu viitor.

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[29] A se vedea M. Andreescu, Aspecte privind constituţionalitatea recursului în interesul legii şi a deciziilor pronunţate în această procedură, www.juridice.ro, p. 2. Autorul citat, arată că: „Obligativitatea stabilită de lege pentru această categorie de decizii ale instanţei supreme nu le oferă calitatea de izvoare de drept, dar ele pot fi considerate o sursă a dreptului. Pentru aceleaşi argumente, tot o sursă a dreptului, iar nu izvoare de drept, sunt şi deciziile Curţii Constituţionale, care, potrivit dispoziţiilor articolului 147 alin. (4) din Constituţie "sunt general obligatorii şi au putere numai pentru viitor". A se vedea şi M. Voicu, Protecţia europeană a drepturilor omului. Teorie şi jurisprudenţă, Editura Lumina Lex, 2001, p. 33-34.

[30] A se vedea C. Bulai, B.N. Bulai, Manual de drept penal, Ed. Universul Juridic, Bucureşti, 2007, p. 75. Autorii vorbesc despre „izvorul formal sau sursa juridică". Pentru alte lucrări care abordează această temă, a se vedea: I. Muraru, E.S. Tănăsescu, Drept constituţional şi instituţii politice, Editura C. H. Beck, Bucureşti, 2003, vol. I, p. 26. Pentru dezvoltări a se vedea şi R. Motica, M. Gheorghe, Teoria generală a dreptului, Editura Alma Mater, Timişoara, 1999, p. 101-103; N. Popa, Teoria generală a dreptului, Editura Actami, Bucureşti, 1999, p. 75-79.

[31] În M. Andreescu, op. cit., p. 6.

ENSURING UNIFORM ADMINISTRATION OF LAW IN CRIMINAL MATTERS - THE HUNGARIAN WAY

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Keywords: *administration of law, Hungarian law, European Court of Human Rights, interpretation of rules, the Suprem Court of Hungary*

Introduction

The first question which must be put when dealing with ensuring uniformity of judicial practice is: why is it a problem? Why is it not evident that an act of parliament or any other source of law can be understood clearly, unequivocally? Why do the rules of criminal law and criminal procedure need any uniformity at international level? The answer is different in the mentioned two fields.

In national law even the rules are not self-evident, it is a very frequent phenomenon that two or more interpretations are possible. If the legislator foresees this problem of the future practice it may give explanation of a category in the given act itself or in the other rule called executive decree. But if a question remains open from the legislator's side the next and most usual solution is that actors of judicial practice interpret the notion of a rule.

At international level we have to speak about harmonisation rather than unification. The need to harmonise some fields of law of different countries emerged only in the last century. Criminal law - and consequently criminal procedural law as well – is the last bastion of sovereignty and states are reluctant to give it up. The most relevant organisations of harmonisation of even the rules of criminal law are the Council of Europe and its control organisations, first of all the European Court of Human Rights and different bodies of the European Union.

In my lecture I will speak about ensuring uniformity at national level and only touch questions of international harmonisation of law.

Before starting to discuss the Hungarian tools of unification I have to mention some basic questions necessary to keep in our mind when speaking about interpretation of rules.

Separation of powers

Montesquieu in his well known publication 'Spirit of the Laws' described a model of the government – which seems to be ideal - where the political authority of the state is divided into legislative, executive and judicial powers. The legislative branch is responsible for making the laws; the executive branch is responsible for implementing, enforcing the law adopted by the legislative and the judicial branch is responsible for interpreting the constitution and laws. This solution may be appropriate to prevent the government's arbitrary exercise of power. Keeping in our mind these separated tasks we examine the connection between legislation and judicial powers especially the function of the judicial bodies and their law-interpretation which is limited in a sense.

As the Constitutional Court of Hungary said '…in order to ensure the uniformity of law application, there can be several possible solutions within the judicial system. The legislative power and the constitutional competence of the legislative branch are not violated by the mere fact that the judicial power provides for a uniform content of the statutes to be applied. As long as it is exclusively based on the interpretation of statutes (as long as the judicial branch does not

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fundamentally and directly take over the function of legislation), "judicial legislation" remains in line with the principle of the division of power.'[1]

Connection between legislation and justice

As it follows from the separation of power the judicial bodies have to make their decisions using and adopting the rules formulated by the legislator. If a problem emerges during their activity they can solve it in two ways: using the tools of interpretation or sending a sign to the legislator that the law is not appropriate for the daily use. Undisputedly the first way is quicker but – as we have seen – provides limited possibility.

The other side of the connection between legislation and justice is when the legislator asks the opinion of the courts in the drafting process.[2] Usually the highest court is the direct partner of the Ministry of Justice, which is responsible for the preparation of draft laws (bills) if the field of criminal law and criminal procedure. This does not mean that lower courts have no possibility to express their view concerning a draft: the Supreme Court and the National Council of Justice regularly send all drafts to the lower courts as well and expect their opinion. The other way in which judges are involved into the legislation is that especially judges of the Supreme Court regularly participate in the work of codification committees.

Independence of justice

The second question which has to be touched at the beginning is the independence of justice. Article 50 section (3) of the Constitution of Hungary declares that judges shall be independent and responsible only to the law. This norm defends the judge against any legal or illegal influence. One guarantee of independence declared by the Constitution is that judges may not be members of political parties and may not engage in political activities. On the other hand the independence of the court means a guarantee for the defendant as well. As the Constitution says „In the Republic of Hungary everyone shall be equal before the law and, in the determination of any criminal charge against him/her or in the litigation of his/her rights and duties, everyone shall be entitled to a fair and public hearing by an **independent and impartial court** established by statute." (Article 57 Section (1)) Of course not only the Hungarian Constitution but the European Convention of Human Rights prescribes that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (Article 6 Section (1)). The independent judiciary is constitutionally protected against any external influence**.** Both the European Court of Human Rights and the Hungarian Constitutional Court have already emphasized the importance of judicial independence, especially the stability and neutrality of the judiciary several times.

Limits of the independence

There is a serious limit of independence and free evidence. In order to prevent the arbitrary administration of justice the Code on Criminal Procedure obligates the court to give reasoning (justification) of their decision. In such circumstances it became obvious for every participant of

[1] Decision 42/2004 (XI.9.) of the Constitutional Court of Hungary

[2] This possibility is based on Act XI of 1987 on Legislation. Article 28 of this act provides that bills and drafts of government decrees shall be sent to the President of the Supreme Court if the rules concern the jurisdiction.

the procedure why the court made the given decision and they can confute the arguments when lodging an appeal. Reasoning is very important if in the remedy proceedings – knowing the reasons of the decision making - the court of appeal reviews the case.

We may think that the high court guidelines compulsory for the lower courts and interpretation accepted by the supreme court threat the independent decision making of the judges. To answer this question we have to have a look at different types of interpretation and their results.

The aim of the interpretation is to know what the intent of the legislator was, which usually can be achieved with the combination of different methods.

Types of interpretation[3]:

From the methodological point of view the interpretation could be

a) grammatical
   logical
   taxonomical
   historical.

The grammatical interpretation solely may not provide enough bases to find the intent of the legislator, it is necessary to follow the examination by using other methods.

Taking into account the result of the interpretation it could be

b) within the text
   outside the text
   contrary to the text.

Of course the judicial interpretation should remain within the text. I do not examine the methodological questions, only would like to pin down that interpretation contrary to the text of the law is prohibited and interpretation outside the text is not supported either.

If the interpretation extends the text of the norm it may occur that a decision is not only not in harmony with the law but it is also unconstitutional.

c) legislatorial
   judicial
   scientific.

The legislator usually interprets the law made by it in the commentary and in the interpretative provisions of the law. The aim of it is to make clear the intent of the legislator and provide a unified administration of the given act at the same time when the act is formulated. If the legislator fails to give a clear explanation of the content of a rule the judicial interpretation may take place with the aim of unification of the administration of justice.

While we as scientists would like our opinion to be taken into consideration, the reality is that scientific interpretation may influence the practice only through the interpretation of the legislator or the court. Scientific opinions are rarely cited in the courtrooms, however, in the training of the judges they play a definitive role. It is a well-known phenomenon that the content of textbooks used in the university training is overruled by the higher court interpretation and guidelines, and judges forget the nice theoretical points of views is very obvious.

[3] To read more about the interpretation of law see – among others: Görgényi Ilona – Gula József – Horváth Tibor – Jacsó Judit – Lévay Miklós – Sántha Ferenc – Váradi Erika: Magyar büntetőjog . Általános Rész, CompLex, Budapest 2007. pp. 82 – 91; Bárd Károly – Gellért Balázs – Ligeti Katalin – Margitán Éva – Wiener A. Imre: Büntetőjog Általános Rész. KJK Kerszöv, Budapest, 2002. pp. 42 - 43

Interpretation by the legislator – what we can find in the commentary of an act?

Interpretative provisions are rather frequently part of Hungarian acts. They explain how a word or an expression should be understood for the purposes of the given act. For example in the Criminal Code we can find explanation of the term 'official persons', "damage', 'recidivist' etc. The justification of the law composed by the ministry responsible for the preparation of draft of a law, regarding the criminal code and the code on criminal procedure by the Ministry of Justice. This commentary speaks about reasons why the formulation of the given act was necessary, why the legislator thought that regulation as the proper solution etc. This is the most authentic resource of getting knowledge of the legislator's will.

While this commentary of the legislator (or justification as it is called if we translate the term word by word) is written at the time of the formulation of the draft, the other type of commentary is made after the law was adopted. The latter is a handbook and its authors usually are scientists and practicing lawyers, recognised experts of a narrower field. This handbook is the result of mixed judicial and scientific interpretation but contains references to higher and constitutional court decisions as well.

Interpretation by the courts

Interpretation of the law is an essential part of the judicial practice. But the courts may not strike down the law itself. There are certain areas of statutory law in every system of law even in England in which little if any discretionary elements remain for judges. For example the Criminal Code prescribes what shall constitute a crime and what the penalties shall be. In this field the judge can make precedent mainly regarding circumstances taken into consideration during the sentencing procedure.

Who (which courts) are authorised to interpret the law?

It is an indisputable fact that the highest court of the court system which plays a role in the unification of the administration of justice is authorised to issue guidelines, publish decisions of theoretical importance and lower courts are bound to follow these or at least they do it on their own will.

Judge made law or only judicial interpretation?

There are several areas even in the continental law system where the legislator leaves room for judges to 'make' law. Sometimes statute offers either no rules or only general clauses or outline provisions. When a judge finds a decision of supreme court relevant for the case before him he will follow that decision. It has become more and more accepted and wide-spread in Hungary as well that lawyers refer to previous decisions of higher court published in law report and it can influence the judge particularly in questions which are not clear or are not precisely outlined in the law.

While the interpretation contrary to law is not accepted we can not speak about judge made law. However the Constitutional Court of Hungary said that the content of the uniformity decision is part of the so called 'living law'.[4]

[4] 'The binding force provided for by the Constitution also means that if the Constitutional Court wishes to find out the actual and uniformly enforced content of a legal norm under review (the "living law"), it must take into account the uniform mandatory judicial interpretation of the statutory provision(s) and the content of the relevant law uniformity resolution. The living content of the statute (statutory provision) concerned is the law uniformity resolution.' Decision 42/2005 (XI.14.) of the Constitutional Court of Hungary

What is the role of the supreme courts?

In 1996 I participated in a conference dealing with this question. Presidents and other judges of the supreme courts and some experts invited by the Council of Europe discussed the present and the future function of supreme courts and their competences. A resolution was adopted at the end of that meeting on measures to reinforce the judiciary in countries of Central and Eastern Europe in which we can read some sentences that are timely nowadays as well. Among others, presidents and judges of supreme courts recall that 'by carrying out their imperative functions in a dynamic and progressive way, leading towards unifying the law, the supreme courts fulfil the role of controlling the application of the Constitution and legislation, as well as international legal instruments, including the European Convention of Human Rights…'[5]

The role of supreme courts is essential both in the judicial practice and in the legislative policy. The main task of the supreme court is to ensure unified practice with tools provided by national law (guiding principle, individual decisions, decision of uniformity etc.). Supreme courts in Europe have some common features regarding their authority and function, but we can find a lot of differences as well. In some states the supreme court is on the top of the court hierarchy with the highest and last appeal authority. In other countries the main task of the supreme court is to watch over the legality. The third group consists of supreme courts which have some mixed functions: working as an appellate court and watching over the legality as well. A separate class includes supreme courts of federal states, where every member state has its own supreme court and above them stands the federal supreme court.[6]

The supreme court may also influence the legislation at least in two ways: rules of judicial practice and guidance laid down in uniformity decisions of the supreme court are often enacted in laws. The second possibility is when draft laws are sent to the court for formulating expert opinion as it was mentioned earlier.

The role of precedents in different systems of the law - two examples: England and Hungary.

As many scholar said the critical difference between Continental and English methods of legal thinking lies in the doctrine of the binding force of precedent.[7] The significant characteristic of English law is that under the doctrine of precedent the judges refer to previous decisions in order to adjudicate the case at issue. Normally, in the common law system precedents have binding character, but judges may occasionally depart from precedent or may distinguish between various precedents in evolving the new law.

As Konrad Zweigert has written '… the critical difference between Continental and English methods of legal thinking lies in the doctrine of the binding force of precedent.'[8]

England:
Common law and statutory law

[5] Resolution adopted on second meeting of presidents of supreme courts of Central and Eastern European Countries, held on 22-25 October 1996 in Tallin/Pärnu (Estonia)

[6] Based on: Zoltán, Ödön: A Legfelsőbb Bíróság a nemzetközi összehasonlítás tükrében. Akadémiai Kiadó, Budapest, 1989. pp 33-34

[7] See Konrad Zweigert, Hein Kötz: Introduction to Comparative Law, Clarendon Press, Oxford, 1994. p. 267; Henry J. Abraham: The Judicial Process, Oxford University Press, 1993. p. 11and others.

[8] Konrad Zweigelt loc. cit. p. 267

In common law systems judges refer to the previous decisions in order to adjudicate the case before them. '…when a judge comes to try a case, she must always look back to see how previous judges have dealt with previous cases (precedents) which have involved similar facts in that branch of the law… Because the branches of English law have been gradually built up over the centuries, there are now hundreds of thousands of reported case decisions available … so that the task of discovering relevant precedents and achieving consistency is by no means simple.'[9] In British law schools moot court competitions are regularly organised for students who can try how good they are at the practice in looking for the adequate precedents.

Hungary:

How do decisions of higher courts influence the judicial practice?

In Hungary – as in other countries of the continental law system – there is not any legal rule which compels a judge to follow the decisions of higher courts, but the reality shows that they do it. We try to find some argument to explain this phenomenon. The most important fact is that in the appeal procedure higher courts have the power to quash the decision of lower courts if they depart from the rules the supreme and other higher courts laid down in their previous decisions. It is very difficult to imagine a judge who wants his decision to be quashed because of the mentioned reason. It is also true that judges of higher – especially of the supreme courts – have outstanding respect, skill, special knowledge and these circumstances help to accept their points of view. The other case when guidelines given by the higher court has to be followed is if they decide in cases which come to them by way of appeal. The space for remedy made by the court of second and third instance is limited and if the decision is quashed and sent back to the lower court the appeal court gives authoritative interpretation and provide guidance which must be followed in the repeated procedure.

Decisions of the Supreme Court – do they have binding force?
Legal background

Constitution of Hungary

Constitution of Hungary contains detailed rules not only defining elements of the court system but pining down that 'The legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall further ensure the harmony between domestic law and the obligations assumed under international law.'[10] This provision will be important when discussing the harmony between national law and international requirements.

The Constitution deals with the function of the Supreme Court as well, emphasizing that it 'shall ensure the uniformity in the application of the law by the courts; its resolutions on the uniformity in the application of the law shall be binding on all courts.'[11] So the binding force of the Supreme Court's decision is based on the Constitution.

Act No 66 of 1997 on the Organization and administration of Courts (Organisational Act)

As it is written in the Section 27 of Act 66 of 1997 „Ensuring uniform application of the law by the courts is the duty of the Supreme Court." The Supreme Court realises/performs this duty in two forms: it adopts uniformity decisions which are binding for all other courts and publishes decisions made in individual cases which may have theoretical importance.

The so called Organisational Act refers the task of ensuring uniformity only into the competence of the Supreme Court, although earlier it was mentioned that lower courts may play an important role in the proper administration of justice. Article 25 of the act says as follows

[9] Penny Darbyshire: Darbyshire on the English legal system. Eighth Edition. London, Sweet & Maxwell 2005. p. 41

[10] Constitution of Hungary Article 7 Section (1)

[11] Constitution of Hungary Article 47 Section (2)

The Supreme Court shall
a) adjudge the legal remedy submitted against the decision of the county court or the regional court in the cases set forth by an Act,
b) adjudge petitions for review,
c) adopt an obligatory uniformity decision applicable to the courts,
d) proceed in other cases referred to its jurisdiction.

It is a very important issue that general rules of the uniformity procedure are laid down in this act, because they are applicable not only in criminal law but in other branches of the law as well. Special provisions are incorporated in the procedural codes as Code on Criminal Procedure and Code on Civil Procedure.

Code on Criminal Procedure

The Code on Criminal Procedure deals with competence and procedure conducted by different courts in criminal cases. As it was mentioned we can find general rules of uniformity procedure in the Organisational Act but specialities of the criminal cases are prescribed in this Code.

Other laws

Competences of the courts regulated in the highest level of the hierarchy of the rules. Only the Constitution and acts are appropriate forms to arrange these questions.

Organisational background

Judicial system of Hungary

In order to understand the administration of justice and the possibility of unification of judicial practice we have to be familiar with the structure of the Hungarian judicial system.

There are four levels of the courts:

- 111 local courts (and district courts in the capital) have general authority to act as first instance courts. 105 local courts are located in the major towns of Hungary and 6 district courts in Budapest.[12]
- The second level of the court system consists of 19 county courts and the Metropolitan court of Budapest. These courts are competent to hear cases at first instance and at second instance as well if the appeal was lodged against the decision of local courts.
- 5 regional courts of appeal compose the third level of the court system. These courts are authorised to hear cases as second and third instance courts.
- The Supreme Court is the highest judicial body in Hungary. "The Supreme Court adjudges the legal remedies submitted against the decisions of the county courts or the regional courts in the cases set forth by an Act; adjudges petitions for review; adopts obligatory uniformity decisions applicable to the courts."[13]

A little bit later I will speak about the role and activity of the Constitutional Court but I have to emphasise that this court is not part of the court system of Hungary.

Some interesting data concerning the activity of the courts in Hungary

The number of judges working for different courts in Hungary was 2887 in 2008 and it means that 28,74 judges have a role in administration of justice/100000 inhabitants. These numbers include judges of different divisions (civil, criminal, administrative, labour, business as well). Number of cases – also in 2008 – was 1.562.166.[14]

[12] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial (02.04.2010)
[13] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial (02.04.2010)
[14] Source of data http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial (02.04.2010)

Who is responsible of the uniformity of judicial practice?

As it was mentioned earlier this task is located to the Supreme Court but regional courts of appeal and municipal courts play a significant role showing the proper way of administration of justice to the lower courts. Two of the main sources of judicial function deal with this question:

Constitution of Hungary Article 47 Section (2)

'The Supreme Court shall ensure the uniformity in the application of the law by the courts; its resolutions on the uniformity in the application of the law shall be binding on all courts'

Article 27 of Act 66 of 1997

'Ensuring uniform application of the law by the courts is the duty of the Supreme Court.'

The role of the Constitutional Court (relevant from the uniformity point of view)

'The establishment of a constitutional court was decided in 1989 …. The aim of founding such an institution was the defence of the new constitutional order and the protection of human rights under the Rule of Law. The Parliament passed the Act on the Constitutional Court on October 19, together with the amendment of the constitution. … The Court commenced functioning on January 1, 1990.'[15]

In Hungary the Constitutional Court has power to examine whether a law or some provisions of it is constitutional or not and in the latter case it annuls the given rule.

The court's decisions cannot be contested.

Some tasks of the Constitutional Court are the following:

- Preliminary (ex ante) review of adopted statutes
- Posterior review of a legal norm
- Review of statutes from the aspect of conformity with international treaties (Examination of conflicts between international treaties and laws)
- Interpretation of provisions of the constitution
- Review of constitutional complaints submitted because of violations of rights provided for in the Constitution.

If the Constitutional Court establishes the unconstitutionality of a statute, it annuls it in whole or in part. Its decision on annulment is published in the Official Journal of Hungary.

The law or other legal means of state administration annulled by a decision of the Constitutional Court may not be applied from the day of publication of the pertaining decision in the official journal.

The decisions of the Constitutional Court may not be appealed and are binding on everyone.

The role of the Supreme Court

The Supreme Court of Hungary has three different functions:

- adjudges the legal remedies
- passes **uniformity decisions** and
- issues decisions of theoretical importance.

The fact is that the Supreme Court in Hungary like in other countries hears only a minimum proportion of the cases. While they deal with only a small number of issues, in many areas of law the Supreme Court rarely makes decisions. It reviews decisions in ordinary and extraordinary legal remedy procedure. As a court of second instance it examines appeals submitted against the decision of the regional courts and as the court of third instance appeals submitted against

[15] http://www.mkab.hu/index.php?id=home_en (17.04.2010)

decisions where the country courts were the courts of first instance. In the extraordinary legal remedy process it examines final decisions of all courts if the breaches of law cannot be remedied in other way. These procedures are called 'Judicial review' and 'Appeal on legal grounds'. The latter one seems to be more important regarding our topic, because its primary aim is to recognise the unlawfulness of the decision. The Prosecutor General may lodge an appeal on legal grounds at the Supreme Court against the unlawful and final decision of the court, unless the final decision may be contested by other means of legal remedy.

Decision of the Supreme Court concerns the position of the accused if the decision in favour of him should be made, in other cases the decision may only establish the fact of unlawfulness.

Although these procedures are very rare the legal and theoretical statements of the Supreme Court should influence the uniform administration of justice.

Harmonisation procedure in which the decision of uniformity may be adopted shall be introduced in details later.

Here I would like to mention that in order to inform all administrators of the justice and the public as well the publication of the Supreme Court's decisions is very important. Uniformity decisions are published in several forms: the most important resource is the Hungarian Official Journal, in which laws, decisions and resolutions of the Parliament and the Government, decisions of the Constitutional Court are available for everybody. Besides this different printed and online collections of laws and decisions contain uniformity decisions and judicial college's opinion. The latter one is a special tool in the hand of the Supreme Court used to show the right way of interpretation of law. 'In order to ensure uniform practice in adjudication the judicial college shall analyze the practices of the courts and express its opinion in disputed matters in the application of the law.'[16]

Beyond uniformity decisions and college's opinion the Supreme Court has the right to issue decisions on principle. These are judgements passed by the chambers of the Supreme Court in various cases and are selected for publication with a view to unify the interpretation of law because the solution of the relevant legal problem is considered theoretically significant.[17]

Uniformity proceeding

The uniformity procedure is the most important tool of ensuring the harmonisation of administration of law in the Hungarian system.

There are two cases when this process may take place:

- if in order to develop legal practice or ensure uniform sentencing policy a harmonisation decision is required in a theoretical question, or
- if a chamber of the Supreme Court intends to deviate from the decision of another judging chamber of the Supreme Court with respect to a legal issue.

The Organisational Act and the Code on Criminal Procedure as well contain provisions on the question who are authorised to initiate this procedure, whom the panel of uniformity proceeding consists of and the rules of the procedure. It is special in the criminal procedure that usually the decision of the Supreme Court does not influence the individual decision and the situation of the accused. But if the guidelines concerning the theoretical question render the disposition of the final court decision (affected by the harmonisation decision) establishing the criminal liability of the defendant unlawful, the harmonisation chamber shall repeal the unlawful

[16] Article 33 Section (1) Act No 66 of 1997 on the Organisation and Administration of Courts.
[17] http://www.lb.hu/english/index.html (02.04.2010)

disposition and acquits the defendant and/or terminates the procedure. If the defendant is detained, the chamber shall terminate the detention.

As it was mentioned earlier, the uniformity decision shall be published in the Hungarian Official Journal.

Responsibility of heads of the county courts

We have examined possibilities of the Supreme Court in unification of the administration of law but one question has remained open: how is it noticed that it has to act?

In order to ensure the uniform application of the law the president of the regional court and the county court, the head of the judicial college and the president of the local court shall continually monitor the administration of justice in the courts they supervise as it is prescribed in the Organisational Act. If they realise that a contradictory practice has developed, they have to inform the president of the higher level court and submit the decisions and other relevant documents.[18]

Here I have to mention that not only presidents of courts but the judicial colleges have to analyze the practices of the courts and express their opinion in disputed matters in the application of the law and propose, if necessary, commencement of a uniformity procedure to the head of the college of the Supreme Court or the regional court.

International impacts

The fact that criminal law and criminal justice was protected from any outsider influence, because it was the last bastion of sovereignty was mentioned earlier. Only national traditions, cultural, ethical values etc. were taken into consideration when rules of criminal law were determined. 'The Council of Europe and the European Union have exerted ever-increasing influences in co-ordinating the criminal justice policies of their Member States. It should not be overlooked, however, that while Europe is growing together quickly there are still serious problems which have to be overcome on the way to an integrated European criminal justice system.'[19] Avoiding the long explanation of reasons why international harmonisation of criminal policies became important I would like to touch only some aspects of the international impact on unification/harmonisation of judicial practice. One important field of this process is the protection of human rights.

European Convention on Human Rights

Member states of international organisations tried and still try to develop a common fund of legal rules, concept and principles, e.g. member states of the Council of Europe ratified the European Convention of Human Rights and submitted themselves to the authority of the European Court of Human Rights and by that act accept the standard legal guarantees for fundamental rights of individuals. It is very important as well, that all members of the European Union are members of the Council of Europe at the same time, so respect of the common guarantees is ensured theoretically.

I would like to emphasize that not only the Council of Europe but the Committee of Ministers, the European Committee on Crime Problems have played an outstanding role by issuing

[18] Simplified description of the procedure written in the Article 28 of the Act No. 66 of 1997

[19] Joachim Hermann: Criminal justice policy and comparativism. A European Perspective. In: Comparative Criminal Justice Systems. From Diversity To Rapprochement. Proceeding of the International Conference for the 25th anniversary of the International Institute of Higher Studies in Criminal Sciences, Siracusa (Italy) 16-20 December 1997. Association Internationale de Droit Penal, Nouvelles Études Pénales No. 17, 1998

recommendations, resolutions, organising conferences in order to discuss questions of criminal justice.

European Court of Human Rights

Decisions of the Court bind the states involved; there is no possibility to submit any appeal. If a decision condemns the state, it has to execute every measure prescribed by the decision. The case law of the ECHR has double effect: It provides legal remedy to the individual whose right was violated and the decision plays a significant role in developing domestic law and in domestic judicial practice. In addition a decision may influence not only the legislation of the state involved directly, but the legislation of states having the same or similar legal background.

Precedents have very important impact in the practice of the Court: it takes into consideration its previous decisions when deciding a question tried earlier and even in the reasoning of its judgment the Court refers to decisions in former similar cases.

Cases concerning Hungary directly

In cases when the Court find out that some rules of the Hungarian system of law violate an Article of the Convention, it means a direct duty of the legislator to prepare the necessary modification of the internal law, because in the Constitution it is declared that the Republic of Hungary shall ensure the harmony between domestic law and the obligations assumed under international law. If the violation is based only on the practice it needs an intervention of the state as well depending on the nature of violation.

Other important cases

Not only cases in which Hungary was directly involved have influenced the domestic legislation. As a good pupil in the school Hungary tries to learn from faults of other member states and takes into consideration the case law of the Court during the codification process.

Concerning the rules of the Code on Criminal Procedure it could be interesting to mention that one reason of the judicial review (a form of extraordinary legal remedy) is the following:

'a body for the protection of human rights, created by way of an international treaty established that the conduct of the procedure or the final decision of the court has violated a provision of the international treaty promulgated by law, provided that the Republic of Hungary has submitted herself to the jurisdiction of the international body for the protection of human rights and the violation of law may be remedied by way of a judicial review'.

European Court of Justice

Questions of criminal law and criminal procedure do not frequently emerge before the European Court of Justice. But now when the last tower of sovereignty is about to be lost we should not neglect the role of this Court in ensuring the uniformity of administration of law in member states.

Framework decisions of the EU

Framework decisions as a special tool in co-operation in criminal matters are used to approximate the laws and regulations of the Member States in the European Union. They are binding on the Member States as to the result to be achieved, but leave the choice of form and methods to the national authorities. Member States have to lodge a report on how they implemented requirements of a framework decision to the European Commission. Because earlier the adoption of such an initiative needed the unanimous decision of the Member States is was difficult and took a long time to have the necessary consent.

CONSIDERATIONS REGARDING THE MAINTENACE OF THE PREVENTIVE ARREST DURING TRIAL

Andrei ZARAFIU*

Abstract

Depriving a person of his/her freedom for trial purposes for a longer period of time represents an issue that, in all legislations, is considered very carefully, the provisions issued reflecting to a large extent the position of the law regarding the real and effective guarantee of the individual freedom. The absolute character of the initial duration of 30 days for the preventive arrest can only be cancelled by the use of a procedure, which is recognised by the Consittution, to continue depriving a person of his/her freedom. Considering that the constituent lawmaker regulates differently the duration of the preventive arrest for the two phases of the criminal trial, the same dual modality of regulation also applies in the case of the juridical tools based on which one maintains the temporary deprivation of freedom.Through this article, I propose an analysis of the juridical tools used, during the trial, in order to extend the provisional detention. This implies both the approach of the trial moments of maintaining the preventive arrest and the analysis of how the national legislation complies with the guarantees established at European level in order to avoid the arbitrary in terms of deprivation of freedom.

Key words *: provisional detention, maintain the preventive arrest, trial phase, duration.*

Introduction

In the Romanian judicial system, after the revision of the Consitution in 2003, the judicial bodies receive different trial remedies for the criminal prosecution phase and for the trial phase in order to maintain the deprivation of freedom.

As a juridical institution, the extension of the duration of the preventive arrest of the defendant may only occur in the criminal pursuit phase. In the trial phase, the measure of preventive arrest, whether it was taken during the criminal pursuit or during trial, can only be maintained.

Although regulated differently, both institutions are governed by the case-law of the Court in Strasbourg in the application of art.5 para. 3 of the European Convention of Human Rights in the sense that they require a control made by a judge in order to assess the circumstances that advocate for and against the maintenace of the preventive arrest, with the obligation to rule according to the juridical criteria on the existence of some solid reasons that justify the mainteance of the preventive arreest, and in the absence thereof, to order the release of the arrested person.

1.1. Preliminary considerations

It has to be noted that the extension of the arrest during the criminal trial has different forms depending on the phase of the main judicial activity. Thus, in the criminal pursuit phase the institution used in order to ensure the maintenance of the deprivation of freedom is the extension

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of the preventive arrest, whereas in the trial phase, this is achieved by the maintenance of the preventive arrest. This dual regulation is determined by the way in which the institution of extending the arrest in time is regulated by the fundamental law.[1] Besides this constitutional reason, the dual type of regulation is also justified by the significant differences involved by the evolution of the relationship between the main judicial activity, that of solving the substance of the case and the adjacent judicial activity, i.e. taking the measure of preventive arrest.

In the same time, the detailed regulation[2] contained in the fundamental law is meant to eliminate the inconsistencies regarding the application of the institution in diferent phases of the criminal trial (as it was the case in the old regulation)[3] and to create in this matter the premises of a coherent and unitary legislative framework.

As regards the evolution of the juridical relationship between the main judicial activity and the adjacent activity, this is in itself the cause of different juridical and institutional contents for the extension of the preventive arrest and for the maintenace of the preventive arrest.

Thus, in the criminal pursuit phase, the juridical relationship between the main activity and the adjacent activity of making the preventive arrest has a special character. This is expressed by the coexistence of two different categories of judicial bodies that act as competent authorities, which perform the two types of activities. The main activity which has the function of conducting the criminal pursuit is performed or supervised by the prosecutor, whereas the adjacent activity through which the provisional deprivation of freedom is ordered is performed by the judge.

Also, the special character is expressed through two different categories of juridical norms of the two types of activities. Thus, the main judicial activity in the criminal pursuit phase is conducted according to the common procedure, regulated through general norms, contained both in the General Part of the Code of Procedure (compentecy, evidence, actions, etc.) and in the Special Part (art. 200-278), whereas the adjacent activity is carried out according to a special procedure, regulated through special norms (art. 146-160).

Unlike this, in the trial phase, the juridical relationship between the main activity and the adjacent activity has a character of subsidiarity, in the sense that both types of activities are carried out by the same body (the court) and according to the same common procedure (*general provisons regarding the trial – art.287-312 Criminal Procedure Code)*, pointed out exceptionally through several special norms.

As regards the juridical nature of the institution of maintenace of the preventive arrest, as a subdivision of the type of adjacent judicial activity, regarding the preventive arrest, it must be noted, for the begininng, that this is an exception to the rule of notification (petitum) that is used in this matter.

If in the criminal pursuit phase whether we refer to the initial moment of ordering the preventive arrest or to a subsequent moment in the evolution of this measure (when the initial

[1] Art. 23, points 5 and 6 of the reviewed Constitution treat differently the ways and terms for the extension of the preventive arrest in the criminal pursuit phase as compared to the way and terms for the maintenace of the preventive arrest in the trial phase.

[2] The doctrine considers the constitutional regulation too detailed, as it practically substitues to the provisions that should have been included in the Criminal Procedure Code. In this sense, see I. Neagu, *Drept procesual penal. Partea generală. Tratat, (Criminal Trial Law. General Part, Treaty)* Global Lex Publishing House, Bucharest, 2007, p. 91.

[3] In the old regulation, in the absence of some explicit legal provisions regarding the ways and terms for the maintenace of the preventive arrest, the Constitutional Court had the role of unifying the application and interpretation of this legislative framework, stating that the preventive arrest in the trial phase lasts for 30 days, with the possibility of extension (Constitutional Court, Decision no. 60/1994, 02.03.1998, published in the Official Gazette no. 57/28.03.1995 and the Decision no. 546/1997, published in the Official Gazette no. 98/08.03.

grounds that generated the measure change or cease),[4] and even if the law allows the possibility for this decision to be taken automatically, the competent judicial body, i.e. the judge, must be notified beforehand by the prosecutor through a proposal or a request.

For instance, even if in the case of the canceling the preventive arrest, the law (art.139 para.2) allows this measure to be taken automatically, considering the fact that the judge is the only authority that can decide on this matter, paradoxically, the same lawmaker establishes that it is the prosecutor's duty to notifiy the court (art.139, para 3^1 of the Criminal Procedure Code) on this matter.

In the trial phase, maintaining the preventive arrest if the reasons that determined this measure still exist or cancelling the measure in case the reasons for it ceased, require a judicial procedure that is carried out automatically, without any prior notification in this respect.

We can appreciate that the notification on the exercise of the adjacent activity regarding the accused's freedom is lawful and pre-existent, being both the consequence of a trial-related obligation and the derivate of the main notification regarding the procedure of solving the case.

The power of the court is enforceable even automatically, i.e. there is no legal obstacle (as compared to the general provisions on taking, replacing, canceling or terminating the prevention measures) to prevent the adjacent judicial activity, in case of the preventive arrest, from being carried out also as a result of a prior notification by the prosecutor or the by accused through a proposal or a request.

In all cases, the lawfulness of maintaining the arrest during the trial phase is not verified automatically, but following a notification through an appeal that is filed either by the prosecutor or by the arrested person.

Although the maintenace of the preventive arrest is an activity that can be enforced automatically, this does not imply an arbitrary decision or an unlimited discretion, but it must be subjectted to an objective parameter obtained through the evaluation of the offence and to a subjective parameter obtained through the evaluation of the degree of danger implied by the accused.[5] The maintenance of the preventive arrest during the trial is a measure that does not materialise directly in a duration that is explicitly established and announced as in the case of the extension of the preventive arrest, where both the starting point (*dies a quo*) and the ending point (*dies ad quem*) are established explicitly through the judge's decision.

For the institution of maintaining the preventive arrest, the duration of this measure, apparently *sine die*, is induced, being regulated indirectly both through the obligation of the periodical verification, but no later that 60 days, established by the provisions of art. 160^b, and through the juridical consequences that result in case of failure to comply with this obligation.[6]

Thus, according to art. 140 para. 1 point b, if by the time the 60 days term expires, the court did not proceed to the verification of the lawfulness and validity of the preventive arrest, the measure ceases automatically, i.e. in this case the measure lasts for a maximum of 60 days.

This maximum duration, indirectly regulated, does not imply any obligation for the court to order the maintenance of the arrest for a certain time, shorter or equal to the one of 60 days, such a procedure being unlawful.[7]

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[4] Changing the grounds based on which the measure of preventive arrest was taken generates the replacement of the measure (art. 139 para. 1), whereaas the cessation of the same grounds results in the cancellation of the measure (art. 139 para. 2).

[5] For a compared approach of the law, see M. Mercone, *Diritto Procesuale Penale, VI Edizione,* Gruppo Editoriale Esselibri – Simone, 2003, p. 310.

[6] These consequences were stated as mandatory by the High Court of Cassation and Justice, the Unified Section, through the decision no. VII/2006, Official Gazette no. 475/2006.

[7] High Court of Cassation and Justice, Criminal Section, decision no. 5320/2005, www.scj.ro.

In the Romanian trial system, the maintenance of the preventive arrest remains an adjacent activity, irrespective of the phase of the main trial procedure[8] (in first court, appeal or last appeal), and irrespective if a non-permanent decision of conviction was ordered on the matter.

Unlike this, in the case-law[9] of the European Court of Justice, the final point of the period considered as provisional arrest is the pronounciation of a decision for conviction in the first court.

After this decison, whether or not it is enforceable in the domestic law of a member state, from the point of view of the Court, the detention falls under the scope of art.5 para.1 point a, beign a detention after conviction.

Although the national law of a member state stipulates that the sentence becomes enforceable once all the remedies were used, in the sense of the Convention, the preventive arrest terminates once the conviction and the decision is pronounced in the first court.[10] In case the decision of conviction pronounced by the first court is quashed or cancelled by the superior courts and the file is referrred for re-trial to the first court, the duration of the provisional detention re-strats to run until a new decision is issued by the first court and thus it is added to the first period.[11]

Irrespective of how we appreciate the duration of the maintenance of the arrest in the trial phase, this complies with the general limits set in art. 140 of the Criminal Procedure Code, exceeding these limits results in the automatic termination of the measure: when, before a decision of convicion is issued by the first court, the duration of the arrest has reached half of the special maximum duration allowed by law for the offence at issue as well as in other cases stipulated by the law.

Through the expression, "the other cases stipulated by the law", the literature[12] identified the situations regulated by art. 350 para. 3, according to which, the preventive measures of deprivation of freedom automatically terminate when the criminal case is solved in the first court and the judge orders: a sentence of imprisonment at the most equal to the duration of the detention and the preventive arrest; a sentence of imprisonment with suspension of the execution or execution of the punishment at workplace; a fine; an education measure.

Note here a lack of correlation between the general and the special provisions, which interpreted systematically lead to contradictory conclusions. Thus, according to art. 136 para. 6, the measure of preventive arrest cannot be taken in case of the offences for which the law stipulates the fine as an alternative punishment and according to art.350 para. 3 point c, the measure of the preventive arrest terminates automatically when the court applies the sanction of the fine. *De lege ferenda*, this lack of correlation must be eliminated.

The doctrine considers that the automatic termination of the measure of preventive arrest also applies in the case of a conviction to imprisonment, punishment that is entirely pardoned.[13]

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[8] For the maintenace of the arrest by the court of appeal, see High Court of Cassation and Justice, Criminal Section, decision no. 6564/2004, and for maintaining it during the appeal see High Court of Cassation and Justice, Criminal Section, decision no. 6738/2004, in D. G. Matei, *Măsurile Preventive, Culegere de practică judiciară*, (Preventive Measures, a Collection of Judicial Practices), Hamangiu Publishing House, 2006, p. 73-77.

[9] This principle was first expressed in the case Wemhoff vs. Germany, June 27, 1968 and B. vs. Austria, 28 Martie 1990.

[10] Solmaz vs. Turkey, 27561/02, January 16, 2007; Romanov vs. Russia 63993/00, October 20, 2005; Iliev vs. Bulgaria, 48870/99, November 22, 2004.

[11] Naus vs. Poland, 7224/04, September 16, 2008; Kaukowski vs. Poland, 10268/03, October 4, 2005 in D. Bogdan, *Arestarea preventivă şi detenţia în jurisprudenţa CEDO***,** *(Preventive Arrest and Detention in the ECHR case-law)***,** Bucharest, 2008, p. 123-124.

[12] I. Neagu, *Drept procesual penal. Partea generală. Tratat, (Criminal Trial Law, General Part. Treaty)* Global Lex Publishing House, Bucharest, 2007, p. 458.

[13] I. Neagu, *Drept procesual penal. Partea generală. Tratat, (Criminal Trial Law, General Part. Treaty)* Global Lex Publishing House, Bucureşti, 2007, p. 459.

As a general remark, the persistence of the plausible reasons to suspect that the person deprived of freedom would have commited an offence is a *sine qua non* requirement in order to maintain that person in arrest. A strong suspicion that the accused commited some severe offences may justify the detention in the beginning. After a while, however, this is no longer enough, other reasons are required in order to justify the maintenance of the deprivation of freedom.

In some cases, where the court had invoked „the state evidence" in order to justify the extension of the arrest in time, the European Court[14] showed that, although the expression „*state evidence"* can generally be a relevant factor for the existence and persistence of some serious indications of guilt in commiting an offence, after a certain time, this cannot justify all by itself the whole period of provisional detention.

1.2. Maintaining the preventive arrest upon receipt of the file

As for the maintenance of the preventive arrest during the trial phase, the legal provisons reveal that this may have two forms. Thus, the court, upon receipt and registration of the file decides on the maintenance of the preventive arrest in the cases when the accused is put to trial in a state of arrest[15] (art. 160 compared to art. 300^1 of the Criminal Procedure Code) and mainly, during the trial of the criminal case, the court that is lawfully notified in this respect. The difference between the two forms is made by the judicial body that is competent to analyse the lawfulness and validity of the measure, in the first case that is a court that was not vested with the solving of the case, whereas in the second situation, we refer to the court that is to decide on the juridical conflict that is put to trial and of which the court has already been lawfully notified.

This is the reason why, in case of control of the lawfulness and validity of the prevenitve arrest upon receipt of the file, this activity is carried out in the board room, whereas the verifications conducted during the trial are carried out on the date set for the ordinary session,[16] in conditions of publicity, orality and contradictoriality.

Also, during the trial, apart from its obligation of periodical control of the lawfulness and validity of the preventive arrest, according to art. 160^b, on the maintenance of the preventive arrest, the court must also rule on this matter when solving the criminal case, according to art. 350 para. 1 of the Criminal Procedure Code. According to these provisions, the court has the obligation to decide, through a ruling, on taking, maintaining or canceling the measure of preventive arrest.

In the light of the provisions of art. 160 of the Criminal Procedure Code, when the prosecutor orders, through the indictment, to put the accused to trial in state of arrest, the file is presented to the competent court within at least 5 days prior to the expiry of the arrest warrant or, if applicable, of the duration for which the extension of the arrest was decided. The court, in the board room, proceeds according to art. 300^1.

As regards the nature of the 5 day deadline, I believe that in its classification we can apply „*mutats mutandis*", the mandatory guidelines[17] of the High Court of Cassation and Justice that

[14] Mckay vs. The United Kingdom, 543/03, October 03, 2006; Vrencev vs. Serbia, 2361/05, September 23, 2008; Hass vs. Poland, 2782/04, November 07, 2008; Garringnec vs. France, 21148/02, June 10, 2008 in D. Bogdan, *Arestarea preventivă şi detenţia în jurisprudenţa CEDO (Preventive Arrest and Detention in the ECHR case-law)*„ Bucharest, 2008, p. 129.

[15] High Court of Cassation and Justice, Criminal Section, decision no. 6102/29.12.2003, in BJ for 2003 ;

[16] D. G. Matei, *Măsurile Preventive, Culegere de practică judiciară*, (Preventive Measures, Judicial Practice Collection) Hamangiu Publishing House, 2006, p. 76-78, High Court Cassation and Justice, Criminal Section, decision no. 6562/0712.2004;

[17] High Court of Cassation and Justice, the Unified Section, Decision to admit the appeal in the interest if the law no. XXV/2008, Official Gazette no. 372/2008.

stated, regarding a similar legal provision, that the syntagm used by the lawmaker „prior to the expiry of the duration of the preventive arrest" has an imperative character and not the character of a recommendation.

Considering that the lawmaker explicitly refers to the provisions of art. 300^1, that are part of the general provisons regarding the judgement (art. 287-312 of the Criminal Procedure Code), common norms with a general character, based on which every judgement is carried out, irrespective of the type of court or the type of judgement,[18] we believe that the institution of the maintenance of preventive arrest upon receipt of the file is applicable both on the registration of the file with the first court and when the file is registered by the court of appeal or of last appeal; in this situation only the act of notification is different (the indictment in the first situation, the statement of appeal or or last appeal in the second situation).

After the registration of the file by the court, in the cases when the accused is put to trial in state of arrest, the court has the obligation to verify automatically, in the board room, the lawfulness and validity of the preventive arrest.

If the court finds that the grounds for the preventive arrest ceased or that there are no new grounds to justify the deprivation of freedom, it decides, through a conclusion, the cancellation of the preventive arrest and the immediate release of the person.[19]

When the court finds that the grounds that generated the arrest continue to require the deprivation of freedom or that there are new grounds to justify the deprivation of freedom, it maintains, through a motivated conclusion, [20] the preventive arrest.

An appeal can be filed against the conclusion, according to art. 160^a para. 2.

3.3. Verifications regarding the arrest of the accused

The extension of the arrest during the trial, by maintaining this measure, is the consequence of a self-notification or of the procedural obligations established in this respect, which occurs in different moments of the judicial activity.

Thus, we analysed the form of maintaining the accused in arrest as a result of the verification of the lawfulness and validity of the measure by the compentent court, activity that is carried out in the board room, then the moment when the file is recorded by the first court, the court of appeal or of last appeal.

Also, considering the fact that the criminal judicial activity during the trial phase implies some successive phases that sometimes extend in time,[21] in an attempt to avoid an arbitrary deprivation of freedom, continued beyond it reasonable limits, the lawmaker established that the court vested with the main activity shall have the obligation to control periodically the lawfulness and validity of the preventive arrest during the trial.

Thus, according to art. 160^b of the Criminal Procedure Code, during the trial, the court verifies periodically, but no later than 60 days, the lawfulness and validity of the preventive arrest.

The activity of verification of the lawfulness and validity of the preventive arrest, although it preserves the juridical nature of an adjacent procedural activity, is carried out by the same body

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[18] I. Neagu, *Drept procesual penal. Partea specială. Tratat, (Criminal Trial Law, Special Part. Treaty)* Global Lex Publishing House, Bucharest, 2008, p. 181.

[19] High Court of Cassation and Justice, Criminal Section, decision no. 4265/11.07.2005.

[20] Court of the 1st District of Bucharest, Conclusion of October 26, 2005, in D. G. Matei, *Măsurile Preventive, Culegere de practică judiciară (Preventive Measures, Judicial Practice Collection*), Hamangiu Publishing House, 2006, p. 50-51.

[21] This opinion has certain nuances. In case of the special procedure of trial of flagrant offences, the trial does not last for more that 10 days (art. 473 para. 3).

that is in charge of the main activity (that of solving the case in the first court, the court of appeal or or last appeal) and according to the same common, contradictory and public procedures.

The unclear juridical nature of the 60 day maximum deadline allowed for the court to verify the lawfulness and validity of the measure has raised controversial opinions as regards the sanction that is required in case of failure to comply with it.

Thus, some consider,[22] that in case the 60 day deadline for the verification of the arrest expires, the preventive arrest ceases automatically.The argument brought in support of this opinion is the imperative character of the constitutional provisions and of the Criminal Procedure Code. It is not clear in the end whether the automatic termination occurs in this situation as a result of the expiry of the deadline established by law or of the deadline established by the judicial body, but it only concludes that, given that the deadline for the verification of the measure of preventive arrest is 60 days, during the trial, this measure can be maintained for a maximum of 60 days, and exceeding this deadline results in an infringement of the preventive measure.

Another opinion,[23] shows that the omission of the periodical verification of the arrest does not fall into the scope of the provisions regarding the automatic termination but of those regarding the nulities. The periodical verification of the arrest is a guarantee against an arbitrary maintenance of this measure. The 60 day deadline does not represent the duration of the preventive measure, but the maximum duration in which the judge verifies the lawfulness and validity of the preventive arrest.

In case of exceeding the 60 day deadline, the provisions of art.185 para.3 shall apply and not those of art. 185 para. 2, the sanction imposed being that of the relative nulity according to art. 197 para. 1 and 4, only if the arrested person is able to prove an injury caused by exceeding the deadline for the verification. The injury could consist in the intervention, before the verification, of some grounds that would have lead to the cancellation of the measure.[24] Although we consider this last opinion as well-grounded, this judicial controversy was settled by the High Court of Cassation and Justice which, in carrying out its role assigned by the Constitution, i.e. to ensure the unitary application and interpretation of the laws in Romania, established that the court's failure to verify, during the trial, the lawfulness and validity of the preventive arrest of the accused before the 60 day deadline expires, results in the automatic termination of the measure of preventive arrest and the immediate release of the accused.[25]

The intervention of the supreme court also resulted in the legislative amendement that establishes the incidence of the automatic termination of the preventive arrest in case of failure to comply with the 60 day deadline.[26]

If the court finds that the preventive arrest is unlawful or that the grounds for this measure ceased or that there are no new grounds to justify the deprivation of freedom, it decides, through a motivated conclusion, the cancellation of the preventive arrest and the immediate release of the accused.

When the court finds that the grounds for the arrest require the maintenance of the deprivation of freedom or that there are new grounds to justify the deprivation of freedom, it decides, through a motivated conlusion, to maintain the preventive arrest.

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[22] L Coraș, Arestarea preventivă, Încetarea de drept a măsurii arestării inculpatului" (Preventive Arrest. The Automatic Termination of the Preventive Arrest Measure), Dreptul no. 6/2005, p 181;

[23] M. Crețu, „Arestarea preventivă. Reglementări recente", (Preventive Arrest. Recent Regulations), RDP no. 3/2004, p. 29;

[24] I. C. Uța, Verificări privind arestarea inculpatului în cursul judecății – garanție împotriva menținerii arbitrare a măsurii preventive, (Verifications of the accused's arrest during trial – guarantee against the arbitrary maintenance of the preventive measure) Dreptul no. 2/2006, p. 217.

[25] High Court of Cassation and Justice, United Sections, Decision VII/2006 to admit the appeal in the interest of the law, followed by the amendment of art. 140 para 1 point a through Law. 356/2006;

[26] Point. A, para 1 art. 140 is reproduced as amended through art. I point. 61 of Law 356/2006.

For instance, in case the accused has been put to trial, but the judge's investigation has not started yet, and the witnesses and the other accused are to be heard, there is a real possibility for some of them to hinder the discovery of the truth by influencing the witnesses or the co-accused, the maintenance of the arrest is required. [27]

During the trial, the court has to process all the evidence that is necessary in order to establish the judicial truth, although this may imply an extension of the trial and does not imply directly the release of the accused for this reason. [28]

An interpretation of the provisions of art. 160^{b} para. 2 and 3, would reveal that the only solutions possible that can be ordered by the court, after meeting its obligation to verify the lawfulness and validity of the preventive arrest, would be, according to the lawmaker, the cancellation or maintenance of the preventive arrest.

I believe that, in taking into account the general provisons regarding the preventive measures, when automatically replacing or cancelling the measure, and the juridical nature of those remedies meant to ensure the lawfulness, that also require the *automatic* analysis of the grounds that generate them (art. 139 para. 3^{1} and 3^{2} and art. 140 para. 3), following the verification of the lawfulness and validity of the preventive arrest, the court may also decide, through a conclusion, the replacement or automatic termination of the preventive arrest, without being notified in this respect by a prosecutor or by the accused.

The institution of the verification of the lawfulness and validity of the preventive arrest, during the trial, is new in the Romanian trial system and reprsents a national transposition of the procedural guarantees that ensure the avoidance of the arbitrary regarding the deprivation of freedom, as they were established in the case-law of the Court.[29]

The periodical control reveals to be necessary from the fact that the circumstances of the case may change and while the grounds for the arrest may continue to exist in the initial phases of the detention, these may not be convincing in the later phases. The authorities have the duty to perform a judicial control of the arrest measure at short and regulated periods. The ongoing supervision should be as rigurous as the initial examination.

In several cases, the Court noted that, during the detention, the domestic courts never analyse the issue of the reasonable character of the duration of the detention, such an analysis would be extremely important once the plaintiff had spent more time in preventive arrest and the maximum duration stipulated by the domestic law was exceeded.[30] In another case, the Court used this argument, although the duration of the maximum detention spitulated by law had not been exceeded.[31]

In conclusion, as the Great Chamber shows, the domestic courts have the obligation to repeatedly analyse the maintenance of the preventive arrest during the trial in order to ensure the release of the person deprived of freedom when the circumstance no longer justify this measure.[32]

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[27] High Court of Cassation and Justice, Criminal Section, decision no. 6562/07.12.2004, www.scj.ro.

[28] High Court of Cassation and Justice, Criminal Section, decision no. 3959/15 iulie 2004, www.scj.ro.

[29] Assenov and other vs. Bulgaria 6847/02, November 08, 2005; Estrikh vs. Latvia, 73819/01, January 18, 2007.

[30] See for instance Khudoyorov vs. Russia, 6847/02, November 8, 2005 (5 years, 4 months and 6 days); Korchuganova vs. Russia, 75039/01, June 8, 2006 (5 years, 1 month and 26 days); Scheglyuk vs. Russia, 7649/02, November 14, 2006 (1 year and 10 months).

[31] Mamedova vs. Russia, 7064/05, June 1, 2006 (detention of about 1 year, the domestic law allowed for a maximum of 2 years).

[32] Mckay vs. the UK, 543/03, October 30, 2006 in D. Bogdan, *Arestarea preventivă şi detenţia în jurisprudenţa CEDO***,** *(Preventive Arrest and Detention in the ECHR case-law)***,,** Bucharest, 2008, p. 128-129.

Conclusions

The issue of extending the provisional deprivation of freedom until a criminal case is permanently solved, raises an interesting controversy, that of the simultaneous application of two principles: the provisional detention of an accused cannot be maintained beyond its reasonable limits, according to art.5 para.3 of the European Convention on Human Rights, and on the other hand, the total duration of a trial must comply with a reasonable deadline, according to art. 6 para. 1 of the same Convention.

The use of trial remedies in order to maintain in time the provisional deprivation of freedom requires a special attention from the judicial bodies as if the moment of discussing this deprivation of freedom considered as provisional, through a preventive measure, there is evidence that clearly justify the accused's guilt, this might require a judge to decide the conviction and not a preventive measure.

Given their particular juridical nature, both procedures, of extension and maintenance of the preventive arrest, have their own juridical configuration, adjacent to the ordinary judicial activities, of carrying out the criminal pursuit or of trying the criminal cases. They do not refer to the substance of the juridical conflict to be solved by the judicial bodies, but to separate, independent aspects concerning the appropriate development of the judicial activity.

Consequently, both the activity of solving the issue of extending the preventive arrest and the acitvity based on which the maintenance or cancellation of the preventive arrest is decided, as judicial activities adjacent to the main activity, as they are not related to elements of substance of the juridical conflict (the existence of the act, the person who perpetrated it and the person's potential guilt), as regards the competences of the courts established by Law 304/2004, these are subject to the activity of solving and not of judgement.

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CONSIDERAȚII PRIVIND MENȚINEREA ARESTĂRII PREVENTIVE ÎN FAZA DE JUDECATĂ

Andrei ZARAFIU*

Abstract

Privarea de libertate a unei persoane cu titlu procesual pe o perioadă mai mare de timp constituie o problemă care, în toate legislațiile, este privită cu deosebită atenție, în dispozițiile edictate reflectându-se în mare măsură poziția dreptului față de garantarea reală şi efectivă a libertății individuale. Caracterul absolut al duratei inițiale a arestării preventive, de 30 de zile, poate fi înfrânt prin utilizarea unei proceduri, recunoscute la nivel constituțional, de continuare a privării de libertate. Ca urmare a faptului că legiuitorul constituant fixează în mod diferit durata arestării preventive pentru cele două faze ale procesului penal, aceeaşi modalitate dualistă de reglementare este aplicată şi în cazul instrumentelor juridice în urma cărora se continuă privarea de libertate provizorie. Prin acest articol propun o analiză a instrumentelor juridice prin intermediul cărora, în cursul judecății, se prelungeşte în timp detenția provizorie. Acest demers presupune atât tratarea momentelor procesuale ale menținerii arestării preventive, cât şi analiza modului în care legislația națională respectă garanțiile instituite la nivel european pentru evitarea arbitrariului în materia privării de libertate.

Cuvinte cheie: *detenție provizorie, menținere arestare preventivă, procedura, fază de judecată, durată.*

Introducere

În sistemul judiciar penal român, după revizuirea Constituției în anul 2003, organele judiciare primesc remedii procesuale diferite, pentru faza de urmărire penală şi pentru faza de judecată, în vederea continuării privării de libertate.

Ca şi instituție juridică, prelungirea duratei arestării preventive a inculpatului, poate interveni numai în faza de urmărire penală. În faza de judecată, măsura arestării preventive, fie că a fost luată în cursul urmăririi penale, fie că a fost luată în cursul judecății, poate fi doar menținută.

Deşi reglementate în mod diferit, ambele instituții se circumscriu condițiilor impuse de jurisprudența Curții de la Strasbourg în aplicarea art. 5 alin. 3 din Convenția Europeană a Drepturilor Omului, în sensul că presupun un control de natură judecătorească în urma căruia sunt examinate circumstanțele care militează pentru şi contra menținerii arestării preventive, cu obligația de a se pronunța potrivit criteriilor juridice asupra existenței unor motive temeinice care să justifice menținerea arestării şi, în absența lor, de a dispune punerea în libertate.

1.1. Considerații preliminare

Trebuie remarcat că prelungirea în timp a stării de arest în timpul procesului penal îmbracă forme diferite după faza în care a ajuns activitatea judiciară principală. Astfel, în faza de urmărire

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penală instituţia prin intermediul căreia se asigură continuarea privării de libertate, este prelungirea arestării preventive, în timp ce pentru faza de judecată acest deziderat este atins prin instituţia menţinerii arestării preventive. Această reglementare dualistă este determinată de modalitatea de normare a instituţiei prelungirii în timp a stării de arest la nivelul legii fundamentale.[1] Pe lângă această raţiune constituţională, modalitatea dualistă de reglementare îşi găseşte justificarea şi în diferenţele notabile pe care le implică evoluţia raportului dintre activitatea judiciară principală, de rezolvare a fondului cauzei, şi activitatea judiciară adiacentă, de luare a măsurii arestării preventive.

În acelaşi timp, reglementarea detaliată[2] conţinută de legea fundamentală este menită să înlăture neconcordanţele legate de aplicarea instituţiei în faze diferite ale procesului penal (cum s-a întâmplat în vechea reglementare)[3] şi să creeze în această materie premisele unui cadru legislativ coerent şi unitar.

În ceea ce priveşte evoluţia raportului juridic dintre activitatea judiciară principală şi activitatea adiacentă, aceasta însăşi este cauza unui conţinut juridic şi instituţional diferit pentru prelungirea arestării preventive şi pentru menţinerea arestării preventive.

Astfel, în faza de urmărire penală raportul juridic, dintre activitatea principală şi activitatea adiacentă de luare a arestării preventive, are un caracter special. Specialitatea se manifestă prin coexistenţa a două categorii diferite de organe judiciare ca autorităţi competente, ce exercită cele două tipuri de activităţi. Activitatea principală, căreia îi corespunde funcţiunea procesuală de desfăşurare a urmăririi penale, este exercitată sau supravegheată de către procuror, în timp ce activitatea adiacentă, prin care se dispune privarea provizorie de libertate, este efectuată de către judecător.

De asemenea, specialitatea se manifestă şi prin reglementarea prin două categorii diferite de norme juridice a celor două tipuri de activităţi. Astfel, activitatea judiciară principală din faza de urmărire penală se desfăşoară potrivit procedurii comune, reglementate prin norme cu caracter general, conţinute atât în Partea Generală a Codului de Procedură (competenţa, probele, acţiunile etc.) cât şi Partea Specială (art. 200-278), pe când activitatea adiacentă se desfăşoară potrivit unei proceduri speciale, reglementate prin norme cu caracter particular (art. 146-160).

Spre deosebire, în faza de judecată, raportul juridic dintre activitatea principală şi cea adiacentă îmbracă un caracter de subsidiaritate, în sensul că ambele tipuri de activităţi sunt exercitate de acelaşi organ (instanţa de judecată) şi potrivit aceleiaşi proceduri comune (dispoziţii generale privind judecata – art.287-312 C.proc.pen.), punctate în mod excepţional prin câteva norme speciale.

În ceea ce priveşte natura juridică a instituţiei menţinerii arestării preventive, ca subdiviziune a genului de activitate judiciară adiacentă, referitoare la arestarea preventivă, trebuie remarcat, pentru început, caracterul său de excepţie de la regula sesizării (petitum) ce funcţionează în această materie.

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[1] Art. 23, pct. 5 şi 6 din Constituţia revizuită tratează în mod diferit modalitatea şi termenele de prelungire a arestării preventive în faza de urmărire penală, faţă de modalitatea şi termenele de menţinere a arestării preventive în faza de judecată.

[2] Doctrina consideră reglementarea constituţională mult prea detaliată, substituindu-se practic prevederilor care trebuiau să-şi găsească locul în Codul de Procedură Penală. În acest sens a se vedea I. Neagu, *Drept procesual penal. Partea generală. Tratat,* Ed. Global Lex, Bucureşti, 2007, p. 91.

[3] În vechea reglementare, în lipsa unor dispoziţii legale exprese, privitoare la modalitatea şi termenele de menţinere a arestării preventive, i-a revenit Curţii Constituţionale rolul de a unifica aplicarea şi interpretarea acestui cadru legislativ, statuând că şi în faza de judecată arestarea durează 30 de zile, putând fi prelungită (Curtea Constituţională, Decizia nr. 60/1994, 02.03.1998, publicată în Monitorul Oficial nr. 57/28.03.1995 şi Decizia nr. 546/1997, publicată în Monitorul Oficial nr. 98/08.03.

Dacă în faza de urmărire penală, indiferent că ne raportăm la momentul inițial al luării arestării preventive, sau la un moment ulterior din evoluția acestei măsuri (când se schimbă sau încetează temeiurile inițiale care au determinat luarea măsurii),[4] şi indiferent că legea permite posibilitatea ca decizia în acest sens să poată fi luată şi din oficiu, organul judiciar competent să decidă în această materie, respectiv judecătorul, trebuie sesizat prealabil de către procuror printr-o propunere sau cerere.

Pentru exemplificare, chiar dacă în cazul revocării arestării preventive legea (art. 139 alin. 2) permite ca aceasta să intervină şi din oficiu, având în vedere faptul că judecătorul este singurul organ competent să dispună în această materie, în mod paradoxal, tot legiuitorul incumbă în sarcina procurorului obligația de a sesiza instanța (art. 139 alin. 3^1 C. proc. pen.) în acest sens.

În faza de judecată, menținerea arestării preventive în cazul în care subzistă temerile ce au stat la baza luării măsurii sau revocarea măsurii, în cazul în care acestea au încetat, presupune o activitate judiciară ce se exercită din oficiu, fără a mai fi nevoie de o sesizare prealabilă în acest sens.

Putem aprecia că sesizarea în vederea exercitării activității adiacente cu privire la libertatea inculpatului este una legală, preexistentă, fiind atât consecința unei obligații procesuale, cât şi derivatul sesizării principale cu activitatea de rezolvare a cauzei.

Puterea instanței de judecată este exercitabilă chiar şi din oficiu, ceea ce înseamnă că nu există niciun impediment legal (prin raportare la dispozițiile generale privind luarea, înlocuirea, revocarea sau încetarea de drept a măsurilor de prevenție) ca activitatea judiciară adiacentă, în cazul arestării preventive, să se exercite şi în urma unei sesizări prealabile a procurorului sau inculpatului, printr-o propunere sau cerere.

În toate cazurile verificarea legalității menținerii arestării în faza de judecată, dar în forma controlului jurisdicțional, se exercită nu din oficiu, ci ca urmare a sesizării printr-un recurs declarat fie de procuror, fie de inculpatul arestat.

Chiar dacă menținerea arestării preventive este o activitate exercitabilă şi din oficiu, aceasta nu presupune nici decizie arbitrară nici discreționalitate nelimitată, ci trebuie circumscrisă unui parametru obiectiv, realizat prin evaluarea gravității faptei comise şi unui parametru subiectiv, realizat prin evaluarea periculozității inculpatului.[5] Menținerea arestării preventive, în faza de judecată, este o măsură care nu se materializează în mod direct într-o durată expres stabilită şi anunțată, ca în cazul prelungirii arestării preventive, în care atât punctul de plecare (dies a quo) cât şi punctul final (dies ad quem) sunt expres stabilite prin decizia judecătorului.

Pentru instituția menținerii arestării preventive, durata pentru care ființează această măsură, aparent una sine die, este una indusă, reglementată în mod indirect atât prin obligația verificării periodice, dar nu mai târziu de 60 de zile, stabilite prin dispozițiile art. 160^b, cât şi prin consecințele juridice ce intervin în cazul nerespectării acestei obligații.[6]

Astfel, potrivit art. 140 alin. 1 lit. b, dacă până la expirarea termenului de 60 de zile instanța nu a procedat la verificarea legalității şi temeiniciei arestării preventive, măsura încetează de drept, ceea ce înseamnă, în acest caz, că măsura durează maximum 60 de zile.

Această durată maximă, reglementată în mod indirect, nu implică vreo obligație pentru instanța de judecată, de a pronunța menținerea arestării pentru o anumită perioadă, mai mică sau egală cu cea de 60 de zile, o astfel de modalitate de a proceda fiind nelegală.[7]

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[4] Schimbarea temeiurilor care au stat la baza luării arestării preventive determină înlocuirea măsurii (art. 139 alin. 1) pe când încetarea aceloraşi temeiuri determină revocarea măsurii (art. 139 alin. 2).

[5] Pentru o privire de drept comparat a se vedea M. Mercone, *Diritto Procesuale Penale, VI Edizione,* Gruppo Editoriale Esselibri – Simone, 2003, p. 310.

[6] Aceste consecințe au fost statuate în mod obligatoriu de Înalta Curte de Casație şi Justiție, Secțiile Unite, prin decizia nr. VII/2006, Monitorul Oficial nr. 475/2006.

[7] Î.C.C.J., Secția penală, decizia nr. 5320/2005, www.scj.ro.

În sistemul procesual penal român menţinerea arestării preventive rămâne o activitate adiacentă, indiferent de stadiul în care a ajuns activitatea principală de judecată[8] (în primă instanţă, în apel sau recurs), şi indiferent dacă în cauză s-a pronunţat o hotărâre nedefinitivă de condamnare.

Spre deosebire, în jurisprudenţa[9] Curţii Europene, punctul final al perioadei considerată arestare provizorie este pronunţarea unei hotărâri de condamnare în primă instanţă.

După această hotărâre, indiferent dacă hotărârea este sau nu executorie în dreptul intern al unui stat membru, detenţia se încadrează, din punctul de vedere al Curţii, în art. 5 alin. 1 lit. a, fiind o detenţie după condamnare.

Chiar dacă legea naţională a unui stat membru prevede că sentinţa devine executorie numai după finalizarea tuturor căilor de atac, arestarea preventivă se încheie, în sensul Convenţiei, odată cu condamnarea şi hotărârea din primă instanţă.[10] În situaţia în care hotărârea de condamnare pronunţată de prima instanţă este casată sau desfiinţată de instanţele superioare şi dosarul este trimis spre rejudecare în faţa primei instanţe, cursul detenţiei provizorii reîncepe să curgă, până la pronunţarea unei noi hotărâri în primă instanţă, adăugându-se astfel primei perioade.[11]

Indiferent de modul în care apreciem durata menţinerii stării de arest, în faza de judecată, aceasta se circumscrie limitelor generale fixate în art. 140 C. proc. pen., limite a căror depăşire conduce la încetarea de drept a măsurii: atunci când, înainte de pronunţarea unei hotărâri de condamnare în primă instanţă durata arestării a atins jumătatea maximului special prevăzut de lege pentru infracţiunea ce face obiectul învinuirii, precum şi în alte cazuri prevăzute de lege.

Prin expresia, celelalte cazuri prevăzute de lege, literatura de specialitate[12] a identificat situaţiile reglementate de dispoziţiile art. 350 alin. 3, potrivit cărora, măsurile de prevenţie privative de libertate încetează de drept atunci când, o dată cu soluţionarea cauzei penale în primă instanţă, se pronunţă: o pedeapsă cu închisoarea cel mult legală cu durata reţinerii şi arestării preventive; o pedeapsă cu închisoarea cu suspendarea executării sau cu executarea la locul de muncă; amenda; o măsură educativă.

Trebuie remarcată în această privinţă o necorelare a dispoziţiilor legale generale cu cele speciale, care interpretate sistematic, ajung la concluzii contradictorii. Astfel, potrivit art. 136 alin. 6, măsura arestării preventive nu poate fi luată în cazul infracţiunilor pentru care legea prevedea alternativ pedeapsa amenzii iar potrivit art. 350 alin. 3 lit. c, măsura arestării preventive încetează de drept atunci când instanţa aplică pedeapsa amenzii. De lege ferenda, această necorelare trebuie înlăturată.

În doctrină se apreciază că încetarea de drept a măsurii arestării preventive intervine şi în cazul condamnării la pedeapsa închisorii, pedeapsă graţiată în întregime.[13]

Ca o apreciere cu caracter general, persistenţa motivelor plauzibile de a bănui că persoana privată de libertate ar fi comis o infracţiune, este o condiţie sine qua non a regularităţii menţinerii în arest. O bănuială puternică privind comiterea de către inculpat a unor infracţiuni grave poate justifica iniţial detenţia. Totuşi, după o anumită perioadă, ea nu mai este suficientă, fiind necesare alte motive care să justifice continuarea privării de libertate.

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[8] Pentru menţinerea arestării de către instanţa de apel vezi Î.C.C.J., Secţia penală, decizia nr. 6564/2004, iar pentru menţinerea cu ocazia judecării recursului a se vedea Î.C.C.J., Secţia penală, decizia nr. 6738/2004, în D. G. Matei, *Măsurile Preventive, Culegere de practică judiciară*, Ed. Hamangiu, 2006, p. 73-77.

[9] Acest principiu a fost afirmat pentru prima dată în cauza Wemhoff c. Germaniei, 27 Iunie 1968 şi B. c. Austriei, 28 Martie 1990.

[10] Solmaz c. Turciei, 27561/02, 16 Ianuarie 2007; Romanov c. Rusiei 63993/00, 20 Octombrie 2005; Iliev c. Bulgariei, 48870/99, 22 Noiembrie 2004.

[11] Naus c. Poloniei, 7224/04, 16 Septembrie 2008; Kaukowski c. Poloniei, 10268/03, 4 Octombrie 2005 în D. Bogdan, *Arestarea preventivă şi detenţia în jurisprudenţa CEDO***,** Bucureşti, 2008, p. 123-124.

[12] I. Neagu, *Drept procesual penal. Partea generală. Tratat,* Ed. Global Lex, Bucureşti, 2007, p. 458.

[13] I. Neagu, *Drept procesual penal. Partea generală. Tratat,* Ed. Global Lex, Bucureşti, 2007, p. 459.

În unele cauze, în care instanța invocaseră „starea probelor" pentru a justifica prelungirea în timp a stării de arest. Curtea Europeană[14] a arătat că, deşi în general expresia „starea probelor" (state evidence) poate fi un factor relevant pentru existența şi persistența unor indicii serioase de vinovăție în comiterea unei infracțiuni, după trecerea unui interval, nu poate justifica, singură, întreaga perioadă de detenție provizorie.

1.2. Menținerea arestării preventive la primirea dosarului

În ceea ce priveşte menținerea arestării preventive în faza de judecată, din economia dispozițiilor legale, reiese că aceasta poate îmbrăca două forme. Astfel cu privire la menținerea arestării preventive se pronunță instanța la primirea şi înregistrarea dosarului, în cauzele în care inculpatul este trimis în judecată în stare de arest[15] (art. 160 raportat la art. 300^1 Cod procedură penală), şi, în principal, în cursul judecării cauzei penale, instanța legal sesizată în acest sens. Diferența între cele două forme este dată de organul judiciar competent să analizeze legalitatea şi temeinicia măsurii, în primul caz fiind vorba de o instanță de judecată care nu a fost investită şi cu soluționarea cauzei pe când, în a doua situație, este vorba chiar de instanța de judecată chemată să se pronunțe cu privire la raportul juridic de conflict dedus judecății şi care a fost deja legal sesizată în acest sens.

Aceasta este şi rațiunea pentru care, în cazul verificării legalității şi temeiniciei arestării preventive la primirea dosarului, această activitate are loc în camera de consiliu, pe când în cazul verificărilor din cursul judecății, acestea au loc la termenul fixat pentru şedința obişnuită,[16] în condiții de publicitate, oralitate şi contradictorialitate.

De asemenea, în cursul judecății, pe lângă obligația instanței de a verifica periodic legalitatea şi temeinicia arestării preventive, în condițiile art. 160^b, asupra menținerii arestării preventive, instanța de judecată se mai pronunță în mod obligatoriu şi atunci când rezolvă acțiunea penală, în condițiile art. 350 alin. 1 C. proc. pen. Potrivit acestor dispoziții, instanța are obligația ca, prin hotărâre, să se pronunțe asupra luării, menținerii sau revocării măsurii arestării preventive.

În lumina dispozițiile art. 160 C. proc. pen., atunci când procurorul dispune, prin rechizitoriu, trimiterea în judecată a inculpatului aflat în stare de arest, dosarul se înaintează instanței competente cu cel puțin 5 zile înainte de expirarea mandatului de arestare sau, după caz, a duratei pentru care a fost dispusă prelungirea arestării. Instanța, în camera de consiliu, procedează potrivit art. 300^1.

În ceea ce priveşte natura termenului de 5 zile, apreciez că la clasificarea sa putem aplica „mutats mutandis", îndrumările obligatorii[17] ale Înaltei Curți de Casație şi Justiție care au statuat, cu privire la o dispoziție legală asemănătoare, că sintagma folosită de legiuitor „înainte de expirarea duratei arestării preventive" are caracter imperativ şi nu de recomandare.

Având în vedere că legiuitorul trimite în mod expres la dispozițiile art. 300^1, ce fac parte din dispozițiile generale privind judecata (art. 287-312 C. proc. pen.), norme comune, cu caracter general, după care se desfăşoară orice judecată, indiferent de gradul instanței şi indiferent de felul

[14] Mckay c. Regatului Unit, 543/03, 03 Octombrie 2006; Vrencev c. Serbiei, 2361/05, 23 Septembrie 2008; Hass c. Poloniei, 2782/04, 07 Noiembrie 2008; Garringnec c. Franței, 21148/02, 10 Iulie 2008 în D. Bogdan, *Arestarea preventivă şi detenția în jurisprudența CEDO*, Bucureşti, 2008, p. 129.

[15] Î.C.C.J., Secția penală, decizia nr.6102/29.12.2003, în BJ pe anul 2003 ;

[16] D. G. Matei, *Măsurile Preventive, Culegere de practică judiciară*, Ed. Hamangiu, 2006, p. 76-78, Î.C.C.J. s. p., d. nr. 6562/0712.2004;

[17] Î.C.C.J., Secțiile Unite, Decizia de admitere a recursului în interesul legii nr. XXV/2008, Monitorul Oficial nr. 372/2008.

judecăţii,[18] apreciem că instituţia menţinerii arestării la primirea dosarului este aplicabilă atât pentru momentul înregistrării dosarului la prima instanţă de judecată, cât şi pentru momentul înregistrării dosarului la instanţa de apel sau de recurs; în această situaţie doar actul sesizării este diferit (rechizitoriul în primul caz, declaraţie de apel sau recurs în cel de-al doilea caz).

După înregistrarea dosarului la instanţă, în cauzele în care inculpatul este trimis în judecată în stare de arest, instanţa este datoare să verifice din oficiu, în camera de consiliu, legalitatea şi temeinicia arestării preventive.

Dacă instanţa constată că temeiurile care au determinat arestarea preventivă au încetat, sau că nu există temeiuri noi care să justifice privarea de libertate, dispune, prin încheiere, revocarea arestării preventive şi punerea de îndată în libertate.[19]

Când instanţa constată că temeiurile care au determinat arestarea impun în continuare privarea de libertate, sau că există temeiuri noi care justifică privarea de libertate, instanţa menţine, prin încheiere motivată,[20] arestarea preventivă.

Încheierea poate fi atacată cu recurs, în condiţiile art. 160^{a} alin. 2.

3.3. Verificări privind arestarea inculpatului

Prelungirea în timp a stării de arest în cursul judecăţii, prin menţinerea acestei măsuri, este consecinţa unei autosesizări sau obligaţii procesuale instituite în acest sens, ce intervine în momente diferite ale activităţii judiciare.

Astfel, am analizat forma de menţinere a arestării inculpatului, ce intervine ca urmare a verificării legalităţii şi temeiniciei măsurii de către instanţa competentă, activitate ce se efectuează în camera de consiliu, o dată cu înregistrarea dosarului la prima instanţă de judecată, la instanţa de apel ori la instanţa de recurs.

De asemenea, având în vedere că activitatea judiciară de natură penală din faza de judecată implică parcurgerea unor etape succesive care uneori se prelungesc în timp,[21] în încercarea de a evita o privare de libertate arbitrară, continuată dincolo de limitele ei rezonabile, legiuitorul a instituit în sarcina instanţei investite cu activitatea principală, obligaţia verificării periodice a legalităţii şi temeiniciei arestării preventive în cursul judecăţii.

Astfel, potrivit art. 160^{b} C. proc. pen., în cursul judecăţii instanţa verifică periodic, dar nu mai târziu de 60 de zile, legalitatea şi temeinicia arestării preventive.

Activitatea de verificare a legalităţii şi temeiniciei arestării preventive, deşi păstrează natura juridică a unei activităţi procesuale cu caracter adiacent, este efectuată de acelaşi organ care desfăşoară şi activitatea principală (de rezolvare a cauzei în primă instanţă, în apel sau recurs) şi potrivit aceleiaşi proceduri comune, contradictorii şi publice.

Natura juridică neclară a termenului maxim de 60 de zile în care instanţa trebuie să verifice legalitatea şi temeinicia măsurii a dus la opinii controversate în ceea ce priveşte sancţiunea incidentă în cazul nerespectării sale.

Astfel, într-o opinie,[22] se apreciază că în cazul desfăşurării termenului de 60 de zile al verificării arestării intervine încetarea de drept a măsurii preventive. Argumentul adus în sprijinul acestei opinii este acela al caracterului imperativ al dispoziţiilor constituţionale şi ale Codului de

[18] I. Neagu, *Drept procesual penal. Partea specială. Tratat,* Ed. Global Lex, Bucureşti, 2008, p. 181.

[19] I.C.C.J., Secţia penală, decizia nr. 4265/11.07.2005.

[20] Judecătoria Sectorului 1 Bucureşti, încheierea din 26.octombrie 2005, în D. G. Matei, *Măsurile Preventive, Culegere de practică judiciară*, Ed. Hamangiu, 2006, p. 50-51.

[21] Aprecierea implică anumite nuanţări. În cazul procedurii speciale de judecată a unor infracţiuni flagrante, judecata nu durează mai mult de 10 zile (art. 473 alin. 3).

[22] L Coraş, Arestarea preventivă, Încetarea de drept a măsurii arestării inculpatului", Dreptul nr. 6/2005, p 181;

Procedură Penală. Nu rezulta în final dacă încetarea de drept intervine în această situaţie, ca urmare a expirării termenului prevăzut de lege sau a celui stabilit de organul judiciar, ci doar se concluzionează că, deoarece termenul limită de verificare a măsurii arestării preventive este, în cursul judecăţii, de 60 de zile, rezultă că menţinerea acestei măsuri este pentru maximum 60 de zile iar depăşirea acestui termen echivalează cu încetarea de drept a măsurii preventive.

Într-o altă opinie,[23] se arată că omisiunea verificării periodice a arestării nu atrage incidenţa dispoziţiilor privind încetarea de drept, ci a celor privind nulităţile. Verificarea periodică a arestării este o garanţie împotriva menţinerii arbitrare a măsurii. Termenul de 60 de zile nu reprezintă durata măsurii preventive, ci durata maximă în care judecătorul asigură verificarea legalităţi şi temeiniciei arestării preventive.

În cazul depăşirii termenului de 60 de zile sunt incidente dispoziţiile art. 185 alin. 3 şi nu cele ale art. 185 alin 2, sancţiunea care intervine fiind aceea a nulităţii relative în condiţiile art. 197 alin. 1 şi 4, numai dacă arestatul poate dovedi o vătămare produsă prin depăşirea termenului de verificare. Vătămarea ar putea consta în intervenirea, înainte de verificare a unor temeiuri, care ar fi determinat revocarea măsurii.[24] Deşi considerăm întemeiată această ultimă opinie, această controversă juridică a fost tranşată de Înalta Curte de Casaţie şi Justiţie care, în exercitarea rolului său constituţional de a asigura aplicarea şi interpretarea unitară a legilor în România, a stabilit că neverificarea de către instanţă, în cursul judecăţii, a legalităţii şi temeiniciei arestării preventive a inculpatului înainte de împlinirea duratei de 60 de zile, atrage încetarea de drept a măsurii arestării preventive luată faţă de inculpat şi punerea lor de îndată în libertate.[25]

Intervenţia instanţei supreme a provocat şi modificarea legislativă care consacră incidenţa încetării de drept a arestării preventive în cazul nerespectării termenului de 60 de zile.[26]

Dacă instanţa constată că arestarea preventivă este nelegală, sau că temeiurile care au determinat arestarea preventivă au încetat sau nu există temeiuri noi care să justifice privarea de libertate, dispune, prin încheiere motivată, revocarea arestării preventive şi punerea de îndată în libertate a inculpatului.

Când instanţa constată că temeiurile care au determinat arestarea impun în continuare privarea de libertate, sau că există temeiuri noi care justifică privarea de libertate, instanţa dispune, prin încheiere motivată, menţinerea arestării preventive.

Spre exemplu, în cazul în care inculpaţii au fost trimişi în judecată, însă cercetarea judecătorească nu a început încă, urmând să fie audiaţi martorii din lucrări, precum şi ceilalţi inculpaţi, existând posibilitatea reală ca unii dintre aceştia să zădărnicească aflarea adevărului prin influenţarea martorilor sau coinculpaţilor, se impune menţinerea stării de arest.[27]

În cursul judecăţii instanţa este datoare să administreze toate probele necesare stabilirii adevărului judiciar, chiar dacă aceasta presupune o prelungire a procesului şi nu implică în mod direct punerea în libertate a inculpatului pe acest motiv.[28]

Interpretând dispoziţiile art. 160^b alin. 2 şi 3, ar reieşi că singurele soluţii posibile ce pot fi pronunţate de instanţă, după îndeplinirea obligaţiei de verificare a legalităţii şi temeiniciei arestării preventive, ar fi, în opinia legiuitorului, revocarea arestării sau menţinerea arestării.

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[23] M. Creţu, „Arestarea preventivă. Reglementări recente", RDP nr. 3/2004, p. 29;

[24] I. C. Uţa, Verificări privind arestarea inculpatului în cursul judecăţii – garanţie împotriva menţinerii arbitrare a măsurii preventive, Dreptul nr. 2/2006, p. 217.

[25] Î.C.C.J., Secţiile Unite, Decizia VII/2006 de admitere a recursului în interesul legii, urmată de modificarea art. 140 alin. 1 lit. a prin Legea nr. 356/2006;

[26] Lit. a de la alin. 1 al art. 140 este reprodusă astfel cum a fost modificată prin art. I pct. 61 din Legea nr. 356/2006.

[27] Î.C.C.J., Secţia penală, decizia nr. 6562/07.12.2004, www.scj.ro.

[28] Î.C.C.J., Secţia penală, decizia nr. 3959/15 iulie 2004, www.scj.ro.

Apreciez că, în considerarea dispozițiilor generale din materia măsurilor preventive, la înlocuirea sau încetarea de drept a măsurii, precum şi a naturii juridice a acestor remedii de intrare în legalitate, ce impun analiza şi din oficiu a temeiurilor care le determină (art. 139 alin. 3^1 şi 3^2 precum şi art. 140 alin. 3), în urma verificării legalității şi temeiniciei arestării preventive, instanța poate dispune, prin încheiere, şi înlocuirea sau încetarea de drept a arestării preventive, fără a fi sesizată de procuror sau inculpat în acest sens.

Instituția verificării legalității şi temeiniciei arestării preventive, în cursul judecății, nou intervenită în sistemul procesual român, reprezintă o transpunere pe plan național a garanțiilor procesuale care asigură evitarea arbitrarului în materia privării de libertate, aşa cum au fost ele surprinse în jurisprudența Curții.[29]

Controlul periodic rezultă cu necesitate din faptul că circumstanțele cauzei se pot schimba şi, în timp ce motivele de arestare pot continua să existe în stadiile inițiale ale detenției, acestea pot să nu mai fie convingătoare în stadiile ulterioare. Revine autorităților sarcina de a supune arestarea unui control judiciar, la intervale scurte şi regulate. Supravegherea continuă ar trebui să fie la fel de riguroasă ca şi examinarea inițială.

În mai multe cauze, Curtea a notat că, în cursul detenției, instanțele interne nu analizează niciodată problema caracterului rezonabil al duratei detenției, o astfel de analiză fiind extrem de importantă după ce reclamanții petrecuseră mai multă vreme în arest preventiv, şi fusese depăşită durata maximă de detenție preventivă prevăzută de legea internă.[30] Într-o altă cauză Curtea a folosit acest argument, chiar dacă durata detenției maxime prevăzută de legea internă nu fusese depăşită.[31]

În concluzie, aşa cum arată Marea Cameră, instanțele interne au obligația să analizeze repetat menținerea arestării preventive în cursul procesului, în vederea asigurării eliberării persoanei private de libertate atunci când circumstanțele nu mai justifică acest lucru.[32]

Concluzii

Problema prelungirii privării de libertate provizorie, până la soluționarea definitivă a unei cauze penale, pune în discuție o controversă interesantă, a aplicării simultane a două principii: detenția provizorie a unui acuzat nu poate fi menținută dincolo de limitele ei rezonabile, conform art. 5 alin. 3 din Convenția Europeană a Drepturilor Omului, iar pe de altă parte, durata totală a unui proces trebuie să se înscrie într-un termen rezonabil, potrivit art. 6 alin. 1 din aceeaşi Convenție.

Utilizarea remediilor procesuale prin intermediul cărora se continuă în timp privarea de libertate provizorie implică o atenție deosebită din partea organelor judiciare, deoarece, dacă la momentul punerii în discuție a acestei privări de libertate, luată cu titlu provizoriu, printr-o măsură preventivă, ar exista probe din care să rezulte în mod cert vinovăția inculpatului, s-ar impune pronunțarea unei hotărâri judecătoreşti de condamnare, şi nu luarea unei măsuri preventive.

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[29] Assenov şi alții c. Bulgariei, 6847/02, 08 Noiembrie 2005; Estrikh c. Letoniei, 73819/01, 18 Ianuarie 2007.

[30] A se vedea spre exemplu Khudoyorov c. Rusiei, 6847/02, 8 Noiembrie 2005 (5 ani, 4 luni şi 6 zile); Korchuganova c. Rusiei, 75039/01, 8 Iunie 2006 (5 ani, 1 lună şi 26 de zile); Scheglyuk c. Rusiei, 7649/02, 14 Noiembrie 2006 (1 an şi 10 luni).

[31] Mamedova c. Rusiei, 7064/05, 1 Iunie 2006 (detenție de aproximativ 1 an, legea internă permitea maxim 2 ani).

[32] Mckay c. Regatul Unit, 543/03, 30 Octombrie 2006 în D. Bogdan, *Arestarea preventivă şi detenția în jurisprudența CEDO***,** Bucureşti, 2008, p. 128-129.

Datorită naturii lor juridice particulare, ambele proceduri, de prelungire şi de menţinere a arestării preventive, au o configuraţie juridică de sine stătătoare, adiacentă activităţilor judiciare obişnuite, de desfăşurare a urmăririi penale sau de judecare a cauzelor penale. Ele nu privesc fondul raportului juridic de conflict dedus spre soluţionare organelor judiciare ci aspecte separate, independente ce ţin de buna desfăşurare a activităţii judiciare.

În consecinţă, atât activitatea de rezolvare a propunerii de prelungire a arestării preventive cât şi activitatea în urma căreia se decide sau nu menţinerea arestării preventive, ca activităţi judiciare adiacente activităţii principale, întrucât nu privesc elementele de fond ale raportului juridic de conflict, (existenţa faptei, a persoanei care a săvârşit-o şi eventuala vinovăţie a acesteia), se circumscriu în ceea ce priveşte competenţele instanţelor judecătoreşti stabilite prin Legea nr. 304/2004, activităţii de soluţionare şi nu celei de judecată.

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GUARANTEES SPECIFIC TO A FAIR TRIAL IN CRIMINAL MATTERS. HARMONISATION OF JURISPRUDENCE

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Abstract

By adopting the European Convention on Human Rights (hereinafter referred to as "the Convention") in 1994, the Romanian State recognised the necessity that any criminal trial should be carried out under fair conditions, in accordance with the requirements of Article 6 of the Convention. In this study, we are going to analyse the requirements of the Convention applying especially to criminal trials, namely those related to the right of the charged person to be informed promptly, in a language which he understands, of the nature and cause of the accusation against him. Moreover, we will take into consideration the obligation of the judicial bodies to offer the charged person the adequate time and facilities for the preparation of his defence. The analysis will be based on the relevant regulations set down in the Convention and the Romanian criminal procedure legislation. Last but not least, it will include a presentation of the jurisprudence relevant to these matters, both of the European Court of Human Rights (hereinafter referred to as "ECHR") and of the Romanian national courts.

Keywords: *criminal trial in Romania, right to a fair trial, the European Court of Human Rights, right to be informed of the nature of the accusation, right to defence.*

Introduction

In accordance with Article 6 Paragraph (1) of the Convention, the requirements regarding a fair trial, consisting of a public hearing within a reasonable time by an independent and impartial tribunal established by the law, are to be applied both to any alleged violation of the civil rights and obligations and to the accusations of a criminal nature.

In addition to these general guarantees, Article 6 of the Convention also includes the guarantees specific to a criminal trial. Thus, Article 6 Paragraph (2) is dedicated to the presumption of innocence ("everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law").

Moreover, in accordance with Article 6 Paragraph (3) of the Convention, everyone charged with a criminal offence shall have the right:

a). to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b). to have adequate time and facilities for the preparation of his defence;

c). to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d). to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

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e). to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Within the classification of the explicit guarantees specific to a fair trial in criminal matters, we are going to deal below with the right of the charged person to be informed of the nature of the accusation against him, the right to have adequate time and facilities for the preparation of his defence, the right to examine the witnesses involved in the trial under the same conditions as the other parties and the right to have free assistance of an interpreter.

Moreover, being of the opinion that the right against self-incrimination is a right specific to the criminal proceedings, we considered that this can be regarded as a guarantee specific to a criminal trial, which is not regulated as such in the text of the Convention, but which clearly arises as a requirement regarding the fairness of the proceedings, especially from the point of view of the ECHR jurisprudence.

1. The right to be informed of the nature of the accusation

1.1. The standards established in the national law system

In accordance with Article 6 Paragraph (3) of the Criminal Procedure Code, the judicial bodies have the obligation to apprise the accused or defendant, immediately and before examining him, of the deed for which he is held responsible and of its legal framing, and to give him the possibility to prepare and perform his defence[1].

As compared to the regulation preceding the adoption of the Law no. 281/2003, it can be noticed that the moment when the charged person must be informed of the commitment of a criminal offence was expressly placed before the first statement.

These obligations of the criminal prosecution bodies must be recorded in a minutes, a procedural act which also comprises references to the information of the relevant person of his right against self-incrimination and of his right to know the fact that any possible statement made may also be used against him during the legal proceedings.

The issue that appears in case of a violation of the rules governing the information of the accused or defendant of all these rights defining the broader concept of defence has been debated in the national jurisprudence. Therefore, there has appeared the question what sanction could be applicable if the information minutes comprising, among other components, the information of the nature of the public accusation is not prepared.

Taking into account the fact that this omission is not included in the cases of absolute nullity, the conclusion was that the relative nullity could be applicable, if any injury is caused. But in order to produce effects this nullity must be claimed in accordance with the requirements set down at Article 197 Paragraph (4) of the Criminal Procedure Code, i.e. during the performance of the act, when the party was present or at the first trial date with complete procedure[2]. Nevertheless, under the circumstances leading to the conclusion that the violation of this obligation has had consequences on the manifestation of truth and the fair result of a case, the relative nullity can be claimed within the legal regime of a nullity, whereas it may be stressed upon the request of the

[1] Paragraph (3) of Article 6 is reproduced as amended by Article I Subparagraph 3 of the Law no. 281/2003. Before this amendment, Paragraph (3) was worded as follows: *"(3) The judicial bodies shall have the obligation to apprise accused or defendant of the deed with which he is charged and of its legal framing, and to grant him the possibility to prepare and perform his defence"*.

[2] The Bucharest Court of Appeal, the Criminal Section II, Decision no. 97/1997, in *Culegere de practică judiciară penală pe anul 1997 (Collection of criminal judicial practice for the year 1997)*, Holding Reporter Publishing House, Bucharest, 1998, pages 44-45; for the same purpose, the Bucharest Court of Appeal, the Criminal Section I, Decision no. 632/1998, in *Culegere de practică judiciară penală pe anul 1998 (Collection of criminal judicial practice for the year 1998)*, All Beck Publishing House, Bucharest, 1999, pages 58-59.

parties or ex officio at any time during the criminal proceedings. For this purpose, if the statements have been obtained by violating the right of the accused or defendant to be informed of the nature of the accusation against him, of the committed deed and of its legal framing, and these are crucial for demonstrating that the accused or defendant is guilty, a procedural defect which can determine the nullity of the evidence obtained in this way may be claimed and the provisions of Article 64 Paragraph (2) of the Criminal Procedure Code may be invoked.

The regulation is also reiterated in Article 70 Paragraph (2) of the Criminal Procedure Code, according to which he must be informed of the deed with which he is charged, of its legal framing, of his right to a defender, as well as of his right to remain silent, whereas he must be warned that any statement made may also be used against him. If the accused or defendant makes a statement, he must be advised to state everything he knows with regard to the deed and the accusation against him[3].

There exists in the specialised literature[4] the opinion that the judicial bodies have the obligation to perform the information of the perpetrator with regard to the defence rights - the information of the nature of the accusation as well - as soon as the commitment of a flagrant offence has been established. Consequently, the perpetrator must be apprised of the accusation against him before his first statement (which includes the questions of the criminal prosecution bodies with regard to the circumstances of the commitment of the criminal offence).

As far as the trial phase and the exertion of the right of the defendant to be informed of the public accusation against him are concerned, there are three instruments for informing the defendant, as well as the public, of the essential elements of the criminal case, namely the preliminary procedure preceding the court hearing, the reading of the document instituting the proceedings, respectively the procedure for changing the legal framing of the deed.

Therefore, in accordance with Article 313 Paragraph (4) of the Criminal Procedure Code, the defendant who is arraigned while being under arrest must be served a copy of the document instituting the proceedings (which can be only the indictment of the prosecutor in this case). In this way, through the submission of the procedural act, the defendant is officially informed of the committed deed and its legal framing, which were referred to the court. Second, we notice Article 322 of the Criminal Procedure Code, according to which, before starting the court inquiry, the President of the court must order the registrar to read or to briefly present the document instituting the proceedings and must then explain to the defendant the accusation brought against him[5].

In case of a change of the legal framing of the deed during the court inquiry, the court has the obligation, in accordance with Article 334 of the Criminal Procedure Code, to discuss the new legal framing with the parties and to warn the defendant that he has the right to require that the case should be left at the end of the court hearing or should be postponed so that he may prepare his defence.

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[3] Paragraph (2) of Article 70 is reproduced as amended by Article I Subparagraph 37 of the Law no. 356/2006. Before this amendment, Paragraph (2) was worded as follows: *"(2) The accused or defendant shall be then informed of the deed with which he is charged, of his right to a defender, as well as of his right to remain silent, whereas he shall be warned that any statement made may also be used against him. If the accused or defendant makes a statement, he shall be advised to state everything he knows with regard to the deed and the accusation against him."*

[4] C.S. Paraschiv, M. Damaschin, *Dreptul învinuitului de a nu se autoincrimina (The right of the accused against self-incrimination)*, in the Magazine "Dreptul" no. 2/2005, pages 141-145.

[5] Article 322 is reproduced as amended by Article I Subparagraph 154 of the Law no. 356/2006. Before this amendment, Article 322 was worded as follows: *"The President shall order the registrar to read the document instituting the proceedings and shall then explain to defendant the accusation brought against him. He shall also inform the defendant of his right to address questions to the co-accused persons, the other parties, the witnesses, and the experts, as well as to offer explanations during the court inquiry, wherever he considers it is necessary."*

There has been established in the jurisprudence of the Supreme Court[6] that the provisions of Article 334 of the Criminal Procedure Code set down the procedure to be carried out in case of changing the legal framing of the deed specified in the document instituting the proceedings. Therefore, in order to comply with the procedural guarantees, the court must discuss the change of the legal framing with the parties, even if the legal framing is more favourable, because in such a case the defendant must organise his defence and, probably, propose evidence correlated with the new legal framing. The obligation of the court is fulfilled only when the defender of the defendant takes into account the new legal framing in his conclusions, whereas the discussion between the parties also derives from the rule that the parties should be heard.

Against this background, as it was established that the appeal court had changed – without discussing it with the parties - the legal framing of the deed from the offence of deceit set down at Article 215 Paragraphs (2), (3) and (5) of the Criminal Code into the offence set down at Article 215 Paragraphs (1), (2) and (3) of the Criminal Code, the court ruled that the defendant had been deprived of the possibility to defend himself against the new legal framing. These aspects led to the cassation of the pronounced judgement, whereas the case was referred back to the court of first instance.

1.2. The standards established in the jurisprudence of ECHR

In accordance with Article 6 Paragraph (3) Point a) of the Convention, *everyone charged has especially the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.*

As far as the right of the charged person to be informed is concerned, it has been established in the jurisprudence of the European Court that it is necessary that the national judicial authorities should perform due diligence with regard to the modality in which the accusation is notified, because this procedure for communicating the criminal offence for which the charged person is held responsible has a special importance, establishing the official legal relationships between the charged person, on the one hand, and the bodies of the state, on the other hand[7]. The right to be informed of the accusation also involves the information of the legal framing of the deed, whereas it is necessary that these two information modalities should be performed in detail[8]. But the detailed character of the information is not applicable at the initial moment of the information of the perpetrator of his deed and its legal framing, because at that procedural stage the details of the accusation may be unclear and the procedural investigations may be in the starting phase. Therefore, it is necessary that the details should be included in the arraignment document, a procedural act which completes any activity of evidence administration.

In the jurisprudence of the court in Strasbourg, the information of the relevant person of the nature of the accusation is analysed as a structural element of the right to a fair trial[9], whereas this obligation must be *promptly* fulfilled. As far as this requirement for the judicial bodies is concerned, it has been determined that the exact information of the relevant person at the moment when he is arrested is sufficient, even if the preliminary procedure preceding the arraignment started earlier and involved a general and undetailed information of the charged person[10].

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[6] The High Court of Cassation and Justice, the Criminal Section, Decision no. 2255/04.04.2005, according to the Web page of the Supreme Court.

[7] ECHR, Decision of 25.07.2000 within the case *Mattoccia vs. Italy*, according to HUDOC.

[8] ECHR, Decision of 25.03.1999 within the case *Pélissier and others vs. France*, according to HUDOC; ECHR, Decision of 01.03.2001 within the case *Dallos vs. Hungary*, according to HUDOC.

[9] ECHR, Decision of 19.12.2006 within the case *Mattei vs. France*, according to HUDOC; for the same purpose, ECHR, Decision of 11.12.2007 within the case *Drassich vs. Italy*, according to HUDOC.

[10] Radu Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații (The European Convention on Human Rights. Comments and explanations)*, Volume I, C.H. Beck Publishing House, Bucharest, 2007, page 418.

Moreover, the right to be informed is also related in the prosecution's procedure for changing the legal framing of the deed that is performed during the legal proceedings. In this case, the judicial bodies have the obligation to inform the relevant person of the new details of the trial, whereas in the opposite case it can be considered a violation of the right to a fair trial[11].

In accordance with Article 6 Paragraph (3) Point a) of the Convention, the information of the charged person must be performed in a language which he understands, this regulation being inextricably linked to another provision, that from Point e), according to which the charged person has the right to have the free assistance of an interpreter if he does not understand or speak the language used for the hearing. It was held that the information performed in the official language of the state, due to the fact that the charged person did not speak that language and was not assisted by an interpreter, does not comply with the requirements of the Convention, thus existing a violation of the right to a fair trial[12].

2. The right to have adequate time and facilities for the preparation of the defence

2.1. The standards established in the national law system

The right to have adequate time for the preparation of the defence. In accordance with Article 6 Paragraph (5) of the Criminal Procedure Code, the judicial bodies have the obligation to apprise the accused or defendant, before his first statement, of his right to be assisted by a defender, whereas this is to be recorded in the hearing minutes. Under the conditions and in the cases set down by the law, the judicial bodies must take measures to provide legal assistance to the accused or defendant, if he does not have a chosen defender.

In this way, the principle regulation set down at Article 6 of the Criminal Procedure Code leads to the conclusion that the person charged with the commitment of a criminal offence is apprised of his right to defence at the moment when the criminal procedural relationship appears, whereas he has to take measures in order to prepare his defence. This provision, corroborated with the right of the accused or defendant to remain silent, may lead to the conclusion that, in this way, the charged person is given a period of time for preparing his defence.

With regard to the same issue, namely the time adequate for the actual exertion of the right to defence during the criminal trial, we mention the provisions of Article 171 Paragraph (4^1) of the Criminal Procedure Code, according to which, if the legal assistance is mandatory and the chosen defender does not show up at the date established for the performance of a criminal prosecution act or at the established trial date and does not ensure his replacement, goes away or refuses to carry out the defence, the judicial body must appoint an ex officio defender to replace the chosen one, *granting him adequate time for the preparation of the defence*. During the trial, after the debates have started, when the legal assistance is mandatory, if the chosen defender fails to come to the court, without reason, at the trial date and does not ensure his replacement, the court must appoint an ex officio defender to replace the chosen one, *granting him at least 3 days for the preparation of the defence*.

There has been formulated in the specialised literature[13] a number of critical comments with regard to the content of Article 171 Paragraph 4^1) of the Criminal Procedure Code. Thus, it was stressed that the present regulation makes a distinction between the legal assistance supplied

[11] ECHR, Decision of 19.12.2006 within the case *Mattei vs. France*, according to HUDOC.
[12] ECHR, Decision of 19.12.1989 within the case *Brozicek vs. Italy*, in Radu Chiriță, *op.cit.,* pages 318-320.
[13] Ion Neagu, *Tratat de procedură penală. Partea generală (Treaty of Criminal Procedure Law. General part)*, Universul Juridic Publishing House, Bucharest, 2010, pages 254-256.

during the prosecution and the legal assistance supplied during the trial, whereas the provisions are confusing. Therefore, in Article 171 Paragraph (4^1) Thesis I of the Criminal Procedure Code, the legislator takes into account the lack of defence at the date established for the performance of a criminal prosecution act, respectively at the established trial date. In this case, the lack of defence can consist in 1) the unjustified absence of the defender, corroborated with the absence of any replacement, 2) the presence of the chosen defender at the judicial activity followed by his leaving and 3) the presence of the chosen defender at the judicial activity corroborated with his refusal to exert his profession. As far as the first legal assumption is concerned, there has been noticed a deficiency of the regulation, because the unjustified absence becomes fully justified if the defender ensures his replacement. Under these circumstances, there has been drawn the conclusion that, at least due to the formulation modality, the first assumption of Article 174 Paragraph (4^1) Thesis I of the Criminal Procedure Code can be subject to criticism. Moreover, a similar and, at the same time, confusing method is used for the other two assumptions. Thus, the use of the conjunction *"or"* by the legislator in order to delimit the situation in which the defender goes away, respectively refuses to carry out the defence, can lead to the conclusion that there are two different situations which can determine the replacement of the chosen defender. Nevertheless, the situation in which the chosen defender leaves the judicial activity is completely equivalent with his refusal to carry out the defence, an implicit passive behaviour with the same end: the accused or defendant is deprived of the possibility to be defended by experts. If the chosen defender is replaced, the judicial body has to grant the new defender adequate time for the preparation of the defence. But the use of the general phrase *adequate time for the preparation of the defence* can bring about periods of time which are too long and affect the operational character of the criminal trial or, on the contrary, insufficient periods of time violating the right to defence. Under these circumstances, the necessary time for the new defender to get acquainted with the probative evidence must not be established only by the judicial body, but upon consultation with the parties to the trial and, more important, with their defenders.

In accordance with Article 171 Paragraph (4^1) Thesis II of the Criminal Procedure Code, the court must decide the replacement of the chosen defender in case of his unjustified absence during the trial, after the debates have started. Thus, there appear the established legal differences with regard to the lack of defence of the accused or defendant in different procedural stages. First, taking into account Article 171 Paragraph (4^1) Thesis I of the Criminal Procedure Code, the only assumption for the replacement of the chosen defender is his unjustified absence. Consequently, one can state that the fact that the chosen defender comes to the hearing but refuses to carry out the defence or leaves the courtroom may not represent a reason to replace him. And this can happen when the legal assistance for the defendant is mandatory. For this reason, it is considered that these established differences are not justified and that the New Criminal Procedure Code should set down equivalent conditions for the act of ordering the replacement of the chosen defender, whereas this is necessary especially if we take into consideration the end of this order of the judicial bodies, which is, undoubtedly, to ensure an efficient framework for the exertion of the right to defence by the accused or defendant.

Last but not least, in case of the replacement of the chosen defender, the new defender shall be granted a period of at least 3 days for the preparation of the defence. This time, the period of time is established by taking into account its minimum duration, whereas by taking into consideration the provisions of Article 340 Paragraph 4 of the Criminal Procedure Code[14] it is possible to also establish its maximum duration, namely 5 days.

[14] Pursuant to Article 340 Paragraph (4) of the Criminal Procedure Code, the debates can be suspended at most 5 days for reasonable grounds.

With regard to the postponement of the case in order to prepare the defence, there has constantly been established in the jurisprudence of the national courts that the case has to be postponed for the preparation of the defence, a decision to be detailed from case to case. Thus, the Supreme Court took note of the fact that at the first trial date, respectively on 17.07.2002, the defendant, who was arrested and assisted by a attorney, an ex officio defender, had asked the court to postpone the case so that he might hire a defender, whereas the appeal court had agreed with this request and the case had been postponed to 14.08.2002. At this trial date, the chosen defender of the defendant (pursuant to the legal assistance contract concluded on 11.08.2002), another attorney, not the ex officio attorney, came to the court, submitted the power of attorney and requested that the case should be postponed in order to prepare the defence on the ground that he had not had the adequate time to prepare himself because he had been on holidays. The appeal court had rejected this postponement request submitted by the defender on this ground and had judged the case with the help of an ex officio defender. Under these circumstances, the Supreme Court established that the appeal court had legally refused to establish a new deadline for the preparation of the defence by the defendant's chosen defender, because the case had already been postponed to 17.07.2002 upon the request of the defendant to hire a defender and the legal assistance contract had been concluded on 11.08.2002, whereas the chosen defender had had sufficient time to prepare the defence until 14.08.2002, the date to which the case had been postponed. The fact that the chosen defender had not performed due diligence in order to prepare himself and ensure the defence at the established date (because he had been on holidays) could not be considered a fault of the court, but of the attorney who did not carry out in a proper way the legal assistance contract concluded with his client[15].

It was also established that the appeal court had appointed an ex officio defender for the defendant, who had failed to show up at the trial date when the case had been debated. Under these circumstances, the Supreme Court decided that the appeal took place without granting adequate time for the preparation of the defence and the submission of the power of attorney or the replacement proxy. Moreover, this represented a violation of the provisions of Article 172 Paragraph (8) of the Criminal Procedure Code, according to which the chosen or ex officio defender has the obligation to supply legal assistance to the defendant, whereas in case of a non-compliance with this obligation the court may inform the managing board of the Bar in order to take measures[16].

The right to have adequate facilities for the preparation of the defence. There are numerous provisions in the Criminal Procedure Code representing facilities for the preparation of an efficient and concrete defence. Thus, we take into consideration the cases in which, for the analysis of the special circumstances of the accused or defendant, the legal assistance is mandatory and the defender must have the possibility to get acquainted with the elements of the case-file and to take part in the performance of all the criminal prosecution acts, respectively the procedure for presenting the criminal prosecution material.

We notice that fact that these instruments made available to the defender are specific to the criminal prosecution stage, because the trial phase, thanks to the guarantees related to publicity and the rule that the parties should be heard, offers the possibility to ensure a more consistent defence.

First, there have been identified cases in which the accused or defendant cannot prepare his defence due to his age or confinement or state of health. Thus, in accordance with Article 171

[15] The High Court of Cassation and Justice, the Criminal Section, Decision no. 1140/2003, according to the Web page of the Supreme Court.

[16] The High Court of Cassation and Justice, the Criminal Section, Decision no. 6981/2005, according to the Web page of the Supreme Court.

Paragraph (2) of the Criminal Procedure Code, legal assistance is mandatory when the accused or defendant is a juvenile, held in a re-education centre or in a medical-educational unit, when he is in custody or arrested, even within another case, when the safety measure regarding the admittance to a medical unit or the compulsory administration of a medical treatment has been taken against him, even within another case, or when the criminal prosecution body or the court considers that the accused or defendant cannot defend himself, as well as in other cases set down by the law[17]. Besides these cases, which are specific to the criminal prosecution, there is also another case which is applicable in the trial phase, namely when the law provides for the committed criminal offence life detention or imprisonment for more than 5 years.

These regulations may be considered facilities made available to the relevant person in order to organise his defence against the accusation brought against him.

In other words, the defence may be organised thanks to the defender's possibility to take part in the performance of any criminal prosecution act.

From the point of view of the possibility of the defender of the accused or defendant to take part in the performance of the criminal prosecution, we can divide the application period of the present Criminal Procedure Code into four large periods: 1). 1968-1992; 2). 1992-2006; 3). 2006-2007; 4). 2007 - up to present.

The first period is characterised by the possibility given to the defender to take part in the performance of any expressly determined criminal prosecution act and to take part in the other activities only on the basis of the approval of the criminal prosecution body. The second period is characterised, due to the social transformations that took place in our country, by the increased attention of the legislator for the right to defence, reflected in the defender's possibility to take part in the performance of any criminal prosecution act. The third period, which started with the Law no. 356/2006, can be defined, in our opinion, as being characterised by the most restrictive legal regime regarding the performance of the defence and, in this last stage, in which we are now, as a consequence of the jurisprudence of the Constitutional Court, accompanied by legislative amendments, we notice again the enacting of the legal framework for an unrestricted exertion of the right to defence.

Before the year 2006, Article 172 Paragraph (1) of the Criminal Procedure Code was worded as follows: *"During the criminal prosecution, the defender of the accused or defendant shall have the right to assist in the performance of any criminal prosecution act which involves the hearing or presence of the accused or defendant for whom he ensures the defence, and may draw up requests and submit written pleadings. The absence of the defender shall not impede the performance of the criminal prosecution act, if there is proof that the defender has been informed of the date and time of the performance of the relevant act. The information shall be performed by telephone notice, facsimile, internet or other such means, whereas a minutes shall be prepared for this purpose".*

These regulations indicate the significant reduction of the participation of the defender of the accused or defendant in the performance of the criminal prosecution. Thus, the criminal prosecution acts in which the defender could assist were only those related to the hearing or the presence of the accused or defendant, when it is clear that all the criminal prosecution acts within a criminal case have a special importance for the situation of the accused or defendant. Moreover,

[17] Paragraph (2) of Article 171 is reproduced as amended by Article I Subparagraph 98 of the Law no. 356/2006. Before this amendment, Paragraph (2) was worded as follows: „*(2) Legal assistance is mandatory when the accused or defendant is a juvenile, military in service, military with reduced service, called-up or summoned reservist, student of a military educational institute, held in a re-education centre or in a medical-educational unit, when arrested even within another case, or when the criminal prosecution body or the court considers that the accused or defendant cannot defend himself/herself, as well as in other cases set down by the law."*

the restriction on the right to defence could be considered significant, inclusively by taking into consideration the regulation existing before the year 1990. Thus, in accordance with Article 172 Paragraph (1) of the Criminal Procedure Code (the version applicable in 1969), the defender of the accused or defendant could still take part in the performance of any criminal prosecution act on the basis of the approval of the criminal prosecution bodies. This legal participation was, thanks to the application of Article 172 in accordance with the Law no. 356/2006, excluded, because the law did not set down the possibility of the defender to assist in other criminal prosecution acts on the basis of the approval of the judicial bodies. Due to these provisions, the criminal trial knew to a significant setback in Romania, from the point of view of the exertion of the right to defence, not only as to the provisions of the legislative instruments adopted before 1990, but also as to the law in force during the period of the totalitarian state.

The amendment introduced by the Law no. 356/2006 produced an echo in the legal world from our country. As an effect of these controversies, exception of the unconstitutionality of this legal text was referred to the Constitutional Court. Thus, on the basis of the arguments below, it decided that Article 172 Paragraph (1) Thesis I of the Criminal Procedure Code is unconstitutional because it violates Article 24 of the Constitution regarding the right to defence:

- in accordance with Article 24 of the Constitution, *the right to defence is guaranteed; during the whole duration of the trial, the parties shall have the right to be assisted by a attorney, chosen or appointed ex officio;* it can be noticed that this text does not condition, limit or restrict in any way the right to defence of the parties to the trial; it can also be noticed that the constitutional text does not make any difference between the phases of the trial and as to the legal nature of the trial;

- as compared to Article 24 of the Constitution, the phrase *which involves the hearing or presence of the accused or defendant* conditions and restricts the defender's right to assist in the performance of the criminal prosecution acts regarding the accused or defendant for whom he ensures the defence and thus restricts and limits even the right to defence;

- the right of the defender is to assist in the performance of any criminal prosecution act, not the right to take part in the performance of the criminal prosecution acts; for these reasons, it has been established in a consistent way that the defender who assists in the performance of the criminal procedure acts by the prosecutor or the criminal police officer may draw up requests and submit written pleadings;

- Article 172 Paragraph (1) of the Criminal Procedure Code, in the version before being amended by Article I Subparagraph 99 of the Law no. 356/2006, represented a restriction of the right to defence due to the possibility given to the defender of the accused or defendant to *assist in the performance of any criminal prosecution act*, and not to take part in the performance of the criminal prosecution acts; this restriction is determined by the nature of the criminal investigation and by its requirements and corresponds with the provisions of Article 53 Paragraph (1) of the Constitution regarding the "performance of the criminal instruction", the cases in which the law may restrict the exertion of the right of the defender; but the introduction of the phrase "which involves the hearing or presence of the accused or defendant for whom he ensures the defence" in Article 172 Paragraph (1) of the Criminal Procedure Code conditions and limits the right of the defender to assist in the performance of the criminal prosecution acts and, thus, violates the guarantee of the right to defence of the accused or defendant[18].

[18] The Constitutional Court, Decision no. 1086/20.11.2007, published in the Official Gazette no. 866/18.12.2007.

As a consequence of the decision of the Constitutional Court, Article 172 Paragraph (1) of the Criminal Procedure Code was amended by means of the Law no. 57/2008[19]. Therefore, *de lege lata*, *„during the criminal prosecution, the defender of the accused or defendant shall have the right to assist in the performance of any criminal prosecution act and may draw up requests and submit written pleadings. The absence of the defender shall not impede the performance of the criminal prosecution act, if there is proof that the defender has been informed of the date and time of the performance of the relevant act. The information shall be performed by telephone notice, facsimile, internet or other such means, whereas a minutes shall be prepared for this purpose"*.

With regard to the facilities set down for the preparation of the defence within the criminal trial, we also mention the procedure for presenting the criminal prosecution material, an activity which represents a consultation of the case-file by the accused or defendant before the preparation of the final document, the indictment.

As it has a special importance for the approach to the right to defence included in this study, we also notice the jurisprudence of the Constitutional Court[20] in which is has been established that the provisions of Article 257 of the Criminal Procedure Code (in the version before being amended by the Law no. 281/2003), according to which the prosecutor, after having received the case-file, can perform the presentation of the criminal prosecution material only if he considers it necessary, are unconstitutional.

Therefore, the regulation was considered to be contrary to the provisions of Article 24 of the Constitution, according to which the right to defence is guaranteed during the whole duration of the trial, whereas the parties have the right to be assisted by a chosen or ex officio attorney, because the free exertion of the right to defence was conditioned by the summoning of the accused to get acquainted with the probative evidence on which the accusation against him was based. Due to the authority of the prosecutor to present the criminal prosecution material, the most important moment of the criminal prosecution – the arraignment – could take place even if the accused was not apprised by the prosecutor of the accusation against him. Under these circumstances, the accused did not have any possibility to be assisted by a defender and to have adequate time for the preparation of his defence, knowing nothing about the decision taken by the prosecutor after the examination of the material received from the criminal prosecution body.

As a consequence of the decision of the Constitutional Court, Article 257 of the Criminal Procedure Code was amended by the Law no. 281/2003, and the present wording is the following: *"After receiving the case-file, the prosecutor summons the accused and presents to him the criminal prosecution material in accordance with the provisions of Article 250 and the following articles, which apply accordingly"*.

2.2. The standards established in the jurisprudence of ECHR

In accordance with Article 6 Paragraph (3) Point b) of the Convention, *everyone charged has especially the right to have adequate time and facilities for the preparation of his defence.*

This regulation, which has a tight relation of interconditioning with the provisions included in Article 6 Paragraph (1) Point a) of the Convention (the right to be informed of the nature of the accusation), respectively in Article 6 Paragraph (3) Point c) of the Convention (the right to defence) [21], involves that concrete conditions may be created for the defender to be able to express his point of view, without any limitation or obstacle on the part the national judicial authorities[22].

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[19] The Law no. 57/19.03.2008 for amending Paragraph (1) of Article 172, published in the Official Gazette no. 228/25.03.2008.

[20] The Constitutional Court, Decision no. 24/23.02.1999, published in the Official Gazette no. 136/01.04.1999.

[21] ECHR, Decision of 01.03.2001 within the case *Dallos vs. Hungary*, according to HUDOC; for the same purpose, ECHR, Decision of 23.03.1999 within the case *Pélissier vs. France*, according to HUDOC; ECHR,

In the jurisprudence of the court in Strasbourg, there are several criteria for establishing the adequate time for the preparation of the defence, such as, e.g., the real possibility to prepare the defence proportionally to the complexity of the probative evidence of the case. For this purpose, the establishment of a short deadline for getting acquainted with a very voluminous case-file is contrary to the requirements of the Convention.

Moreover, the requirements regarding a fair trial are not complied with from the point of view of the time adequate for the preparation of the defence, if the court pronounces a conviction for another criminal offence than that which was referred to it and the change of the legal framing of the deed takes place at the last trial date of the relevant case[23].

As far as the facilities adequate for the preparation of the defence are concerned, ECHR established that the provisions of the Convention had been violated by carrying out the hearing proceedings over a long period of time (15 hours and 45 minutes), whereas the defender had asked that the trial should be suspended for these reasons[24].

One of the fundamental elements necessary for the preparation of the defence is the right to have access to the case-file, a right which includes the right to have access to all the elements gathered by the prosecution. This right is not absolute and it can be subject to certain limitations. Nevertheless, when the defendant was not allowed to consult the case-file until a late stage of the trial, the court established that it was a violation of the right to have adequate facilities for the defence[25].

Conclusions

In the analysed field, that of the right to defence, a specific assumption of the fair trial in criminal matters (through the two components presented in the study, the right to be informed of the accusation, respectively the right to have adequate time and facilities for the preparation of the defence), the Romanian criminal procedural legislation is in accordance with the requirements of the Convention. Thus, there are provisions which set down the information of the accused of the committed deed, its legal framing, and the right against self-incrimination. Moreover, at present (after the periods of time varying from the point of view of this regulation), the right to defence is secured by the legal provisions, under conditions complying with the requirements of the Convention. Nevertheless, some Romanian criminal procedural regulations may be improved, but, on the whole, the legal framework established in Romania complies with the requirements regarding the fair performance of a criminal trial.

Decision of 22.06.1993 within the case *Melin vs. France*, according to HUDOC; ECHR, Decision of 17.07.2001 within the case *Sadak and others vs. Turkey*, according to HUDOC.

[22] ECHR, Decision of 15.11.2007 within the case *Galstyan vs. Armenia*, according to HUDOC; for the same purpose, ECHR, Decision of 11.12.2007 within the case *Drassich vs. Italy*, according to HUDOC.

[23] ECHR, Decision of 17.07.2001 within the case *Sadak and others vs. Turkey*, according to HUDOC.

[24] ECHR, Decision of 19.10.2004 within the case *Makhfi vs. France*, according to HUDOC.

[25] ECHR, Decision of 12.03.2003 within the case *Oçalan vs. Turkey*, according to HUDOC; for the same purpose, ECHR, Decision of 16.02.2000 within the case *R. and others vs. United Kingdom of Great Britain*, according to HUDOC.

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THE INFLUENCE OF THE ECHR JURISPRUDENCE ON THE NATIONAL CRIMINAL PROCEDURE SYSTEM. THE ITALIAN PERSPECTIVE: FROM DIVERGENCE TO REALIGNMENT

Clara TRACOGNA*

Abstract

The paper will offer a survey of the most important and recent ECHR decisions that sentenced Italy on varied criminal procedure aspects. In particular, the essay will analyze how those decisions influenced both legislative choices and judicial decisions: as a matter of fact, the Italian Parliament approved specific laws in order to adapt the criminal procedure code to the ECHR decisions that sentenced Italy; the Constitutional Court, as well as the Trial Courts, also changed its perspective and followed the principles carried out by the ECHR. The overview will focus on: in absentia trials, defendant rights, revision of the final conviction and right to a renewal of the trial.

Keywords: *ECHR jurisprudence; national Courts decisions; in absentia trial; renewal of the trial; draft-bills.*

Introduction

One of the most important and up-to-date matters that involve lawyers is to understand at which level the European Convention of Human Rights should be placed among the Italian sources of law. The matter intersects several fields, including International law, European law, Constitutional law, Criminal and Criminal Procedure law. After many years of debate and after changing its perspective several times, in the last two years four decisions passed by the Constitutional Court seemed to acknowledge a new position for the rules of the Convention and, at the same time, paved the way for a forthcoming constitutionalization of the Convention as a Constitutional charter of fundamental rights. Aim of the essay is to point out which are the rules of the Constitution through which the Convention enters in the Italian legal system and, according to Constitutional Court decisions, which is the role of the Trial Courts in case a national law violates a rule of the Convention.

Once this matter will be solved, the research will focus on other topics in the field of criminal procedure which are related especially on the effects of ECHR decisions which sentenced Italy because of the unlawfulness of a trial. The core question is: if a trial whose decision is final didn't respect an article of the Convention, how and through which legal instruments should that trial be renewed? After pointing out the rules in force both at European Council and national law level, the essay will offer a case study on recent and relevant decisions, offering a perspective for a new law that Italy cannot put off any longer.

Afterwards, the survey will analyze the legislative reforms that have been approved and entered into force after ECHR sentenced Italy on *in absentia* trials, pointing out which are the problems still pending.

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The essay will show a law case in which the Courts play a relevant role in avoiding the violations of the Convention interpreting the Italian laws according to the principles carried out by ECHR decisions.

Offering an overview of the above mentioned issues and formulating hypothesis for matters that have not been solved yet, the aim of the study is to put on the floor the core matters in order to provoke a debate with Scholars from other Countries, in light of the harmonization pursued by the ECHR jurisprudence.

1. The position of the European Convention of Human Rights in the hierarchy of the Italian sources of law. - Since Italy implemented the European Convention of Human Rights[1], judges and Scholars had to face the problem of the relationship between the rules of the Convention and those of the national sources of law. In particular, the core question is where to place the European Convention among the Italian sources of law[2].

In analogy with all other European Council member States, Italy was entitled to choose among four options: first, to either be bounded by the European Convention at the international level only, or, second, to recognize a constitutional significance to the Convention's rules, or, third, to regard them at an intermediate level between the Constitution and the statutory laws approved by Parliament or, finally, to consider them *au par* with statutory law[3].

To better understand the current Italian approach to the rules of the Convention, it is useful to offer a short overview on the previous ways, that can be summarized as follows:

1) At a first stage, in light of the theory that states that the national and the Convention systems are separated, the Convention, as any other international treaty that Italy has signed, has been considered as a law issued by the Italian Parliament. The main reason is that the legal instrument through which an international treaty enters into force in Italy is in fact a law of the Parliament.

2) At a second stage, all levels of Courts' jurisprudence set forth several solutions in order to assure to the rules of the Convention an acknowledgment by the rules of the Constitution as well as the respect of the national statutory laws. However, the varied solutions brought to very different decisions, which cannot be accepted inside a unique and coherent legal system.

3) Finally, further to the constitutional reform approved in 2001 together with the interpretation proposed by the Constitutional Court on the new articles in 2007, the relationship between the Italian system and the Convention changed: in the sources of law hierarchy, the

[1] The European Convention on Human Rights has been implemented in Italy by means of the law 4th August 1955, n. 848.

[2] See Antonio Ruggeri, "Carte internazionali dei diritti, Costituzione europea, Costituzione nazionale: prospettive di ricomposizione delle fonti in sistema", in *"Itinerari" di una ricerca sul sistema delle fonti*, vol. 11, ed. Antonio Ruggeri (Torino: Giappichelli, 2008).

[3] As for the first choice, it is possible to mention the UK before the implementation of the Convention through the approval of the Human Rights Act in 1998; as for the second, several States (i.e. Austria and The Netherlands) aknowledged a constitutional significance to the Convention; as for the third, we can consider France, Spain and Portugal; as for the fourth, even Italy could be mentioned in this group until 2007. For a comparative overview on the approach of the European Council member States on points of hierarchy of the sources of law, see, above all, Andrew Drezemczewski, *European Human Rights Convention in Domestic Law* (Oxford: Oxford University Press, 1983); Laura Montanari*, I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne* (Torino: Giappichelli, 2002), 45-195; Laura Montanari, "*Le tecniche di adattamento alla Cedu come strumento di garanzia dei diritti: un'analisi comparata delle soluzioni adottate negli ordinamenti nazionali"*, in Antonio Gambaro, Gaetano Silvestri, Mario Chiavario et al., *I diritti fondamentali in Europa*, (Milano: Giuffrè, 2002), 522-557.

Convention took a higher placement with respect to the law of the Parliament, but still lower than the Constitution[4].

The articles of the Constitution by means of which the Convention could receive acknowledgement in our legal system are four: art. 10, paragraph 1, which states that «The legal system of Italy conforms to the generally recognized principles of international law»; art. 11, on the basis of which «Italy […] agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends»; art. 2, which states that «The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity»; art. 117, paragraph 1 on the Legislative power, which has been modified in the year 2001 and whose wording is: «Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations».

The turning point for Italy is represented by two "twin" decisions that the Constitutional Court handed down in 2007: the Court passed the interpretation that, due to the new art. 117, paragraph 1 of the Constitution, the Convention can be used as a criteria to check the respect of the Constitution by a law of the Parliament[5]. In other words, as art. 117, paragraph 1 mentions «European union law and international obligations» and as the Convention is, as a matter of fact, an international obligation, a law of the Parliament or a law of a local Parliament (which exist in each Italian region) must respect, apart of course from the Constitution, even the rules of the European Convention of Human Rights. This means that a law of the Parliament can't change the

[4] See Constitutional Court, 22nd December 1980, n. 188; Constitutional Court 22nd October 1998, n. 388 and Cassazione penale, sez. I, 23rd March 1984, n. 2770; Cassazione penale, sezioni unite, 8th May 1989, n. 1191. For an overview of the above-mentioned theories, see Marta Cartabia, "La Cedu e l'ordinamento italiano: rapporti tra fonti, rapporti tra giurisdizioni", in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotto, Paolo Veronesi (Torino: Giappichelli, 2007), 1-20; Marta Cartabia, "La Convenzione europea dei diritti dell'uomo e l'ordinamento italiano", in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto E. Kostoris (Torino: Giappichelli, 2008), 33-66; Laura Montanari, "*Giudici comuni e Corti sovranazionali: rapporti tra sistemi"*, in Luigi Cozzolino, Gianmario Depuro et al., *La Corte costituzionale e le Corti d'Europa* (Torino: Giappichelli, 2003), 119-163; Oreste Pollicino and Vincenzo Sciarabba, "La Corte europea dei diritti dell'uomo e la Corte di giustizia nella prospettiva della giustizia costituzionale", paper presented at the Conference "I° Workshop in diritto dell'Unione europea e internazionale", held by Magistratura Democratica and MEDEL in Venice, 26th-27th March 2010, now available in *Forum di Quaderni costituzionali* (2010), http://www.forumcostituzionale.it; Margherita Salvadori, "L'applicazione della Convenzione europea e l'integrazione dei processi interpretativi", in *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 1-47.

[5] See Constitutional Court decisions nn. 348 and 349, handed down on 24th October 2007. For comments on the two decisions, see Rosanna Gambini, "Corte costituzionale «europeista»: una svolta non priva di rischi per la tavola delle garanzie", in *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 67-78; Laura Montanari, "Il sistema integrato delle fonti: analisi e prospettive in relazione all'ordinamento italiano dopo l'intervento della Corte costituzionale con le sentenze 348 e 349 del 2007", paper of the presentation at the Conference "Il sistema integrato delle fonti e la giurisprudenza della Corte europea dei diritti dell'uomo", held by the High Council of the Judiciary in Rome, 23rd September 2009; Diletta Tega, "Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte ordinaria a fonte "sub-costituzionale" del diritto", *Quaderni Costituzionali* (2008): 133-136. For comments in English on the 2007 Constitutional Court decisions, see Francesca Biondi Dal Monte and Filippo Fontanelli, "The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", *German Law Journal* (2008), 889-931; Oreste Pollicino, "Constitutional Court at cross road between constitutional parochialism and cooperative constitutionalism", *European Constitutional Law Review* (2008): 363-382.

law which implemented the Convention and can't breach its rules without being declared unconstitutional.

From the point of view of the Italian Courts, the decision means that, as the control of the respect of the Constitution belongs only to the Constitutional Court, a judge who has to apply in a trial a law which seems to violate the European Convention of Human Rights' rules must ask to the Constitutional Court to check its constitutionality and eventually declare the annulment of the law.

The only thing that a judge can do by itself in order to avoid an appeal for the intervention of the Constitutional Court is, while interpreting the national law, to do the utmost to save the constitutionality of the law, which means to find an interpretation which could be coherent with the European Convention of Human Rights. If this is not possible unless causing a breach in the system, the judge should ask to the Constitutional Court the annulment of the statutory law.

The Constitutional Court itself, prior to declare the unconstitutionality of the law, should try to offer an interpretation coherent with the Convention.

The outcome of this decisions is that the Constitutional Court will check the Convention respect of the rules of the Constitution. On the other hand, the rules of the Convention itself should be applied in light of the interpretation given by ECHR decisions.

As stressed by the Court itself, this is pretty different from what happens when a national rule breaks the European union law: after many years of debate between the Constitutional Court and the European Court of Justice, the outcome is that, in case a law violates the European Union law, a judge (both at Trial Courts level and at the Supreme Court level) can decide not to apply that law in the concrete case in order to save the respect of the European union law, which deserves a special position in the hierarchy of the sources of law and is able to produce direct effects on our legal system[6].

Recently, the Constitutional Court passed two new decision in which it is stated that, depending on their content, the rules of the Convention find their acknowledgement not only in art. 117, paragraph 1, but also in art. 10, paragraph 1, of the Constitution: as a matter of fact, art. 117, paragraph 1, will be the basis of the acknowledgment in our legal order when referring to rules of the Convention which are new in the international landscape, while art. 10, paragraph 1, will be the basis when the rules of the Convention are only reproducing through their wordings a generally recognized principle of international law (i.e. prohibition of torture)[7].

The framework resulting from the above mentioned decisions shows that the Convention rules cannot breach any of the rules of the Constitution. On the other hand, as the Convention still keeps its nature of international treaty, its rules cannot be forced or changed in their meaning in light of the Constitution.

Nevertheless, for sure the Constitutional Court decisions seem to pave the way for the acknowledgment of the Convention as a Constitutional charter of fundamental rights, pursuing eventually the aim to place the Convention and the Constitution altogether at the top of the hierarchy.

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[6] See Michele de Salvia and Vladimiro Zagrebelsky, eds., *Diritti dell'uomo e libertà fondamentali: la giurisprudenza della Corte europea dei diritti dell'uomo e della Corte di giustizia delle Comunità europee* (Milano: Giuffrè, 2006).

[7] See decisions nn. 311 and 317 respectively passed on 16th and 30th November 2009. For first comments on these decisions, see Oreste Pollicino, "Margine di apprezzamento, art. 10, c.1 Cost. e bilanciamento "bidirezionale": evoluzione o svolta nei rapporti tra diritto convenzionale nelle due decisioni nn. 311 e 317 della Corte costituzionale?", *Forum di Quaderni costituzionali* (2009), http://www.forumcostituzionale.it; Antonio Ruggeri, "Conferme e novità di fine anno in tema di rapporti tra diritto interno e CEDU (a prima lettura di Corte cost. nn. 311 e 317 del 2009)", *Forum di Quaderni costituzionali* (2009), http://www.forumcostituzionale.it.

As a final remark, in view of future developments of the role of the Convention in the Italian legal system, it is interesting to point out a recent debate, which follows a controversial ECHR decision. In Lautsi v. Italy case, issued in November 2009, the ECHR stated that the crucifix, which is present in public School classrooms, should be banned, as it discriminates those who observe other religions or those who are atheists. The topic is discussed deeply in Italy and has caused a bitter debate, involving politicians, Vatican representatives and the civil society as a whole. The decision has been appealed and the ECHR *Grand Chambre* is about to decide. It's not unlikely to foresee that, if the first-instance decision will be confirmed, the Italian Courts' enthusiasm in applying principles and rights provided by the Convention could diminish, maybe causing a step backward in the way to a complete constitutionalization of the Convention[8].

2. ECHR decisions effects in light of recent Italian jurisprudence. – As stated in art 46, paragraph 1, of the European Convention, «if the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party». The Committee of Ministers is competent in identifying the public administration of the sentenced Country in charge of the payment of the «just satisfaction».

A second effect is the obligation to conform to the sentence purview: the State has the duty to reproduce the situation existent before the breach of the Convention and to adopt any needed measure to stop the violation, delete its consequences or prevent other similar violations.

The practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of the proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*. As a matter of fact, in the year 2000 the Committee of Ministers approved a Recommendation inviting the member States to adopt measures in order to assure the injured person's *restitutio in integrum*, also by means of a re-examination of the case, including reopening of the proceeding[9]. In particular, when the violation consists in the breach of the defendant's right

[8] See ECHR, Lautsi v. Italy, 3rd November 2009. The ECHR *Chambre de la Cour*, composed by seven judges, stated that «the presence of the crucifix – which it was impossible not to notice in the classrooms – could easily be interpreted by pupils of all ages as a religious sign and they would feel that they were being educated in a school environment bearing the stamp of a given religion. This could be encouraging for religious pupils, but also disturbing for pupils who practised other religions or were atheists, particularly if they belonged to religious minorities. The freedom not to believe in any religion (inherent in the freedom of religion guaranteed by the Convention) was not limited to the absence of religious services or religious education: it extended to practices and symbols which expressed a belief, a religion or atheism. This freedom deserved particular protection if it was the State which expressed a belief and the individual was placed in a situation which he or she could not avoid, or could do so only through a disproportionate effort and sacrifice. The State was to refrain from imposing beliefs in premises where individuals were dependent on it. In particular, it was required to observe confessional neutrality in the context of public education, where attending classes was compulsory irrespective of religion, and where the aim should be to foster critical thinking in pupils». For first comments on the decision, see Ilaria Anrò, "Il crocifisso e la libertà di non credere", *Forum di Quaderni costituzionali* (2009), http://www.forumcostituzionale.it; Giuseppe di Genio, "Laicità europea e struttura pluralista dell'ordinamento", Forum di Quaderni costituzionali, http://www.forumcostituzionale.it; Ilenia Ruggiu, "Perché neanche "l'argomento culturale" giustifica la presenza del crocifisso negli spazi pubblici", *Forum di Quaderni costituzionali* (2010), http://www.forumcostituzionale.it.

[9] See Reccomendation R (2000) 2 of the Committee of Ministers. Among several Scholars, see Silvia Allegrezza, "Violazione della Cedu e giudicato penale. Quali contaminazioni? Quali rimedi?", in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotto, Paolo Veronesi (Torino: Giappichelli, 2007), 21-26; Filippo Giunchedi, "Linee evolutive del giusto processo europeo", in *Procedura penale e garanzie europee*, ed. Alfredo Gaito and Filippo Giuchedi (Torino: UTET, 2006), 15-27; Barbara Lavarini, "Giudicato penale ed esecuzione delle sentenze della Corte europea dei diritti dell'uomo", in *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 129-

to take part at the trial, ECHR jurisprudence states that «a retrial or the reopening of the case, if requested, represents in principle the appropriate way of redressing the violation», all the same confirming that it's not her duty «to indicate how any new trial (or re-examination of the applicant's appeal) is to proceed and what form it is to take»[10].

Recently, on January, 15th 2010, the State Duma of the Russian Federation has voted in favour of the draft law ratifying Protocol No. 14 to the European Convention on Human Rights. On February, 19th 2010, the President of the Court has received the depositing by the Russian Federation of its instrument of ratification. Protocol no. 14 will be effective three months after its deposit. As for what matters to the present study, it is relevant that art. 46 of the Convention will be amended: the new provisions are more strict in introducing an infringement procedure towards the State which does not respect its obligation to adopt measures requested by the ECHR decision.

A large number of States adopted special legislation providing for the possibility of re-examination of the case or reopening of the proceedings. In other States this possibility has been developed by the Courts and national authorities under existing law. The two missing States are Spain and Italy[11]. From the Italian perspective, the question becomes ticklish when it comes into consideration that the Italian criminal procedure law doesn't provide any remedy against the execution of a decision adopted in breach of the ECHR principles nor the Italian criminal procedure code gives the opportunity to replace the trial with a new one that respects the Convention rules. The revision of the final decision is an extraordinary remedy on an otherwise final judgment conviction. Such an attack is allowed only when there is a new evidence which alone, or in connection with other evidences, shows that the defendant must be acquitted, or that the conviction was based on false or fabricated evidence. This remedy is not available to a condemned person who seeks for a more favorable disposition or for a mild punishment[12].

Up till now, only the Courts tried to solve the problem interpreting the rules of the Italian criminal procedure code provided for different kind of situations: in these decisions, judges acted as substitutes of the Parliament in lack of a specific law for the case[13].

149; Daniele Negri, "Rimedi al giudicato penale e legalità processuale: un connubio che gli obblighi internazionali non possono dissolvere", in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotto, Paolo Veronesi (Torino: Giappichelli, 2007), 169-176; Barbara Randazzo, "Le pronunce della Corte europea dei diritti dell'uomo: effetti ed esecuzione nell'ordinamento italiano", in *Le Corti dell'integrazione europea*, ed. Nicolò Zanon (Napoli: ESI, 2006), 295-352; Michele de Salvia, "L'obbligo degli Stati di conformarsi alle decisioni della Corte europea e del Comitato dei Minsitri del Consiglio d'Europa", in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto E. Kostoris (Torino: Giappichelli, 2008), 67-79.

[10] See the following ECHR decisions: Pititto v. Italy, 12th November 2007; Kollcaku v. Italy, 8th February 2007; Zunic v. Italy, 21st December 2006; Alì Ay v. Italy, 14th December 2006; Sejdovic v. Italy, 1st March 2006; Somogyi v. Italy, 18th May 2004.

[11] For a comparative overview on this topic, see Mitja Gialuz, "Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane", *Rivista italiana di diritto e procedura penale* (2009): 1864-1877; Annalisa Mangiaracina, "La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (I) La progettualità italiana e l'esperienza del Regno Unito", *Rivista italiana di diritto e procedura penale* (2006): 982-1009; Lucia Parlato, "La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (II) L'esperienza della Repubblica federale tedesca e di altri Paesi dell'Europa continentale", *Rivista italiana di diritto e procedura penale* (2006): 1010-1042; Vincenzo Sciarabba, "La riapertura del giudicato in seguito a sentenze della Corte di Strasburgo: profili di comparazione", *Diritto Pubblico Comparato ed Europeo* (2009): 917-947.

[12] See art. 630 of the Italian criminal procedure code.

[13] Among Scholars, see Ercole Aprile, *Diritto processuale penale europeo e internazionale* (Padova: CEDAM, 2007), 147-153; Mitja Gialuz, "Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane", *Rivista italiana di diritto e procedura penale* (2009): 1844-1895; Andrea Saccucci, "Obblighi di riparazione e revisione dei processi nella Convenzione europea dei diritti umani", *Rivista di diritto internazionale* (2002): 618-681; Andrea Saccucci, "La riapertura del processo penale quale misura

The first decision passed by the Supreme Court (*Corte di Cassazione*) is related to the "Cat Berro case". ECHR sentenced Italy because the trial at the end of which the accused was sentenced was unfair. Therefore, the defendant's counsel of the defense asked to the competent Court of Appeal the annulment of the execution. The Court of Appeal rejected the request and the defendant seek review by the Supreme Court, which stated that the matter of the effects of ECHR decisions on a final conviction issued at the end of an unfair trial cannot be decided by the Court of Appeal pending the execution, but should be analyzed in a cross-examination procedure. Accordingly, the Supreme Court annulled the Court of Appeal decision, which had to decide again on the point, but rejected the defendant's request a second time[14].

More insightful has been the decision handed down in the "Somogyi case". An Hungarian citizen sentenced in Italy for trafficking in weapons at the end of an *in absentia* trial appealed to the ECHR, which sentenced Italy for violating the defendant's right to be present at trial because there was no evidence of the fact that the defendant was aware of the ongoing trial. After that, the Supreme Court stated that the defendant could appeal the first instance decision in accordance with art. 175 of the code of procedure, which entitles a person who, without his fault, was not aware of the trial to appeal the decision even if the time period to apply has expired[15].

The third one is known as "Dorigo case": Mr Dorigo was final sentenced in 1996 to thirteen years in prison. After Mr Dorigo appeal, the ECHR sentenced Italy because the conviction was based on statements made during the investigations by three witnesses who, once the trial came to the Court, took the right to refuse to answer[16]. This caused a breach of the defendant's right to confront and question the witness against him provided by art. 6 of the Convention.

After the ECHR decision, Mr Dorigo asked to the competent judge (Court of Appeal in Bologna) to stop the execution of the final decision condemning him, taking advantage of ECHR decision. However, the Court of Appeal, refused to accept the request and asked the Constitutional Court to decide whether the Italian rule which provides the review only in the abovementioned hypothesis was respectful of the principles of the Constitution.

The Constitutional Court stated that only the Parliament is competent to decide whether a trial can be reviewed: according to the Italian *principio di tassatività delle impugnazioni*, the hypothesis in which it is possible to apply for appeal are limited by the statutory law. Therefore, it's a duty of the Parliament to find a remedy in case a final decisions is passed at the end of trials that the ECHR considers unlawful accordingly to the European Convention rules.

At the same time, the Public prosecutor in Udine, competent for the execution of the sentence condemning Mr Dorigo and aware of the critical situation, asked to the execution judge

individuale per ottemperare alle sentenze della Corte europea", in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto Kostoris (Torino: Giappichelli, 2008): 81-97; Vincenzo Sciarabba, *Tra fonti e corti: diritti e principi fondamentali in Europa* (Milan: Giuffrè, 2008), 332-350; Eugenio Selvaggi, "Linee di evoluzione dell'ordinamento integrato. I limiti della protezione dei diritti da parte della Cedu. Appunti e spunti per una riflessione", paper presented at the Conference "La tutela dei diritti e delle libertà fondamentali nella giurisprudenza della Corte europea dei diritti dell'uomo in materia civile e penale", held by the High Coucil of the Judiciary in Rome, 21st-23rd January 2008; Giulio Ubertis, "L'adeguamento italiano alle condanne europee per violazione dell'equità processuale", in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto E. Kostoris (Torino: Giappichelli, 2008), 99-121.

[14] See ECHR, Cat Berro v. Italy, 28th August 1991; ECHR, Cat Berro v. Italy, 25th November 2008; Cassazione penale, sez. I, September, 22nd 2005, n. 35616; Corte d'assise d'appello di Milano, 30th January 2006, Cat Berro.

[15] See ECHR, Somogyi v. Italy, 18th May 2004; Cassazione penale, sez. I, 18th May 2006, n. 56581. For a comment, see Pierpaolo Rivello, "La vicenda Somogyi di fronte alla Corte di Cassazione: un'importante occasione di riflessione", *Rivista italiana di diritto e procedura penale* (2007): 1071-1115.

[16] This was possible according to the version of art. 513 of the criminal procedure code in force before the amendment introduced in 1997.

to declare that Mr Dorigo's detention was not lawful because based on a final decision which was the outcome of an unlawful trial. However, the execution judge rejected its request stating that: a) the execution judge should only control the existence of a final decision, no matter what happened on merit points during the trial; b) there's no instrument to renew a trial in this case, and a decision stopping the execution would create the strange situation in which a final decision is suspended without an end and the subsequent possibility to be executed.

The Public prosecutor seek review of the Supreme Court, which admitted the Public prosecutor's claim stating that, whenever ECHR sentences Italy for unlawfulness of a trial, the defendant has the right to ask for a review of the decision and Italy should respect the decision, according to art. 46 of the Convention. Even if the Italian code of criminal procedure doesn't allow a review for this particular case, the judge in charge of the execution should declare that he cannot execute the decision condemning the defendant, because doing so he would breach the Convention rules for two times in the same case (in particular, a breach of art. 5 of the Convention)[17].

According to art. 670 of the criminal code of procedure, should the judge stop the execution, the defendant will have again the time to apply for the appeal. However, in the Dorigo case, the Supreme Court only blocked the execution, stating nothing about the renewal of the trail. Doing this, the Supreme Court avoided a breach of art. 5 of the Convention but still didn't solve the problem of the right of a review of the final decision.

In the "Drassich case", Mr Drassich was sentenced to eight years and three months in prison for corruption. Seeking review by the Supreme Court, he said that the crime has lapsed, but the Court rejected his claim giving a different qualification of the fact committed: instead of "simple" corruption, the conduct was considered corruption of the judiciary, which deserves a harder punishment. The effect was a longer prescription time and the final conviction of Mr Drassich. Therefore, Mr Drassich presented his appeal to the ECHR, that sentenced Italy because the changing in the description of the fact was not respectful of art. 6 of the European Convention, because nor the defendant or the Public prosecutor had the possibility to discuss the new qualification. Taking advantage of the ECHR decision, Mr Drassich asked to the competent judge to stop the execution on the basis of art. 670 of the Italian criminal procedure code, as the Supreme Court stated in the "Dorigo case". Nevertheless, in this case the Supreme Court, though stating that the final decision couldn't be executed, didn't apply art. 670 of the criminal procedure code. As a matter of fact, its decision was based on art. 625-*bis*: however, art. 625-*bis* provides an extraordinary remedy useful only in case of mistake on fact[18].

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[17] See ECHR, Dorigo v. Italy, 16th November 2000; Cassazione penale, sez. I, 1st December 2006, n. 2800; Corte costituzionale, 30th April 2008, n. 129. Among Scholars, see Mario Chiavario, "Giudicato e processo «iniquo»: la Corte si pronuncia (ma non è la parola definitiva)", *Giurisprudenza costituzionale* (2008): 1522-1524; Luca De Matteis, "Tra Convenzione europea dei diritti dell'uomo e Costituzione: la Corte costituzionale in tema di revisione a seguito di condanna da parte della Corte di Strasburgo", *Cassazione penale* (2009): 3994-4003; Mitja Gialuz, "Il caso Dorigo: questione mal posta, ma con qualche (tenue) speranza di essere accolta", in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotto, Paolo Veronesi (Torino: Giappichelli, 2007), 123-128; Simone Lonati, "Il «caso Dorigo»: un altro tentativo della giurisprudenza di dare esecuzione alle sentenze della Corte europea dei diritti dell'uomo in attesa di un (auspicato) intervento legislativo", *Rivista italiana di diritto e procedura penale* (2007): 1538-1551; Vincenzo Sciarabba, "La riapertura del giudicato in seguito a sentenze della Corte di Strasburgo: questioni generali e profili interni", *Giurisprudenza costituzionale* (2009): 513-543; Vincenzo Sciarabba, "Il problema dell'intangibilità del giudicato tra Corte di Strasburgo, Corte costituzionale e… legislatore? (osservazioni a margine della sentenza della Corte costituzionale n. 129 del 2008)", *Europeanrights.eu* (May, 30, 2008), http://www.europeanrights.eu/index.php?funzione=S&op=5&id=130.

[18] See ECHR, Drassich v. Italy, 11th December 2007 ; Cassazione penale, sez. VI, 12th November 2008, n. 45807. The Supreme Court, however, not only solved the single case suggesting art. 625-*bis* of the code of criminal procedure as a special remedy, but also gave a general solution if the breach of the right to confrontation happens during the second-instance trial: in this case, the defendant has the opportunity to apply a claim to the Supreme

Finally, on February 2010 the Supreme Court decided the "Scoppola case". Mr Scoppola was final sentenced to life-imprisonment because he murdered his wife and tried to kill one of his sons. During the first-instance trial, Mr Scoppola asked to apply for a special proceeding (*giudizio abbreviato*) that grants the defendant to obtain: a) reduction of the punishment by 1/3 if he is found guilty; b) a change from in life imprisonment to thirty years imprisonment; c) no daytime isolation during life imprisonment[19].

The first-instance Court admitted Mr Scoppola request and sentenced him to thirty years in prison. However, on the day of the decision, a law entered into force providing an interpretation of the said special proceeding: according to that law, Mr Scoppola should have been sentenced to life imprisonment because the punishment for murder together with other crimes he committed is punishable with life imprisonment and daytime isolation. Then, thanks to *giudizio abbreviato*, it would have turned into life imprisonment.

On this basis, the Public prosecutor applied to the Court of Appeal, which admitted the claim and sentenced Mr Scoppola to life imprisonment, stating that, in respect of the *tempus regit actum* principle, the judge should apply the new law to the pending case.

The core question is: if that law is considered as a procedural law, then the judge should respect *tempus regit actum* principle. If, instead, is considered as a substantive criminal law, the judge should apply the rules which provide the lesser punishment, in respect of art. 2 of the criminal code, art. 25 of the Constitution and, last but not least, art. 7 of the European Convention.

Firstly, the Court explained that «Article 7, paragraph 1, of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the Courts must apply the law whose provisions are most favourable to the defendant».

Secondly, the Court considers that Article 442, paragraph 2, of the criminal procedure code is a «provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure. It therefore falls within the scope of the last sentence of Article 7 § 1 of the Convention». In respect of this reasoning, the ECHR sentenced Italy because of violation of art. 7 of the Convention[20].

Therefore, taking advantage of the "Drassich case", Mr Scoppola asked for the special remedy provided by art. art. 625-*bis*. The Supreme Court accepted its request in February, but the decision has not been published yet.

From the above mentioned examples, we can say that Italian jurisprudence found a solution utilizing a technique that, from the point of view of the victim's rights, deserves approval. However, even Scholars agree that, following the Constitutional Court decision, the Parliament

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Court by using the general remedy of art. 606, lett. c of the criminal code of procedure, which entitles the defendant to seek review whenever a criminal procedure rule has been violated during the proceedings. Among Scholars, see Michele Caianiello, "La riapertura del processo ex art. 625-bis c.p.p. a seguito di condanna della Corte europea dei diritti dell'uomo", *Cassazione penale* (2009): 1465-1473; Luca De Matteis, "Condanna da parte della Corte europea dei diritti dell'uomo e revoca del giudicato", *Cassazione penale* (2009): 1474-1483; Chiara Gabrielli, "*Decisum* del giudice europeo e parziale rimozione del giudicato", *Giurisprudenza italiana* (2009): 2295-2296; Roberto E. Kostoris, "Diversa qualificazione del fatto in Cassazione e obbligo di conformarsi alle decisioni della Corte europea dei diritti dell'uomo: considerazioni sul caso Drassich", *Giurisprudenza italiana* (2009): 2514-2525; Fulvio Maria Palombino, "Esecuzione delle sentenze della Corte europea dei diritti dell'uomo e integrazione analogica dell'art. 625 *bis* c.p.p. (in margine al caso Drassich)", *Giurisprudenza italiana* (2009): 2296-2299; Francesco Zacché, "Cassazione e *iura novit curia* nel caso Drassich", *Diritto penale e processo* (2009): 781-788.

[19] See art. 438-443 of the criminal procedure code.

[20] See ECHR, Scoppola v. Italy, 19th September 2009.

should approve a specific law in order to avoid uncertainty and discrimination among defendants. As an evidence of the fact that the solution is not completely welcomed by the judges of the Supreme Court itself, at the end of April all the sections of the Supreme Court will take part to a meeting in order to decide whether to submit the question to the plenary session, so to find a shared solution in lack of a law on the point.

The only relevant reform has been introduced on the 28th November 2005 with the decree of the President of the Italian Republic n. 289, which provides a new ruling for the criminal records, stating that the ECHR decisions must be added to the defendant's criminal record below the Italian final decision to which they are referred. Even if this is not practically useful, it has the implicit meaning of a first step towards a modification of the effects of the Italian decision.

3. Draft bills on the renewal of the trial. – The above mentioned Recommendation R (2000) 2, encourages «the Contracting Parties to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that: (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of».

Bearing in mind these wordings, from 1998 on, several draft bills have been presented to the Parliament in order to introduce an instrument that allows a renewal of the trial or a revision of the decision passed at the end of a trial considered unlawful by the ECHR, but none of them has been approved nor even discussed by the two Chambers of the Parliament yet[21].

The drafts choose among two options: modify art. 630 of the criminal procedure code, which provides four cases in which it is possible to ask for a revision of the decision condemning the defendant, or introduce a specific rule for the case.

Analyzing the drafts, it's possible to notice that they entitle the sentenced defendant to apply for a renewal of the trial only if criminal procedure rules have been violated during the trial. Nothing is provided in case the breach is related to substantial rules. Some of them are even more strict, limiting the possibility to seek review only when a breach of art. 6 of the Convention is committed. Of course this is not in line with the Committee of the Ministers Recommendation R (2000) 2 and would exclude from the remedy a large number of cases. From the above mentioned cases, we can mention the last one (Scoppola), as an example in which ECHR sentenced Italy for violation of art. 7 of the Convention.

Secondly, some of the drafts provide the special remedy only if the defendant has been sentenced in prison, or to any other no-pecuniary punishment, thus excluding all the unlawful trials at the end of which the defendants are obliged to pay a fine.

The competent judge will be the Court of Appeal, and the judge should renew only the part of the trial in which ECHR ascertained a violation of the Convention.

[21] For comments on the draft bills, see Mitja Gialuz, "Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane", *Rivista italiana di diritto e procedura penale* (2009): 1881-1895; Annalisa Mangiaracina, "La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (I) La progettualità italiana e l'esperienza del Regno Unito", *Rivista italiana di diritto e procedura penale* (2006): 985-991; Barbara Randazzo, "Nuovi sviluppi in tema di esecuzione delle sentenze della Corte europea dei diritti dell'uomo", *Diritti dell'uomo, cronache e battaglie* 2 (2006): 11-18.

The revision of the final decision is admitted in the Italian system only if it could held to the defendant's acquittal. However, this is not always useful for the situation we are analyzing, because not necessarily a new trial, hold in respect of the Convention, must lead to the defendant's acquittal. The draft-bills suggest that at the end of the new trial which respects the rules of the Convention, there are two options for the competent judge: a) confirm the first decision, b) annul it.

Moreover, as suggested by Scholars, three more questions rise: 1) in case the trial was held against two or more defendants and only one of them applied to the ECHR, what should happen to the co-accused who didn't apply to the ECHR?; 2) what is it going to happen to the victim who already had her compensation for the damages suffered?; 3) how is the new law going to solve the matter that both judge and participants to the trial should face in terms of possible loss of evidence due to the period elapsed[22].

These question are still unanswered and should be taken into consideration by the draft-bills before the approval of a new law.

4. ECHR decisions about Italian *in absentia* trials. – As a general rule, the criminal trial must guarantee that the accused will be present during the hearing and will be able to follow and understand any part of the proceedings[23].

Interpreting art. 6 of the Convention, the ECHR stated that, although not expressly mentioned, «the object and purpose of Art. 6 taken as a whole show that a person "charged with criminal offence" is entitled to take part in the hearing»[24].

However, proceedings held in the absence of the accused are not necessarily incompatible with the Convention, particularly when the accused can obtain a new determination of the charge, in respect of both law and fact. Furthermore, even in those cases where there is no possibility of a re-trial, the *in absentia* trial may be compatible with art. 6 of the Convention, namely when the accused was aware of the summons: States can consider the failure of the accused to appear as implicit waiver, and thus carry out a trial *in absentia*.

In 1975, the Committee of the Ministers approved a Resolution in which the States were recommended to apply the following minimum rules: «no one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice». Moreover, «6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice. 7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present. 8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled. 9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control»[25].

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[22] As noticed by Elisabeth Lambert-Abdelgawad, *The execution of judgements of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2008), 72.

[23] See Ercole Aprile, "La tutela dei diritti fondamentali e le nuove garanzie del processo penale", in *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, ed. Ercole Aprile and Filippo Spiezia (Milano: Ipsoa, 2009), 157-161; Sarah J. Summers, *Fair Trials. The European Criminal Procedure Tradition and the European Court of Human Rights* (Oxford and Portland: Hart Publishing, 2007), 113-120.

[24] See ECHR, Colozza v. Italy, 12nd February 1985.

[25] See Council of Europe Committee of Ministers Resolution (1975) 2, adopted on 21st May 1975. See Ercole Aprile, *Diritto processuale penale europeo e internazionale* (Padova: CEDAM, 2007), 195-198.

From the Italian perspective, we can notice that there are three different cases related to the defendant's absence during the trial, ruled by artt. 420ter, 420quater, 420quinquies (as far as regards the preliminary hearing) and art. 484, paragraph 2bis (as far as regards the trial at Court) of the code of criminal procedure:

a) *contumacia* / *absentia*, which means that the person is not available at the trial even if he has been summoned in person or otherwise informed of the date and place of the hearing of the trial going on against him. More precisely, the code distinguishes between: 1) summon in person, which means that the person has received the writ of summon directly and is aware that a process is going on against him; 2) presumption of knowledge of the trial, which is obtained after sending services of writ of summon to persons (i.e. relatives, employers, etc.) or institutions (i.e. local authorities) that have a relation with the defendant[26];

b) *assenza al processo* / absence at the trial depends on the defendant's will. It means that the defendant has been correctly summoned but he declares that he doesn't want to attend the trial and in fact asks that the trial is continued even if he will not attend it. If the defendant is in jail, and he refuses to attend the trial, still the trial is continued without him. The attorney-at-law will act on behalf of the defendant and will ensure a proper defense at the trial;

c) *legittimo impedimento* / legitimate impediment, which is related to the fact that the defendant, even if imprisoned in jail, cannot stand to the hearings for a reason that doesn't depend on his will (i.e. fortuitous events, necessities or other lawful impediments). The process is held over till the end of the impediment.

As far as regards *contumacia* / *in absentia* trials, Italy has been sentenced several times under the principles stated by two important ECHR decisions[27].

Before the new criminal code of procedure entered into force, the ECHR sentenced Italy in the "Colozza case". Mr Colozza was sentenced in absentia even if he was not aware of the trial. He applied for an appeal and then seek review to the Corte di Cassazione because he didn't receive any summon even if his address was known by the office of the Prosecutor, as it was testified by summons that Mr Colozza received and that were related to different proceedings in which he was involved as defendant. However, the decision became final and he applied to the ECHR, which sentenced Italy[28].

After the new criminal code of procedure entered into force, Italy has been sentenced because, according to our criminal procedure code, a defendant convicted *in absentia* doesn't have an immediate right to appeal against the decision convicting him if he is not aware of the trial going on against him (except the case of his negligence). To be more precise, the former wordings of art. 175 of the criminal code of procedure stated that the defendant convicted *in absentia* had to prove that he was not aware of the trial and that this lack of awareness was not related to his fault or negligence. If he would have successfully carried out that proof, then he would have been given the time to apply for an appeal against the decision convicting him.

Thus, the ECHR sentenced Italy in the cases Sejdovic and Somogyi because the two defendants were convicted even if there was no evidence that they were aware of the trail: in the first case the Court presumed that the defendant gave up his right to be present at the trial, but

[26] For the presumption of awareness, see art. 157, 159, 160 of the criminal procedure code.

[27] See Mario Deganello, "Procedimento in absentia: sulla 'tratta' Strasburgo-Roma una 'perenne incompiuta'", in *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 79-114; Barbara Milani, "Il processo contumaciale tra garanzie europee e prospettive di riforma", *Cassazione penale* (2009), 2180-2193; Giulio Ubertis, "Corte europea dei diritti dell'uomo e «processo equo»: riflessi sul processo penale italiano", *Rivista di diritto processuale* (2009): 33-45.

[28] See ECHR, Colozza v. Italy, 12th February 1985. See also ECHR, Rubinat v. Italy, 12th February 1985; Brozicek v. Italy, 19th December 1989.

there was no evidence about the voluntary waiver to this right; in the second case, the Court stated that the defendant had received and signed the writ of summon, so he was aware of the trial: however, the defendant claimed that the writ had been signed by a different person and there was no evidence that he had signed in person the writ. Moreover, in this two decisions the ECHR criticized the Italian rulings on *in absentia* trial: first of all, the terms to prove the lack of awareness when applying for a new term to appeal were too short; secondly, the defendant's duty to prove his blameless lack of awareness about the trial instead of the Prosecutor's burden of proof about the awareness of the trial was not in line with the principles of the Convention[29].

Following the ECHR decisions, in the year 2005 the Italian Parliament approved a law that modified art. 175 of the criminal code of procedure. The new wording reads that the defendant who has been convicted without being aware of the trial is given the time to apply for the appeal: he must ask for the appeal within thirty days after he gets to know about the decision. Furthermore, it's not a defendant's burden to carry the proof that he has received no information about the trial.

But still some matters have not been solved. First of all, even if the person is given the time to present an appeal, this is only a review of the first decision, and not a retrial, which means that the person has the right to attend only one stage related to the merit of the fact. However, *in absentia* trials are in line with the principles of the Constitution, namely art. 24, which provides the right of defense, and art. 112, which introduces the mandatory prosecution principle. Furthermore, the Italian Constitution states that the defendant has only the right for a petition to the *Corte di Cassazione* (art. 111, paragraph 7 of the Italian Constitution), which decides only on points of law. This means that there is no defendant's right protected by Constitution to two merit trials (first and second instance judgments). Actually, there is the right to one only merit trial and to a reviewing of the decisions of an inferior Court on points of law. This means that art. 175 of the criminal code of procedure is in line with the Italian Constitution provisions stating that: 1) the defendant who has been convicted without being aware of the trial against him is automatically given the time to present appeal (excepts for the hypotheses in which the lack of awareness depends on the defendant's fault or negligence); 2) it is no more a defendant's duty to provide the proof that he was unaware of the trial against him.

A second matter is related to a lack of coordination between new art. 175 and art. 603 of the criminal procedure code, which deals with renewal of the proceedings, by means, for example, of the possibility to confront and question the witnesses. Renewal of the proceedings in appeal can take place only in four hypothesis. One of these regards *in absentia* decisions given at the end of the first instance trial. Art. 603, paragraph 4, states that a renewal of the proceeding is possible only if the defendant carries the proof that he was not able to attend the trial due to fortuitous events, necessities, other lawful impediments, or that he was not informed of the ongoing trial against him. So, if the defendant isn't anymore obliged to provide the proof of his unawareness in order to be allowed to present appeal, that proof is still on him in case he wants to obtain a renewal of the proceeding.

Furthermore, the defendant misses the opportunity to ask for an alternative proceeding (such as *applicazione della pena su richiesta delle parti* and *giudizio abbreviato*) that grant a reduction of the punishment, because the deadline for this proceedings is, in general, the preliminary hearing during the first-instance trial.

This causes a breach in the system and Italian Scholars assert that a decisions of the Constitutional Court is needed on the subject.

[29] ECHR, Sejdovic v. Italy, 18th May 2004 and ECHR, Somogyi v. Italy, 10th November 2004. See also ECHR, Osu v. Italy, 11th July 2002; ECHR, Hu v. Italy, 28th September 2006; ECHR, Ay Ali v. Italy, 14th December 2006; ECHR, Zunic v. Italy, 21st December 2006.

The Constitutional Court decided several times upon the constitutionality of the articles of the criminal procedure code dealing with the summons' procedure. In each decision, the Court stated that there is no breach with the Constitution if the criminal procedure code doesn't provide a postponement of the proceedings whereas it is impossible to find the defendant or there's no evidence that he is aware of the trial. In fact, as confirmed by the ECHR jurisprudence, *in absentia* trials are not incompatible with the Convention once the State provides the defendant with the opportunity to ask for a renewal of the trial.

Secondly, the Constitutional Court explained that the choice between the postponement or the renewal of a trial that involves a person who is impossible to find must be demanded to law. Thus, the Court cannot interfere with the current choice of the Parliament, which consists, as already mentioned, in the possibility to apply for an appeal as stated in art. 175 of the code of criminal procedure[30].

Therefore, two different ways can be suggested to solve the matter: the first assumes that art. 159 of the criminal procedure code should be interpreted in light of the Convention, as suggested by the Constitutional Court decisions n. 348 and 349 passed in 2007. However, the wordings of art. 159 are clear in providing a situation in which the summon served only to the defendant's attorney-at-law is valid and lawful even if the defendant's himself was not aware of the trial. Thus, this way is not practicable.

A second possibility is related to the interpretation of art. 648 of the criminal procedure code where the definition of a sentence which is final is provided. The question is: is it logical to consider as final a decision passed at the end of a trial held in the defendant's absence and whereas the defendant was not aware of the trial? The problem is that this final decision can be executed. However, thanks to art. 175 of the code of criminal procedure, the defendant can ask a renewal of the trial. So, the suggestion is to ask to the Constitutional Court to declare the unlawfulness of art. 648 of the criminal procedure code whereas it considers that a decision is final even if the defendant is provided with the opportunity to ask for a renewal of the trial, due to the fact that the trial was held *in absentia* and without the evidence of the fact that the defendant was aware of it[31].

Conclusions

The matters presented in this essay show that main topics are still on the socks and have not been totally solved yet[32].

First of all, the question about where the Convention should be placed among the sources of law is still pending. In fact, two decisions handed down by the Constitutional Court in November

[30] See Constitutional Court decisions n. 399 passed on 12th December 1998; Constitutional Court decision n. 117 passed on 5th April 2007; Constitutional Court ordinance n. 89 passed on 4th April 2008. Among Scholars who suggested that the right to be present at trial is not only a defendant's right, but also a condition for an objective validity of the trial, see Francesco Caprioli, ""Giusto processo" e rito degli irreperibili", *Legislazione penale* (2004), 586-595; Francesco Caprioli, "Cooperazione giudiziaria e processo in absentia", in Alfio Gabriele Fragalà, Tommaso Rafaraci et al., *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia, Catania, 9-11 giugno 2005* (Milano: Giuffrè, 2007), 391-402. See also Carlo Dell'Agli, "Il fuggevole interesse della Corte costituzionale al principio *ne absens damnetur*", *Diritto penale e processo* (2010): 244-248.

[31] See Pasquale Profiti, "La Corte italiana e il processo in contumacia: i riflessi della giurisprudenza di Strasburgo", *Europeanrights.eu* (March, 12, 2010), http://www.europeanrights.eu/index.php?funzione=S&op=5&id=381.

[32] See Mario Chiavario, "Giustizia europea e processo penale: nuovi scenari e nuovi problemi", *Legislazione penale* (2009): 461-470; Mario Pisani, "Il «processo penale europeo»: problemi e prospettive", *Rivista di diritto processuale* (2004): 653-678.

2009 seem, from one hand, to confirm the decisions passed in 2007, and, on the other hand, that a different interpretation is possible, as they state that the rules of the Convention receive acknowledgment in our system through art. 117 and art. 10 of the Constitution. Moreover, things seem to be on the way of a deep change, as the Council of European Union received on 17th March 2010 the mandate to sign the European Convention of Human Rights on behalf of the European Union. This means that, from the point of view of the national judges, the Convention, the Treaty and the other rules approved by the European Union could be applied and interpreted through a unique approach, instead of the two current approaches explained in paragraph 1. Since the Lisbon Treaty entered into force in December 2009 and the European Union is supposed to sign the European Convention of Human Rights in June 2010, this field of discussion will probably be one of the most interesting, as it involves both the European top-level Courts (ECHR, ECJ) and the national judges (Constitutional Court, Corte di Cassazione and merit Courts).

As regards the matter related to the duty for the State to abide the final ECHR judgment, the subject is really tricky and both Scholars and judges are waiting for the approval of a new law that should introduce an instrument through which a final sentence passed at the end of a trial which the ECHR considers not fair could be reviewed. Unfortunately, we must remark that the draft bills awaiting for discussion at the Parliament are not at all satisfactory, as they limit the possibility to obtain a new trial only in case of violations of art. 6 of the Convention. However, as the Italian Courts have tried different solutions through interpretation in order to grant a remedy for the defendant who has been sentenced at the end of an unfair trial, the only way to obtain a unique solution is the approval of a statutory law, which shouldn't be put off any longer.

Finally, as explained in paragraph 4, *in absentia* trials represent a matter which has not been solved yet, even if the Parliament approved a law in 2005 that introduces a new wording inside art. 175 of the criminal procedure code, in order to adapt it to the Convention principles and the ECHR decisions.

The matter becomes even tougher if we consider that a sentence passed at the end of a trial in which the defendant was not present could be considered final and then able to produce the *ne bis in idem* effect. From one point of view, it is important to grant the defendant's right to ask for a renewal of the trial previously held in the defendant's absence. From another point of view, to exclude that a sentence passed at the end of a trial in absentia could be considered as final and then able to stop a second trial against the same person charged of the same facts, would be against art. 54 of the Convention implementing the Schengen Agreement.

What is certain is that up till now there is no harmonization among member States as far as regards *in absentia* trials. The European Union, being aware that the mutual trust itself is not enough to grant a shared position on *in absentia* trials, is trying to offer a common definition of *in absentia* decisions: as a matter of fact, on 26th February 2009 the European Union Council approved a framework decision «enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial». One of the main reasons that led the Council to approve the framework decision is due to the fact that the various framework decisions «implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and hamper judicial cooperation»[33].

[33] See framework decision 2009/299/JHA published in the Official Journal of the European Union on 27th March 2009. For a comment of the Framework decision from the Italian perspective, see Andrea Chelo, "Nuove regole per l'esecuzione delle sentenze emesese *in absentia*", *Diritto penale e processo* (2009): 111-120.

This topic could be discussed also through a dialogue between the ECHR and the European Union Court of Justice, as the Lisbon Treaty explicitly mentions that the European Union joins the European Convention of Human Rights (as well as the 2000 Charter of Fundamental Rights signed in Nice, which reproduces several principles carried out by the Convention), including the provisions related to the defendant's presence at the trial as interpreted by the ECHR (see paragraph 4). Another way to deal with the subject could be to issue an EU regulation stating when a final *in absentia* decision must be subjected to the *ne bis in idem* principle or instead must be reviewed because the defendant was not aware of the trial going on against him: the main thing is to avoid impunity spots or, even worse, to cause a detriment in the defendant's rights to a fair trial[34].

[34] See Annalisa Mangiaracina, "Sentenze contumaciali e cooperazione giudiziaria", *Diritto penale e processo* (2009): 120-127.

THE PROHIBITION OF REFORMATION IN PEIUS IN THE HUNGARIAN JURISPRUDENCE

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Keywords: *the prohibition of reformation in peius, Hungarian law, Hungarian jurisprudence*

In the operative criminal procedure law the prohibition of reformatio in peius is effective during the procedure of second instance, the procedure of third instance, the retrial procedure, during the procedure of the extraordinary legal remedies, and even during the special procedures. In addition to the criminal procedure the prohibition of reformatio in peius is regulated within the law of misdemeanor, since the Section 92. (4) of the Act LXIX of 1999 on Misdemeanors provides that the court may take a more disadvantageous decision against the person subjected to the criminal procedure than it was stated in the provisions of the decision of the infringement authority just in case during the hearing new evidences are revealed and on the grounds of this the court establishes a new fact and due to such fact more serious crime must be classified or the penalty shall be significantly increased. By the same token the principle of ne ultra petitium is just as relevant in the civil procedure law: according to first sentence of the section 253 (3) of the Act III of 1952 (Code of Civil Procedure) the court of second instance may alter the decision of the court of first instance just within the confines of the appeal (joint appeal) and the cross-appeal. However, within such confines questions concerning the right enforced in the lawsuit as well as plea against such enforcement of right may be decided by the court of second instance even if the court of first instance did not discuss or make a decision on such questions[1].

The prohibition of reformatio in peius benefits the accused during the process of the appeal and the extraordinary legal remedies regardless of the person who filed them. This may be the defendant himself, or the prosecutor who, according to Section 324 (2) of the Code of Criminal Procedure, may appeal in favor of the defendant, and according to Sections 409, 417, 431, 440 of the Code of Criminal Procedure the prosecutor may file for remedy against or in favor of the defendant as well. In addition, the counsel for the defense has absolute right to appeal in favor of the defendant, and has absolute right to file for remedy unless the defendant expressly forbade this. Furthermore, other persons may exercise their right to file a remedy against or in favor of the defendant, such as the legal representative of the defendant, the relative of legal age of the defendant, other interested parties etc.. So the prosecutor can file for remedy against and also in favor of the accused, the other entitled persons may exercise their right only in one way (either against or in favor of the accused).

The prohibition of reformatio in peius is irrelevant in the case of a remedy filed against the defendant. The prosecutor as the public prosecuting body of the state may proceed in both directions, while the privet accuser and the substitute privet accuser may file a remedy just against the defendant. The prohibition of reformatio in peius intends to enable the accused to exercise his right to legal remedy if his punishment is deemed to be too serious or illegitimate, but without risking that the judgment would be altered to a more serious one without the possibility of

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[1] But the court of second instance shall decide regardless of confines of the appeal (joint appeal) and the cross-appeal on the unpaid duties, as well as on the unpaid expenses which were advanced by the state. (second sentence of Section 253 (3) of the Code of Civil Procedure)

revoking it due to groundlessness. The court empowered to take the decision is as a rule always subject to the prohibition of reformatio in peius, if the court took the new decision of the same action of the defendant on the ground of an appeal filed by the defendant, by the prosecutor or another person, who has the right to appeal, in favor of the defendant. The prohibition of reformatio in peius shall grant the freedom of the decision-making process: the judgment must be acknowledged or an appeal may be filed without the risk of adverse alteration. However, the new verdict does not have to be the same comparing to the appealed verdict concerning the declaration of guilt or the penalty.

The freedom of the decision-making of the accused is significant in the matter of usage and extent of prohibition of reformatio in peius. The prohibition of reformatio in peius is in this respect a "procedural protection-right"[2], which should compensate the hindrance to file an appeal. The defendant would face a psychological dilemma in the lack of prohibition of reformatio in peius[3], in which he would have to decide whether to accept the verdict (including the penalty set forth thereby), or he should fear that the appeal submitted by him would put him at disadvantage. The reformatio in peius may show a way out of this dilemma, because it may give a reason to trust that the submission of an appeal will not affect the situation adversely. MOLNÁR is right to call the prohibition of reformatio in peius as "the principle of fearless appeal"[4].

The problem of the prohibition of reformatio in peius raises many important questions. However, in the Hungarian legal bibliography just very few writers have discussed this subject. In the twentieth century only eight studies were published in our country, which examined specifically the question of prohibition of reformatio in peius, and still none of them is from the time after the regime change. This instrument of law is poorly endowed by the university textbooks and notes as well, just a few pages are devoted to the topic. The situation is different abroad, especially in German literature. In Germany not only several professional articles are issued in respect of certain questions of prohibition of reformatio in peius, but also various monographs have reviewed the prohibition of reformatio in peius to the full or just some of its segments (e.g. measures taken).

The prohibition of reformatio in peius in the judicial practice

After analyzed the case-law it may be stated that the ad hoc decisions regarding the prohibition of reformatio in peius have been referring to the following issues:

a) What is declared as an appeal against the defendant?

- The legal classification of a criminal offense does not mean only the designation according to the provisions set forth in the Special Part of the Criminal Code (including the basic case, the qualified case and the privileged case), but also the formation of the perpetrators and the determination of the stage of the completion of the committed crime etc. Therefore, an appeal against the defendant should be any appeal filed on the grounds of the above written.

[2] GRETHLEIN, Gerhard: Die Problematik des Verschlechterungsverbotes im Hinblick auf die besonderen Maßnahmen des Jugendrechts. Neuwied am Rhein, 1963. 29. o.

[3] KRETSCHMANN, Hans-Jochen: Das Verbot der reformatio in peius im Jugendstrafrecht. Saarbrücken, 1968. 54. o.

[4] MOLNÁR László: A reformatio in peius tilalmának érvényesülése a Bp. 202. § a)-c) pontjára alapított hatályon kívül helyezést követő új eljárásban. Magyar Jog, 1956/4. 109. o.

- The appeal filed by the prosecutor in order to take measures (such as like confiscation of property or supervision by probation officer) does not lift the prohibition of reformation in peius.
- In the same way: the prohibition of reformatio in peuis became effective despite the appeal against the defendant filed by the prosecutor, if the Attorney General acting at second instance upholds his transcript (the grounds of the appeal) only regarding to motions which does not lift the prohibition of reformation in peius (for example, in order to aggravate the degree of security of imprisonment)
- If the prosecutor makes a motion concerning the revocation of the sentence due to groundlessness (within the compass of the reserved appeal aiming the aggravation), the possibility of aggravation cannot be changed thereby (unless, the appeal against the defendant is expressly withdrawn).
- If the prosecutor files an appeal on account of partial acquittal, the prohibition of reformation in peius does not take effect in case the Court of Appeal establishes the guilt of the accused because of this crime.
- If the prosecutor is not present at the hearing and he makes a statement concerning the decision reported by the means of serving the operative parts, he files an appeal against such decision and the reasoning of the remedy is made after serving the justified judgment, this statement shall not be considered as an appeal against the defendant, not even in spite of the fact that the prosecutor upholds the appeal against the accused in the reasoning arrived to the court after the expiration date for filing an appeal.
- In case the prosecutor files an appeal in order to impose a general (covering all categories of public vehicles) prohibition of driving or prohibition of driving covering more than one category of public vehicles instead of prohibition of driving of one category (or not all from among several ones) shall be considered as an appeal against the accused. However, the principal and secondary penalty shall not be aggravated during the process of second instance just if the appeal filed (upheld) regarding the prohibition of driving a moped and not regarding the prohibition of driving a vehicle included in Category "A" (among the categories there is no class in severity).
- Appeals filed apart from but related to the imposition / aggravation of punishment (principal- and secondary penalty, criminal measures) shall never be considered as an appeal against the defendant (appeal for preliminary exemption or inclusion of fines imposed during a procedure of minor offence, etc.)
- An appeal of defense shall never lift the prohibition of reformation in peius, even if the appeal apparently seems to be filed against the defendant.

b) When may the defendant be declared guilty again despite the prohibition of reformatio in peius?

- To consider an act as a different (or additional) criminal offense than the court of first instance has established is not regarded as the establishment of guilt, but rather as the alteration of classification of the criminal offense, therefore this is not excluded by the prohibition of reformation in peius.
- Nevertheless, if the court of first instance has sentenced the defendant, but has not established the guilt of the defendant concerning other crimes as well according to the facts written in the statement of fact of the indictment (i.e. has not covered adequately the indictment), the court of second instance shall not find the defendant guilty in the kind of crimes written above in lack of an appeal against the defendant

- In case the unification of the cases did not happen during the procedure of first instance, the court of second instance may unify the cases, but if the prohibition of reformation in peius takes effect the court of second instance shall quash the judgment of the court of first instance (and during the retrial there is no impediment to aggravation).

c) When may more disadvantageous provisions be taken against the defendant despite the prohibition of reformatio in peius?

- the secondary penalty is always considered as a lighter punishment than the principal penalty, even if the truth is that it means heavier detriment for the defendant;
- If the prohibition of reformatio in peius is effective the court of second instance shall not impose such secondary penalty which was not imposed by the court of first instance, neither in case it reduces the extent of the principal penalty, nor if it ignores another secondary penalty imposed by the court of first instance.
- The prohibition of reformatio in peius does not exclude the possibility that the court of second instance may ignore the preliminary exemption in the lack of an appeal against the accused filed by the prosecutor;
- The prohibition of reformatio in peius does not exclude the possibility that legal measures, which were not imposed by the court of first instance, may be imposed by the court of second instance;
- The prohibition of reformatio in peius shall not be considered as violated if the provisions of the probation of the defendant is aggravated in spite of the prohibition of reformatio in peius.;
- The prohibition of reformatio in peius does not inhibit the aggravation of the degree of security of imprisonment of the defendant;
- It shall be possible to pass a judgment on the civil claim when the prohibition of reformatio in peius is effective, even in case the court of first instance has directed the enforcement of the civil claim to be managed by other legal means and this provision has not been appealed by anyone.

d) The case law regarding the prohibition of reformatio in peius prevailing in the retrial process:

- The numerous ad hoc decisions record merely the fact, that the prohibition of reformatio in peius is also applies during the procedure of retrial if none of the exceptions occurs (e.g. triple novelty – i.e. a new evidence comes up, according to this new fact shall be established and as a result of this heavier punishment shall be imposed)
- The prohibition of reformatio in peius shall be lifted during the procedure of retrial if any new fact based on any new evidence is established during the procedure of second instance of the main case.
- If the defendant fails to fulfill his obligation of support since the sentence of first instance has passed, this should be qualified as a new evidence in case of the crime of omission of support and in such cases the prohibition of reformatio in peius is not effective during the procedure of retrial.

e) The ad hoc decisions related to the separate procedures, the extraordinary legal remedies and special procedures are primarily carrying out the clarification of the text of the law:

- The prohibition of reformatio in peius is not violated in case the court condemns the defendant to labor in the public interest in the decision given according to the hearing

instead of to a fine imposed without a hearing because of significantly aggravating penalty should be imposed on the basis of the establishment of new facts.

- However, if the defendant files a request for holding a hearing regarding to the summons made without a hearing, and during the trial no new facts emerges according to which new facts should be established and significantly aggravating penalty should be imposed, the secondary penalty shall not be aggravated (e.g. assignation a longer duration of prohibition from driving vehicles).
- In case a request for holding a hearing is filed at the procedure of first instance and the judgment of first instance is appealed against the defendant, the sentence may be aggravated during the procedure of second instance irrespective of who has filed the request for holding a hearing.
- The prohibition of reformatio in peius does not hinder the imposition of reduction to a lower rank instead of prohibition from participating in public affairs. In this case no new secondary penalty has been imposed, it rather means only that the court of second instance imposed just a part of the legal disadvantages of prohibition from participating in public affairs, so it reduces the punishment.
- The prohibition of reformatio in peius is effective during the procedure of retrial in case the judgment has been revoked because a motion for revision has been filed on the basis of absolute procedural contravention.
- The prohibition of reformatio in peius which became effective during the main case is not effective during several of the special procedures (e.g. posterior consolidation of sentences)
- But at the same time the exceptions of the prohibition of reformatio in peius, which are effective during the retrial, are not effective during the special procedures.

The consequences of the violation of prohibition of reformatio in peius were subjected to many disputes before the operative Act XIX of 1998 on Criminal Proceedings came into force, because the former Act on Criminal Proceedings (Act I of 1973) did not consider the violation of prohibition of reformatio in peius as a ground for revision. The jurisprudence treated - correctly - the violation of prohibition of reformatio in peius as a relative procedural contravention (cp. Article II. of Criminal Conceptual Resolution no. 189 of 2000). The violation of prohibition of reformatio in peius became an absolute procedural contravention when the operative Act on Criminal Proceedings came into force on 1st of July 2003, regarding to its consequences. This alteration can be definitely approved by us.

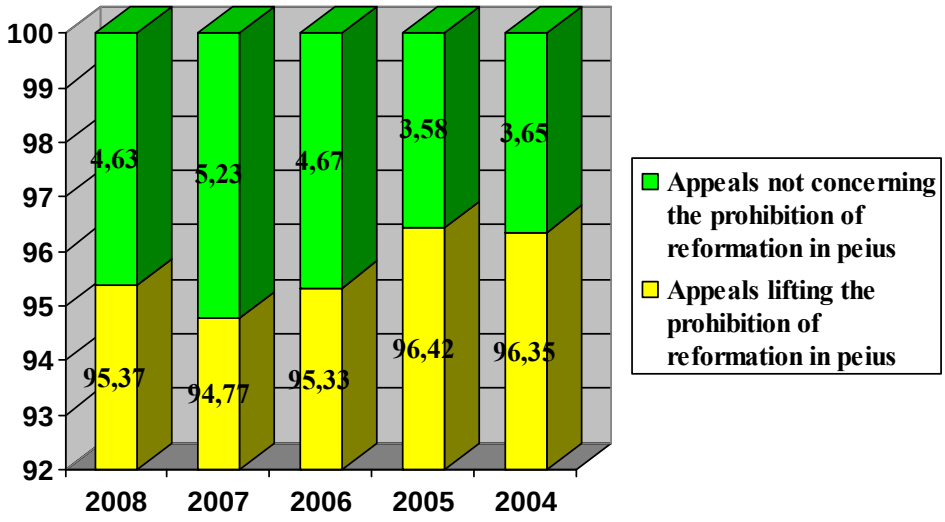
The statistical analysis of the appeals filed by the prosecutor - in the light of the prohibition of reformatio in peius.

The prosecutors filed appeal against 6.509 defendants according to the statistic statement of the Supreme Prosecutors' Office of 2008 (this data was 5.542 in 2007, 6.296 in 2006, 6.426 in 2005, 7.024 in 2004). The appeals were filed mostly against the defendant and just 1, 26% of the appeals were filed in favor of the defendant by the prosecutors (for acquittal, reduction of the sentence or abandonment of proceedings). The purpose of the appeals filed by the prosecutors against the defendant mostly, i.e. in 4.885 cases (75, 05%), was the aggravation of the sentence. By the way this rate is relatively invariable, since the rate of the appeals filed for aggravation happens to be between 74, 51% and 76, 14% with the regard to the data of the past five years:

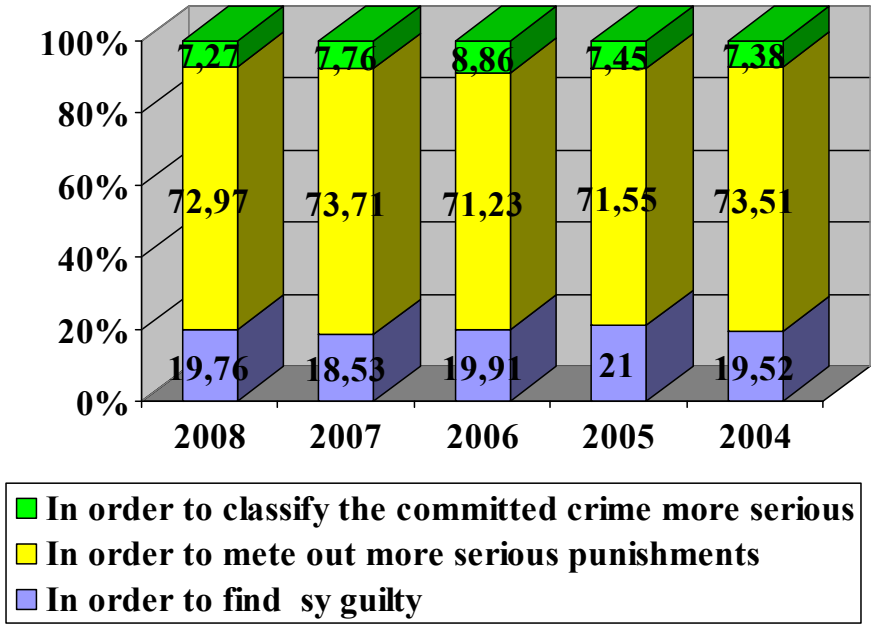
Prosecutors' offices	The no. of the defendants affected by the prosecutor's appeal	The grounds of the appeals filed by the prosecutor												
		Procedural misdemeanor	Groundlessness	Appeal against the defendant			Appeal in favour of the defendant			Classification of the crime	Termination of child-custody	Decision on civil claim	Other provisions of the judgement	Lack of lawful prosecution-termination of the process
				'cause of acquittal	For increasing the punishment	'cause of termination	For acquittal	For reduce the punishment	For termination					
		percentage												
Capital	2009	0,90	4,63	16,28	79,99	1,24	0,45	0,40	0,00	6,72	0,00	0,00	1,74	0,20
Baranya County	230	0,00	5,22	24,35	75,22	1,30	0,43	0,87	0,00	10,00	0,00	0,00	3,48	0,00
Bács-Kiskun County	246	2,85	6,50	22,36	76,83	0,81	0,00	0,00	0,00	5,69	0,00	0,00	2,03	0,00
Békés County	128	0,78	3,91	10,94	79,69	0,78	0,00	0,00	0,00	3,91	0,00	0,00	3,91	0,00
Borsod-A-Z County	364	1,37	7,14	19,51	76,10	1,37	0,00	2,47	0,00	6,32	0,00	0,00	0,82	0,00
Csongrád County	276	1,09	13,41	7,61	68,84	1,09	5,80	0,36	0,36	6,52	0,00	0,00	2,17	0,00
Fejér County	153	0,00	3,92	26,14	70,59	1,96	0,65	3,27	0,00	9,15	0,00	0,00	1,96	0,00
Győr-M-Sopron Coutny	105	0,90	5,71	16,19	75,24	0,00	0,00	0,95	0,00	3,81	0,00	0,00	2,86	0,00
Hajdú-Bihar County	422	0,95	19,43	24,17	68,96	0,47	0,24	1,90	0,00	10,43	0,00	0,47	1,66	0,00
Heves County	75	0,00	4,00	14,67	85,33	0,00	0,00	0,00	1,33	4,00	0,00	0,00	0,00	0,00
Jász-N-Szolnok County	241	0,00	7,88	7,88	82,16	0,41	0,41	0,83	0,00	2,07	0,00	0,00	1,24	0,00
Komárom-E County	261	1,53	3,07	8,43	76,63	1,53	1,53	0,00	0,00	11,49	0,00	3,45	5,36	0,00
Nógrád County	78	0,00	0,00	25,64	67,95	2,56	0,00	0,00	0,00	5,13	0,00	0,00	2,56	0,00
Pest County	443	2,03	9,03	24,38	65,91	2,93	0,23	0,23	0,00	12,42	0,45	0,00	2,03	0,00
Somogy County	238	0,00	7,14	14,29	78,57	0,00	0,84	0,42	0,00	7,98	0,00	0,00	1,26	0,00
Szabolcs-Sz-B Count	331	0,00	4,63	23,26	74,02	0,60	0,30	0,00	0,00	6,34	0,00	0,00	0,60	0,00
Tolna County	84	2,38	2,38	29,76	64,29	5,95	0,00	0,00	0,00	9,52	0,00	0,00	0,00	0,00
Vas County	70	1,43	14,29	18,57	75,71	0,00	0,00	1,43	0,00	12,86	1,43	0,00	0,00	0,00
Veszprém County	557	0,36	10,41	31,42	68,40	1,44	0,00	0,36	0,00	6,46	0,18	0,00	0,72	0,00
Zala	46	6,52	30,43	15,22	47,83	0,00	0,00	4,35	0,00	8,70	0,00	0,00	4,35	0,00

County														
Chief Investigating Prosecutor's Office	1	0,00	0,00	0,00	100,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Budapest Military Prosecutor's Office	115	0,87	3,48	17,39	82,61	0,00	0,00	0,00	0,00	1,74	0,00	0,00	0,87	0,00
Debrecen Military Prosecutor's Office	16	0,00	18,75	31,25	75,00	0,00	0,00	0,00	0,00	25,00	0,00	0,00	0,00	0,00
Győr Military Prosecutor's Office	5	0,00	0,00	20,00	80,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Kaposvár Military Prosecutor's Office	8	0,00	37,50	50,00	100,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Szeged Military Prosecutor's Office	7	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	85,71	0,00	0,00	0,00	0,00
In the aggregate	**6509**	**0,95**	**7,36**	**19,11**	**75,05**	**1,21**	**0,57**	**0,66**	**0,03**	**7,47**	**0,06**	**0,17**	**1,77**	**0,66**
Year 2007	5542	1,35	7,06	18,17	75,73	0,87	0,63	0,83	0,04	7,98	0,07	0,18	2,33	0,04
Year 2006	6296	1,19	8,13	20,17	74,51	0,65	0,78	0,67	0,06	9,28	0,05	0,22	1,78	0,02
Year 2005	6426	1,91	8,89	20,96	74,54	0,92	0,82	0,39	0,03	7,77	0,09	0,08	1,96	
Year 2006	7024	1,34	7,22	19,33	76,14	0,88	0,54	0,85	0,07	7,22	0,14	0,06	1,49	

The table shows properly that great percentage of the appeals filed by the prosecutors lifted the prohibition of reformatio in peius and just a few appeals filed by the prosecutors did not concern it. The following diagram demonstrates the insignificant fluctuation of the amount of the appeals which does not concern the prohibition of reformatio in peius:



In terms of the prohibition of reformatio in peius the appeals filed against the defendant is significant. Obviously there were appeals filed by the prosecutor which were filed for more than one reason (since if we add the numbers of appeals filed for aggravating classification to the numbers of the appeals filed against the defendant, then the result of the numbers of the appeals would be more than the total number), notwithstanding it is still necessary to examine the rate of distribution of the appeals among the relevant reasons concerning the prohibition of reformatio in peius (reasons such as establishment of guilt, aggravation of penalty or difficulties with classification):



Apparently, only a difference of 1-2 % can be observed in the distribution of the reasons of the appeals filed against the defendant during the past five years. Appeals filed by the prosecutors against the defendant add up to three-quarters of the appeals filed in order to aggravate the sanction; the remainder of 25-30% is divided in the ratio of 2 to 1 between the appeals filed for establishment of guilt and aggravation of classification, in favor of the first one.

It can be laid down as a fact with regard to the statistics of the counties that prominent difference can hardly be found among the grounds of the appeals filed by the prosecutors. The fact that the rate of appeals filed by the Central Chief Investigating Prosecutors' Office against the defendant, for imposing aggravated penalty in particular is 100% confirms the thesis that statistic data may often be misguiding. (Since this body of justice filed an appeal only against one defendant in 2008, therefore if it had been filed for whatever reason it would drew one-sided picture of the cause of the appeal filed by this office.) It is a more expressive data that the rate of appeals filed for the establishment of guilt of the defendant on the grounds of acquittal or terminating the procedure was far less than the average 20% in the following counties: Békés County (11, 72%), Csongrád County (8, 70%), Jász-Nagykun-Szolnok County (8, 29%) and Komárom-Esztergom County (9, 96%). The difference is reverse in Veszprém County where almost one-third part of the appeals was filed by the prosecutors on this ground (32, 86%). It is hard to say whether the prosecutors 'offices or the courts are the cause of this (It is obvious that there is less chance for filing appeals for such reasons in case less acquittal or termination of the procedure occurs.) Remarkable disproportion concerning the average ratio of 3/4 arises regarding to the appeals filed for aggravating the penalty just in Zala County since here the purpose of the prosecutors' office to aggravate the penalty or the measures was only less than the half (47, 83%) of the cases when the appeals were filed by the prosecutors.

The appeals filed by the prosecutors' offices operating alongside the courts of first instance were mostly upheld by the (chief) prosecutors' offices operating alongside the courts of second instance. It happened just about in the one-sixth part of the cases that the (chief) prosecutors' office operating alongside the court of second instance withdrew the appeal of the prosecutor of first instance and the rate is almost the same in the case when it upheld the appeal, just revised. So the appeals were sustained in the two-third part of the cases without any modification, and this rate has not changed remarkably in the past five years:

Year	Sustained appeals (%)	Revised appeals (%)	Withdrawn appeals (%)
2008	4382 (67,40 %)	1047 (16,10 %)	1073 (16,50 %)
2007	3620 (65,37 %)	879 (15,88 %)	1038 (18,75 %)
2006	4236 (67,33 %)	915 (14,54 %)	1141 (18,13 %)
2005	4311 (67,09 %)	1020 (15,88 %)	1094 (17,03 %)
2004	4817 (68,57 %)	1006 (14,33 %)	1201 (17,10 %)

It is interesting that remarkable difference can be observed in Zala County regarding to the above written case after considering the distributions in the counties. While in other counties the total rate of the sustained or revised appeals amount to the four-fifth part of the cases – similarly to

the national average – until then this rate is in Zala County just 60, 87% (i.e. the Chief Prosecutors' Office of Zala County has withdrawn approximately the 40% of the appeals filed by the prosecutors of lower-grade against the definitive decision of first instance!). Likewise, the rate of the withdrawn appeals appears to be quite high in Baranya County (40, 87%) and TolnaCounty (34, 51%), whilst this number stayed significantly low comparing to the national average of 16, 50% in Borsod-Abaúj-Zemplén County (9, 34%) and Jász-Nagykun-Szolnok County (6, 22%).

Last but not least, the efficiency of the appeals filed by the prosecutors for aggravation of the penalty shall be examined. Generally the one-third part of such appeals seems to be efficient for many years (in 2008: 32,09 %; in 2007: 33,28 %; in 2006: 36,21 %; in 2005: 33,45 %; in 2004: 37,73 %). The efficiency of the appeals was greater comparing to the national average in 2008 in Békés County (47, 13%) and Heves County (44, 44%), and the efficiency was remarkable significant in Szabolcs-Szatmár-Bereg County (55, 79%) and in Zala County (53, 33%). The situation is similar regarding to the Chief Prosecutors' Office of Appeal, though the efficiency of the appeals filed for aggravating the penaly aggragate 1/4-1/5 at three courts of all the High Courts of Appeal (High Court of Appeal of Budapest, of Pécs and of Győr).

It is worth mentioning that the efficiency of the appeals filed by the prosecutors on the basis of groundlessness is much better than efficiency of theappeals filed for aggravating the penalty (44, 61% on national wide level). The efficiency exceeded the 50% at six of the ten County Courts entitled to pass a judgment on the appeals based on groundlessness (63, 33% in Csongrád County, 52, 63% in Jász-Nagykun-Szolnok County, 76, 47% in Komárom-Esztergom County, 73, 33% Pest County, 52, 63% in Szabolcs-Szatmár-Bereg County, 66, 67% in Vas County).

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CRIME INVESTIGATION METHODOLOGY OF MONEY LAUNDERING OFFENCES

Constantin NEDELCU*

Abstract

As a result of the non-adoption of certain new laws specific to market economy such as: the bankruptcy law, the law of incriminating tax avoidance, the law on foreign currency transfer etc., as well as the desincrimination of offences concerning the public wealth, the crime phenomenon is increasing. To this end, the enforcement of the provisions related to offences concerning public wealth, due to the reduced amount of punishments, does not perform anymore the general necessary prevention, these being even encouraging in certain cases. Not accidentally, decision makers in the economy sector were corrupted or let themselves bribed, participating directly in the commission of certain economic offences having substantial repercussions over the state wealth, over the equity of state-owned companies in favor of private agents.

Keywords : *The Romanian criminal law, object of evidence, investigation of money laundering offence*

Introduction

The ascending evolution of crime in Romania is the consequence both of the impact of serious economic and social problems specific to the period of transition towards market economy, and of the wrong understanding of freedoms by many persons interested in gaining proceeds through evasion to which there is added also the tendency of offenders to create offending relationships in other countries, especially in the environment of persons belonging to immigrant groups and even within certain structures of "organized crime ".

The provisional situation present in all sectors of social, political and economic life, including in relation to public order observance, led to the increase of crime phenomenon, especially in the field of violent offences and of offences against public and private wealth, the non-settlement in an adequate way of all strained situations and social conflicts created precedents leading to the escalation of protest demonstrations and of personal or collective justice.

The complexity and amplitude of this phenomenon, of money laundering, can discourage any attempt of state control and create conditions for concealing the money derived from illicit operations. Contrary to a general impression, it is not true that most of these amounts of money result from criminal operations. We mention that "dirty" money and "hot" money does not mean the same thing. "Dirty" money represents only a small part of the "hot" money, and as far as concerns the first category, there is a clear distinction between the money which is dirty as they derive from criminal transactions and the money which, even though it has been gained legally, becomes dirty as its holders choose other practices, such as tax avoidance and illegal capital export.

Money circulates all over the world through the same geographical and institutional channels open to organized crime and used by it. For being transferred from one place to another, this money uses the same technology and tends to gather in the same places or at the same banks.

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In these conditions the examination of the investigation methodology of offences leading to money laundering seems to be extremely important.

I. Money laundering, issues to be clarified, object of evidence

The applicable law sets forth several methods of investigating economic offences, among which there is also the money laundering:

- putting under supervision the bank accounts of investigated persons and of their assimilated accounts;
- putting under supervision or listening to the telephone *lines*;
- access to computer systems;
- requesting the communication of original documents or by private signature, of banking, financial or accounting documents.[1]

A. Putting under supervision the bank accounts and their assimilated accounts

This probation institution is decided for the purpose of verifying the amounts of money to be transactioned by the persons charged with having committed money laundering offences or for deciding illegal financial and banking operations.

In order to decide to put under supervision the bank accounts and their assimilated accounts, the following conditions have to be met:

a) There should be solid evidence that a commission of money laundering offence is going to take place or that such an offence has been committed.

b) The solid evidence should concern the commission or the preparation of a money laundering offence granted by law under the competence of the National Anticorruption Directorate.

c) The person preparing the commission of one money laundering offence set forth by law or has committed such an offence should have bank accounts or their assimilated accounts and use them financial and banking operations.

d) The putting of the bank accounts and of their assimilated accounts under supervision should be useful in order to find out the truth.[2]

In connection with the information obtained by taking this action, art. 21 of the Government Emergency Ordinance no. 43/2002 sets forth expressly the obligation of the persons carrying on the criminal prosecution activity, the obligation of specialists, as well as of the specialty ancillary staff to observe the professional secrecy.

B. Putting under supervision or listening to the telephone lines

The putting under supervision or listening to the telephone lines is carried out when there is solid evidence concerning the commission of a money laundering offence, and is decided for the purpose of gathering evidence or of identifying the offender.

The measure may be decided by the prosecutors of the National Anticorruption Directorate for a period of maximum 30 days, according to art. 16 paragraph 1 of the Government Emergency Ordinance no. 43/2002. For solid evidence, the measure may be extended by the prosecutor by motivated ordinance, and each prolongation cannot exceed 30 days. It is worth pointing out that this measure is taken only after commencing the criminal prosecution activity.[3]

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[1] T. Butoi, in C. Aioniţoaie, V. Berchesan, T. Butoi, I. Marcu, C. Pletea, I.E. Sandu, E. Stancu, *Tratat de tactică criminalistică*, Carpaţi Publishing House, Craiova, 1992, pag. 87.

[2] V. Bujor, *op. cit.*, pag. 225.

[3] L. Cârjan, *Tratat de criminalistică*, PinguinBook Publishing House, Bucharest, 2005, pag. 300.

C. The access to computer systems

In order to authorize the access to computer systems, the following conditions have to be met cumulatively:

- that there should be solid evidence concerning the commission of a money laundering offence;
- that the evidence should concern the preparation of a money laundering offence;
- the person preparing the commission of a money laundering offence should use such computer systems;
- the access to these systems should be useful for gathering evidence or for identifying the offender having committed the money laundering offence.[4]

The measure is taken by the prosecutor of the National Anticorruption Directorate, by an ordinance, for a period of maximum 30 days. For solid reasons, the measure of the access to computer systems may be extended, by a motivated ordinance, by the same prosecutor, and each prolongation cannot exceed 30 days.

The provisions of art. 91^1-91^5 of the Code of Criminal Procedure., concerning the audio or video records, to which the special normative documents refer, shall be enforced accordingly.[5]

The doctrine appreciates that the access to computer systems may be made also on the occasion of the search. The judicial body, assisted by an IT specialist, will carry out the search with special precautions both when disassembling or assembling the equipment of a computer, as well as for the integrity and accessibility of data contained by it.

D. Audio or video records

The audio or video records were introduced by Law no. 141/1996 for amending and supplementing the Code of Criminal Procedure and they are regulated in art. 91^1-91^5 of the Code of Criminal Procedure.

The legal doctrine considered that the audio or video records were technical methods of revealing and preserving the evidence, and the result of their usage – magnetic tape, film, photography, video tape belonged to the general category of material means of evidence.

According to art. 91^1 of the Code of Criminal Procedure, the phone conversations may be recorded on magnetic tape if there are data or solid evidence concerning the preparation or the commission of an offence for which the criminal prosecution is carried out ex officio, and the listening is useful. The audio or video records may serve as means of evidence if the contents of recorded conversations reveal facts or circumstances which may contribute to find out the truth[6].

The prosecutor shall be authorized for the time needed for recording, up to a period of maximum 30 days, except as otherwise set forth by law. The authorization may be extended in the same conditions, for well-grounded reasons, and each prolongation cannot exceed 30 days.

The audio or video records may be made also upon the motivated request of the injured person concerning the communications addressed to him/her, under the authorization of the prosecutor appointed by the general prosecutor.

The criminal prosecution body is obliged, following the recording, to draw up an official report which should include, besides the general data set forth in art.91 paragraph 1 letters a-e of the Code of Criminal Procedure, the following specifications: the authorization granted by the prosecutor, the number or numbers of telephone stations between which the conversations are

[4] T. Amza, *Criminalitatea informatică*, pag. 97.

[5] Gr. Theodoru, *Tratat de drept procesual penal*, Hamangiu Publishing House, Bucharest, 2007, p. 119.

[6] I. Neagu, *Tratat de procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2008, pag. 120.

held, the names of the persons holding the conversations, if known, date and time of each conversation, the registration number of the roll or of the tape on which the impression was made.[7]

The records of telephone conversations shall be given in writing and shall be enclosed to the official report after having been certified as true by the criminal prosecution body, reviewed and countersigned by the prosecutor carrying out or supervising the criminal prosecution. The roll tape containing the conversation record, in original, sealed by the criminal prosecution body with its own seal, shall be enclosed to the official report. According to art. 91^5 of the Code of Criminal Procedure, the audio, video or pictures records may be subject to technical expertise upon the request of the prosecutor, of the parties or ex officio. At the same time, these records may serve as means of evidence if not forbidden by law. The expert's conclusions, even if they are not compulsory for the prosecutor, may serve to clarify the ground and to find out the truth.[8]

II. Elements of criminal proceedings law, incident in the investigation of money laundering offence

In order to settle the criminal causes of action, the judicial bodies need data or information leading to the conclusion of the existence or non-existence of the offence, guilt or non-guilt of the offender.

For the purpose of finding out the truth, the judicial bodies have to know the objective reality of the circumstances of the case, this operation being carried out by producing of evidence, in order to obtain an accurate representation of the events occurred. The process of notifying the judicial body shall be carried out exclusively based upon the sources permitted by law and only in formats provided by legal regulations. Producing of evidence may take place only by avoiding any prejudice which could disregard human dignity and the prestige of justice. According to art. 68 of the Code of Criminal Procedure, it is forbidden to use the means of constraint, of false promises, of challenges or fraud, methods which prejudice the human dignity and even the justice.

Producing of evidence supposes to provide judicial efficiency to concrete aspects contained in evidence, so that it should allow the settlement of the cause of action.

As a procedural activity, producing of evidence is carried out by judicial bodies in cooperation with the parties and consists in the performance of rights and obligations set forth by law in relation to procuring, reviewing and processing, by papers of the file of the cause of action, the evidence in the light of which the facts are to be elucidated and the cause is to be settled.

Object of probation means all the facts and circumstances de facto which have to be proved for the purpose of settling the criminal cause. The object of probation includes only the facts and the circumstances de facto, as well as the existence of legal regulations, circumstantiating that they are known both by the judical bodies, and by justiciables.

The generic object of the probation shall comprise the facts concerning the incrimination, the circumstances regarding the aggravation or the attenuation of criminal liability, as well as elements related to the consequences of the offence.

The charge of probation means the obligation to produce evidence in the criminal lawsuit.[9]

According to art. 202 of the Code of Criminal Procedure, producing of evidence for the criminal prosecution bodies supposes firstly to gather the necessary evidence for finding out the truth and for settling the cause of action under all its aspects.

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[7] I. Neagu, *Drept procesual penal. Partea generală*, Global Lex Publishing House, Bucharest, 2008, pag. 234.

[8] I. Neagu, *Tratat de drept procesual penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2008, pag. 221.

[9] I. Moldovan, *Drept procesual penal*, Editura Didactică şi Pedagogică Publishing House, 1999,pag. 159.

The evidence is defined as de facto elements relevant from the information point of view concerning all the aspects of the criminal cause. The evidence cannot be confounded with the mean of evidence, this being a legal way by which the evidence is produced in the criminal lawsuit.

In compliance with art. 64 of the Code of Criminal Procedure the following are deemed to be means of evidence: the statements of the blamed person or of the defendant, the statements of the injured party, of the civil party and of the party liable in civil matters, the witnesses' statements, the documents, the audio or video records, the pictures, the material means of evidence, the technical and scientific findings, the medical and legal findings and the expertises.[10]

In the criminal prosecution stage, the investigation of the crime scene is carried out *following the commencement of the criminal prosecution***,** which may be decided *immediately or during the criminal inquiry*. It is performed regularly in the presence of assisting witnesses, except for the situation in which this is not possible.[11]

The investigation may be performed in the parties' presence, but failure to appear of the informed parties does not prevent it to be carried out. The blamed person or the defendant retained or arrested may be brought to investigation. If this is not possible, the criminal prosecution body notifies him/her that he/she is entitled to be represented and arranges his/her representation, upon request. According to art. 172 of the Code of Criminal Procedure, amended by Law no. 32/1990, the defense attorney of the blamed person or of the defendant has the right to assist to the performance of any action of criminal prosecution; so, to the investigation of the crime scene, as well.

In the trial stage, according to art. 129 paragraph 4 of the Code of Criminal Procedure, the trial court carries out also the investigation of the crime scene under contradictoriality conditions, by summoning the parties and in the prosecutor's presence, when his participation in the trial is compulsory.

The persons present or appearing to the crime scene may be prevented, according to art. 129 final paragraph of the Code of Criminal Procedure, to communicate with one another or with other persons, or to leave before the completion of the investigation.

Procedures of identifying the clients and of processing the information related to money laundering

According to art.3 of Law no. 656/2002, as subsequently amended, the employees of the legal entities or the natural person among those set forth at art.8[12] is obliged to observe the legal

[10] V. Lăpăduşi, *Rolul şi contribuţia probelor criminalistice şi medico-legale în stabilirea adevărului*, Luceafărul Publishing House, 2005, pag. 225.

[11] V. Stoica, *Cercetarea la faţa locului*, in Internal Journal, no.2/1991.

[12] According to art. 8, „the following natural persons or legal entities shall fall under this law: a) the credit institutions and the Romanian branches of foreign credit institutions; b) financial institutions, as well as the Romanian branches of foreign public institutions; c) the private pension fund administrators, on their behalf and for the private pension funds that they manage, the marketing agents authorized/certified in the private pension system; d) the casinos; e) the auditors, the natural persons and legal entities providing tax or accounting consultancy; f) the notaries public, the attorneys-at-law and other persons exercising legal liberal professions, in case they provide assistance in drafting or perfecting operations for their clients concerning the purchase or sale of immovables, shares or registered shares or goodwill elements, the management of financial instruments or of other assets of clients, the provision or management of bank accounts, of savings accounts or of financial instruments, organization of the subscription process of the contributions needed for establishing, operating or managing a company, the establishment, administration or management of companies, of securities collective placement bodies or of other similar organizations or the development, according to law, of other fiduciary activities, as well as in the situation they represent their clients in any financial operation or operation aiming at immovables; g) the services suppliers concerning companies or other entities, others than those set forth at letter e) or f); h) the persons in charge with privatization process; i) the real estate agents; j) the associations and foundations; k) other natural persons or legal

provisions on the prevention and fighting against money laundering. Thus, when they are suspicious that by an operation which is going to take place there is intended to launder money, they are immediately obliged to inform the person or persons appointed by the management of the institutions mentioned at art.8 to examine and process the data and information concerning such cases. In their turn, these persons, based upon certain solid evidence, shall inform the National Office for Prevention and Control of Money Laundering. The first persons referred to are the employees of the entities and institutions set forth in art.8 of the law or even the natural persons or legal entities to which art. 8 refers explicitly, and the following are persons expressly appointed by the management of the entities and institutions set forth at art.8, in charge with the prevention and fight against money laundering.

Following the examination made in relation to the received notification, the Office may decide in a justified manner to suspend the performance of the transaction, and to this end it communicates immediately in writing to the legal entity or natural person to which the performance of the transaction was asked.

Concerning the operations of cash deposit or withdrawal, in RON or in foreign currency, these amounts exceeding the equivalent value in RON of Euro 10,000, the entitled staff within the institutions mentioned at art.8 will report to the Office within maximum 24 hours from the date of operation performance.

In all these situations in which it is informed, the Office proceeds to the examination, processing and supplement of information contained in notifications, and in case there are generated data and solid evidence related to money laundering, it shall communicate the entire informative material to the Prosecutor's Office attached to the High Court of Cassation and Justice. The legal entities mentioned at art.8 are obliged to establish the clients' identity for any transaction whose maximum limit in RON or foreign currency represents the equivalent value of Euro 10,000, no matter if the transaction is performed by a single operation or by several operations connected among them.

At the same time, the legal entities and natural persons set forth at art.8 are obliged to draw up a written report for each transaction which, pursuant to its type or to the unusual character related to the background of usual activities of the client, may be related to money laundering. There is also set forth the obligation of the legal entities or of natural persons for which the provisions of law no.656/2002 are enforced, to keep in a format which can be used as a mean of evidence in the court, the secondary or operative evidence, as well as the records of all the financial transactions representing the subject matter of the law, for a period of 5 years from the performance of each transaction, and subsequently they will be handed over to the Office for recording purposes.

The persons set forth at art. 8 paragraph 1 letter e, do not fall under the Law 656/2002, concerning the information they receive or obtain from one of their clients, when determining his legal status, or when defending or representing him during certain legal proceedings, or in relation to these, including when providing consultancy, concerning the commencement of certain legal proceedings, no matter if this information was received or obtained before, during or following the conclusion of proceedings. The persons mentioned in the above mentioned text are:

- the auditors, the natural persons and legal entities providing tax, financial and banking or accounting consultancy;
- notaries public, the attorney-at-law and other persons exercising legal liberal professions.

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entities selling goods and/or services, only in so far as they are based on operations with cash amounts, in RON or in foreign currency, whose minimum limit represents the equivalent value in RON of Euro 15, 000, no matter if the transaction is executed by a single operation or by several operations which seem to have a connection between them".

The legal entities set forth at art.8 shall appoint one or several persons in charge with the enforcement of this law. The financial institutions are obliged to appoint a compliance officer at the level of the executive management, which will have the duties set forth in Law 656/2002, in art.14 paragraph 1.

In case of offences set forth at articles 23 and 24, as well as in case of the offence related to financing terrorist actions, the bank secrecy and the professional secrecy are not binding on the criminal prosecution bodies and on the courts. The data and information requested by the prosecutor or by the court shall be communicated by the persons mentioned at art.8 upon the written request of the criminal investigation authorities, by authorizing the prosecutors or the court.

In all situations in which there is solid evidence concerning the commission of the offence of money laundering or of financing terrorism, for the purpose of gathering evidence or of identifying the offender, the prosecutor or the judge may decide the following measures:

a) putting under supervision the bank accounts and their assimilated accounts;

b) putting under supervision, listening to or recording the communications;

c) access to computer systems.

The prosecutor is authorized to decide to be sent the banking documents, deeds, financial or accounting documents, in case there is solid evidence as mentioned before.

In all situations in which there is solid and concrete evidence that there was committed or that the commission of a money laundering or terrorism offence was intended, which could not be discovered or whose offenders could not be identified by other means, undercover investigators may be used for the purpose of gathering data concerning the existence of the offence and the identification of the offenders, under the conditions set forth by the Code of Criminal Procedure.[13]

III. General methodological rules enforced for the investigation of the money laundering offence

The criminal investigation of the scene in case of money laundering offences corresponds to the general requirements concerning the functions, the conditions, the characteristics and the general rules of carrying on and materializing the results of any investigation of the crime scene. We will try to point out certain specific procedural and practical elements, as well as certain special rules in case of criminal investigation of the crime scene of certain economic offences, as they resulted from the criminal prosecution activities.[14]

The investigation of the crime scene in case of economic offences may be carried out on the occasion of finding the gross offence, this activity being placed usually, at the beginning of the investigations or at a certain time during the criminal prosecution.

The main activity carried out by the criminal prosecution bodies during such a procedure consists in the investigation of the crime scene. In such a situation, the results of the investigation are materialized in the findings report of the gross offence which, as a written mean of evidence, receives a different probatory value.

The assignments of the investigation of the crime scene derive both from the provisions of art. 129 of the Code of Criminal Procedure, and from the experience gathered in practice and in the specialty literature:

[13] Gh. Mateuţ, *Tratat de procedură penală, Partea generală, vol. I*, C.H. Beck Publishing House, Bucharest, 2007, pag. 92.

[14] V. Berchesan, *Cercetarea penală. Îndrumar complet de cercetare penală*, Icar Publishing House, Bucharest, 2001, pag. 251.

- investigating the crime scene for establishing its nature and the circumstances in which it was committed;
- discovering, determining, taking of traces and examining them and other means of evidence;
- determining the route crossed by the offender (*iter criminis*);
- establishing the manner in which the offender (offenders) acted;
- specifying the time of commission of the offence;
- identifying the persons related to the investigated cause of action: offenders, witnesses, victims, persons responsible in civil matters;
- working out the first versions for orientation purposes within the subsequent investigations.[15]

An important characteristic of money laundering offences consists in their hidden nature, determined by the intention of the offender that the judicial bodies should not take note of his facts.

Due to their own nature, to the manner and circumstances in which they are committed, the economic offences are difficult to be proved as they are committed in secret, without leaving many concrete traces and without drawing up or using documents. To this end, as compared to the limited character of using certain classical means of evidence, such as the witnesses' statements, the documents or concrete means of evidence, the center of gravity of the probation is transferred to the investigation at the crime scene, this being a probation proceeding which uses, by excellence, scientific means and methods, which are mainly criminal, being highly accurate and objective.

Another distinct characteristic of the investigation of the crime scene in such cases, consists in the fact that the main objective is represented by the determination of facts, starting from the concerned persons, who are, in the quasi-totality of the situations, known to the investigation team and not otherwise, as in case of murder offences, for instance, where many times, the purpose consists in the accurate determination of facts in order to identify, in this way, the offence perpetrators.

For the activities which are precursory to the performance of the investigation of a scene of money laundering, tax avoidance, it is necessary to establish the place, the purpose and the opportunity of its performance, as well as if it is included in a group of criminal procedural activities.[16]

Depending on the established facts and on the concrete activities which are going to be carried out, the prosecutor shall decide the structure of the investigation team.

Its members are prosecutors, officers of judicial police and specialists in various fields, depending on the characteristics of the crime scene and of the specific character of its commission. Thus, if there are IT systems and equipment at the crime scene, the presence of an IT specialist is absolutely necessary.

An important specification is that the team leader is always the prosecutor, who, under the authority and prerogatives conferred by law, has to assume the responsibility of the entire activity and to coordinate it effectively.

Moreover, the management of the technical team should be unipersonal in all cases, and shall provide the coherence of the decisions, as well as the knowing by the team leader of all data and information related to the development of the investigation of the crime scene.

[15] V. Stoica, *op.cit.,* pag. 112-115.
[16] A. Ciopraga, I. Iacobuță, *Criminalistica*, Chemarea Publishing House, Iaşi, 1997, pag. 237.

The experience demonstrated that the basic component of the team is the criminal specialist, whose specialized knowledge proved to be effective during the investigations carried out at the scene of certain money laundering offences.

After having setting up the team, the following step shall consist in obtaining as much information as possible concerning the person, the scene and the conditions under which the investigation will be carried out. The data and information existing prior to the investigation may be used in order to establish the investigation methods, the emergency operations, the sequence of activities, the areas and the objectives of interest. The sources of information may consist in databases managed by various public authorities, by those provided by the services and structures specialized in gathering and processing of information or even in precursory studies of the area of the respective crime scene.[17]

Taking into account the specialized action methods of criminal groups committing organized money laundering crimes, for the counteractions of their actions it is necessary to carry on the activity of gathering information simultaneously with the performance of the proper investigation, so that, by investigating the crime scene, the data obtained might be verified and made available immediately.

For instance, by listening to the communications in real time and by transmitting the data obtained to the investigation team, the plans were thwarted may times, that, on a plea of solving certain emergency work problems or of buying medicines for a family member, certain investigated persons leave the crime scene for a period, for the purpose of either alerting the other participants in the offence, or for hiding the objects bearing the traces of the offence.

The action of the team of investigating the crime scene has to act quickly and precisely, that is why it is necessary to know exactly the address of the concerned dwelling or institution, of its geographical position, as well as of the access ways and possibilities.

Due to the organized character that the money laundering phenomenon has recently got, the complex actions of the criminal prosecution bodies became more frequent, consisting in the simultaneous and adjoint formulation of criminal summons in several places where such offences have been committed.

These scenes are, sometimes, scattered at long distances, and the simultaneous actions are necessary for avoiding the disappearance of the offences traces, as a result of the communication among the members of the offence group.[18]

The criminal prosecution bodies have opposed to this tendency the setting up of certain pluridisciplinary investigation teams, having a fixed structure and, which, due to the common experience gathered, arrive at an homogenous and extremely efficient way of action.

Following the setting up of the investigation team it is necessary to select and make available its necessary material resources, urging on the transportation means, for the efficient travel of the team members, and on the communication means, very important for the coordination of actions in real time.[19] A different practical signification is granted to certain adjacent material means, whose omission may lead to practical difficulties which may be hard to remove. We refer to seals, labels, packages (polyethylene bags and pouches, cartoon boxes, envelopes, PET or glass recipients), as well as to accessories such as cord, wax, plasticine, adhesive substances, which must never lack from the criminal kit.

Concerning the technical insurance of the investigation teams of money laundering investigation, the basic element shall consist, as for other categories of offences, the criminal kit.

[17] Gr. Theodoru, *op. cit.*, pag. 302.

[18] E. Stancu, *Tratat de criminalistică*, Universul Juridic Publishing House, Bucharest, 2007, pag. 504.

[19] O. Năstase, V.Greblea, *Prelegeri la cursurile de perfectionare a procurorilor criminalişti, din cadrul Parchetului de pe lângă Curtea Supremă de Justiţie a României*, Bucharest, 1992.

In the current activities of the police related to money laundering there is used a specialized criminal kit, which contains various tools, divided in general use compartments and specialized compartments.

For providing, in the limited space of the criminal kit, a very large number of criminal means which could be used in the practical activity, the method used consisted in comprising certain elements with multiple usage, as well as in ensuring the compatibility and the interchangeability of its components.

For the determination of the results of the investigation of the crime scene it is necessary to use the photographic audio and video technique. Due to the tehnical progress, at present, digital cameras are used, and the processing of images is made by the electronic computer. This technology has the advantage of obtaining high quality pictures, which may be processed easily and in very short time.[20]

Before starting the travel to the scene where the investigation shall be made, it is required to establish exactly the ways of access to the respective place, no matter if it is a dwelling, an institution or a public location. If the immediate access is not possible, it is necessary to ensure and watch the perimeter, including by setting up watching or guard posts or by sealing the precincts. A successful element is represented by the unexpected character of the action, which excludes the possibility that the offenders eliminate the traces of the offence or change the condition and the position of the means of evidence. For obtaining the surprise element adjacent activities may be performed such as: the legendary penetration to the crime scene, blocking of the access ways and occupying the key-positions in the interest area by the team members. In practice, at the time of the access to the crime scene, the duties of the team members are strictly distributed, meaning that some of them go to the proper investigation scene, while others have as objectives to decline the quality and the purpose of the arrival, to identify certain present witnesses or the provision of the perimeter.

After having arrived at the crime scene, the identification and the unequivocal exposure of the quality and of the purpose of the arrival, the first task of the team consists in the identification and supervision of persons representing the subject matter of the investigation activity – the presumed perpetrators of the money laundering offence and their abettors – as well as in the identification and recognition of the possible witnesses present in the area.

In order to observe the procedural requirements it is necessary that all the activities carried out at the crime scene should be carried on in the presence of witnesses.

In the current activity there have been often problems related to the refuse of the requested persons to cooperate in order to assist in their capacity as present witnesses, as well as to the non-cooperating attitude of the fellows of concerned persons or even of the management of the institution where the investigation is carried on.

Such attitudes may be avoided by the objective and impersonal construction of the object of investigation, as well as by the explanation of the status of the present witness so that the requested persons might understand the significance and the importance of the actions to which they will assist, and also the fact that this a type of involvment and civil control of the activities of judicial bodies.

Another difficulty consists in the fact that, in certain situations, the investigation of the crime scene may last for a long time and consists mostly in routine procedures, so that, gradually, the attention and the interest of the present witnesses in the activities which they assist to, decrease. That is why, it is required that the present witnesses are inoculated with the idea that they are granted an official position involving certain responsibilities, that they are obliged to assist

[20] C-tin Aioaniţoaie ş. a, *op.cit.,* pag. 259.

directly and the right to use, according to law, their initiative, within all the actions taken within the investigation.[21]

We consider the practice of certain criminal investigation bodies to be useless, especially that of the police, to hear, in their capacity as witnesses, the persons having participated in the investigation of the crime scene as present witnesses, in so far as the conclusions of the investigation are determined in an official report being signed inclusively by the present witnesses.

Nevertheless, if there are doubts concerning the accuracy of the data recorded in the official report, we do not exclude the possibility to hear the present witnesses subsequently, concerning the activities which they assisted to, by the criminal prosecution bodies or by the trial court.

For the purpose of guaranteeing the right to defense, even from the beginning of the investigation, especially in case of gross money laundering offences, the prosecutor has to inform the concerned persons about their right to be assisted by the attorney-at-law chosen by themselves and he should offer them the possibility to appeal to his services, by the means of communication or in another way.

Regularly, the proper activities of the investigation of the crime scene are carried on in the presence of the attorney-at-law, but there are also certain measures of emergency nature which may be decided prior to his arrival. For instance, they may consist in the isolation of the crime scene and of its perimeter, in the setting up of the interdiction that certain persons leave the crime scene or communicate among them, in the identification and investigatory stop at the crime scene of the participants in the commission of the offence and of other persons who may provide data related to the commission of the offence, in the protection of objects and the preservation of traces existing at the crime scene.

In all cases, the introduction of the official report of registering the conclusions of the investigation of the crime scene, shall include the mention that the inquired person has been informed about the subject matter of the activity and he/she has been notified about his/her right to be assisted by an attorney-at-law, by specifying the steps undertaken for ensuring his/her presence.

If, due to various grounds, the attorney-at-law appears during the investigation, the time of his appearance, as well as the fact that starting from that moment he shall participate in all actions carried on, will be recorded as such in the contents of the official report. At the same time, the attorney-at-law will be informed verbally and by reading the entire contents of the official report, about the activities carried out and the results obtained prior to his arrival.

When one of the parties does not know the Romanian language it is necessary to use, during the entire investigation process, the services of a sworn translator, and at the end of the process, the drawn up documents shall be read and translated into the respective language. Due to the practical difficulties related to finding a sworn translator and to his travel to the crime scene, it is required either to be appointed by the concerned person, or to decide the measures needed for ensuring his/her presence prior to the commencement of the investigation of the crime scene.

If the performance of the investigation of the crime scene supposes the access to classified information, this circumstance must be taken into consideration both when making up the investigation team and when selecting the present witnesses.[22]

The observance of the law framework on classified information, the impossibility to provide immediate protection of the present witnesses, the location of the crime scene in an isolated or difficult to be accessed area represent also circumstances in which, in a justified way and by observing the proportionality, the prosecutor may make the decision to give up finding certain present witnesses or to give up their presence. But this decision must always be mentioned and

[21] G. Ungureanu, *Criminologie*, Timpolice Publishing House, Bucharest, 2004, pag. 207.
[22] V. Berchesan, *op.cit.,* pag. 275.

well-grounded in the contents of the official report drawn up on the occasion of the investigation of the crime scene.

Often, within the current activity, the investigation of the crime scene involves also the formulation of other criminal summons, such as the corporal or house searches, keeping objects or documents, reconstructions and others, and in this case the tactic and criminal procedural rules specific to them must be observed.

In the situations set forth by law, the permanent presence of the representative of the unit is compulsory at the investigation scene, and at the end of the activity, he/she shall be handed over a counterpart of the official report derived. Often, by his/her authority and knowledge about the crime scene, the representative of the unit provided fundamental data for the effective completion of the actions of investigating the crime scene.[23]

The investigation process of the crime scene supposes to make all physical and psychical efforts, being an activity which often requires an intense mental concentration of the persons carrying it out for long periods of time.

On the other hand, if it is carried out in an inadequate way, certain means of evidence may be omitted and the conclusions may be compromised.

That is why, among the members of the investigation team there must be complementarity and an appropriate distribution of the concrete tasks of each of them, being grafted on his/her specialty training.

As demonstrated by experience, the part of the team leader must be limited to the coordination and supervision of the actions, as well as to determining the conclusions of the investigation by involving individually only in the performance of the most important and difficult actions. Consequently, the prosecutor coordinating the investigation of the crime scene is the "clear mind" of the team, the person having an overall vision over the entire action, representing the team in its relationships with third parties and ensuring the communication with them, as well as the coordination with other teams carrying on similar activities in different places.

The achievement of the objectives of an investigation of the crime scene requires the use of the imagination, spontaneity and utilization of the experience gained in this field, and the interpretation of the traces and the gradual development of the versions represent a continuous process improving at the same time with carring on the investigation properly.

The demarcation of the crime scene is simply conventional, and the scope of the investigations may be extended gradually depending on the results previoulsy obtained. Thus, it is possible that the claiming take place in a certain location, and the receipt of money or of other benefits in other place or that the money be received or even claimed through the agency of one or several agents, abettors to the commission of offences.

For instance, due to the gradual extension of the investigations in the common places of a block of flats, there was found the package of a household appliance previously received by the owner of a flat as bribe. In another situation, in a vehicle ocasionally driven by a relative of the offender, there was found an amount of money, as well as documents which helped discover other money laundering offences. The investigation of the crime scene is almost always an unrepeatable action, that is why it has to be carried out very carefully, so that the smallest details being relevant to the cause of action as well, may be emphasized, but also those elements susceptible to be used subsequently in order to decide the truth.

Such elements which were detected during the investigations referred to the elastic banderoles or strips by which the amounts of money were tied up or to the characteristics making possible the identification of the objects – mark, type, model, manufacturing series, color, dimensions, fault, documents of origin and others.

[23] V. Berchesan, *op. cit.*, pag. 258.

The general issues that have to be cleared up by the investigation of the crime scene are grafted on the constituent elements of money laundering offences, these being as follows:

- The identity, capacity and participation of the persons in the commission of money laundering offences;
- The illicit actions and non-actions of these persons, including those related to the work duties;
- The purpose of the offence-related activity;
- The money or benefits representing the subject matter of the offence related activity.

At the same time, there shall be searched documents, securities and other means of evidence which could lead to attendant elements of the proper facts, but which contribute to the settlement of the criminal cause: the work duties of the offender, his/her relationships with the denouncer, the assets or securities susceptible to be the object of the injunctions for preservation of assets, the amounts of money or other benefits which could derive from the commission of other money laundering offences (assets exceeding the real needs of consumption or of use, the amount of assets of the same kind and having the same characteristics etc.). [24]

A special category of traces which, within the procedure of finding gross money laundering offences is distinctly relevant, is represented by the traces of fluorescent substances. As a matter of fact, in such situation, the investigation of the crime scene is closely connected to the precursory and simultaneous activities of finding gross offences.

The traces of fluorescent substances shall be highlighted by the ultraviolet lamp and subsequently they will be pictured and filmed by standard of measures and described in relation to their nature, size, value, form and position.

It is also necessary to describe the object bearing them and which may be, eventually, kept for being pictured in laboratory.

In certain situations, such exact remarks had a special impact on the development of the investigation, being corroborated with the other means of evidence. For instance, on the desk (work table) of an official there was highlighted a stratification trace, presenting fluorescence and deriving from the fluorescent subtance by which the amount of money received as bribe had been treated previously.

The trace had a prolonged and rectilinear form, and following its measurement, it was proved to have the same length as the notes which had been the object of the bribe and that the respective official had arranged on his/her desk after having received them.

The fluorescence traces and microtraces may provide interesting details, due to their position, both concerning the place where the notes chimically treated were put, and concerning the route crossed or the objects grazed by the persons getting in touch with the amount of money. Another important aspect is that the fluorescent substances used are made up of particles of reduced dimensions and density, so that they have the tendency to accumulate on the edges and in the hollows of the objects and, in certain conditions, they can be carried far away by the air draughts.[25]

That is why, the discovery of only some particles of fluorescent substance in a certain place, has to be regarded with reservation and only on the aggregate of the elements resulted from the investigation of the crime scene. A typical example for adapting the investigation to the environment conditions consists in the investigation of the objects in a precincts where there is no possibility to create the necessary obscurity conditions artificially, and in this case the

[24] V. Lăpăduşi, *op. cit.*, pag. 305.

[25] Gh. Mocuţa, *Metodologia investigării infracţiunilor de spălare a banilor*, Noul Orfeu Publishing House, 2004, pag. 178.

investigation team waited for the evening in order to highlight the fluorescence traces in a timely manner.

During the investigation, also the negative circumstances have to be highlighted and described and which, from the probation point of view, may provide very important elements. We referred also to the absence of traces of fluorescent substance on the palms of the perpetrator of a gross bribe offence, even if the amount of money was found in another place than that where the briber had put it.

The explanation has been found subsequently, meaning that because of the fact it was winter, the perpetrator had some gloves with which he/she took the amount of money and moved it to another place, where it was found by the criminal prosecution bodies.[26]

The objects and the documents shall be packaged accordingly and afterwards they shall be labelled, sealed and carried in safety conditions for avoiding their destruction, impairment or change of their properties. In practice, keeping and preserving of components of computer systems for investigation purposes have raised problems, as because of their volume and weight, they cannot be always packaged and sealed, and in this situation there has been performed the isolation and sealing of their connection orifices to the power source and to other components of the same type.

As far as concerns the determination of the conclusions of the investigation of the crime scene, the official report must be drawn up immediately after the completion of the proper activity, preferably in the same place. The public places or those having other characteristics which make impossible the immediate drawing up of the official report are excepted (climate or environmental factors). [27]

In such cases, the document related to the completion of investigation shall be drawn up in another adequate location in the neighbourhood of the crime scene or at the prosecutor's office, based upon the notes taken during the investigation of the crime scene and by meeting all the procedural requirements. When the object of the investigation is represented by large spaces or different places or supposes distinct types of activities, the actions shall be performed by stages and described simultaneously and according to their development.

The official report has to describe chronologically, in an accurate and detailed manner, all the activities and findings carried out in an objective, concise, solemn and accessible way. In order to supplement the information of the crime scene there shall be drawn up, preferably to scale, plans and drawings of the crime scene or of certain objects; the plans shall be signed by all the participating persons and these are mentioned in the official report. At the same time, the contents of the official report have to record the statements of the inquired persons, including those of the denouncer, by insisting on the reportings and explanations which, in the light of the conclusions of the investigation of the crime scene, are directly relevant concerning the constituent elements of money laundering offences.

It is preferable that the entire process of investigation of the crime scene should be filmed by the video camera, as subsequently the record may provide additional probation elements and because it may represent itself a mean of evidence or even a procedural proof, certifying the observance of the criminal proceedings requirements.

Actually, during the performance of the investigation, the objects and traces discovered, as well as the elements found, are described in detail aloud while being filmed, so that the video record might represent an extension and a reproduction of the contents of the official report in images. The elements discovered on the spot shall represent the object of a photographic board

[26] Gh. Mocuţa, *op. cit.*, pag. 283.
[27] I. Mircea, *Criminalistica*, Editura Didactică şi Pedagogică, Bucharest, 1998, pag. 237.

which, together with the video tapes or the electronic supports containing images, are enclosed to the official report.[28]

The participating persons shall be asked if they have objections or remarks related to the performance of the investigation or to those recorded in the official report, and in case of any affirmative situation, these remarks will be mentioned, trying to eliminate or correct the elimination or the correction of the inadequate aspects noticed.

Finally, it is necessary to locate exactly in time both the moment of the beginning and of the completion of the investigation, and of the performance of the main stages of the activities, as well as the specification of the total number of pages of the official report.

[28] V. Stoica, *op.cit.,* pag. 302.

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METODOLOGIA INVESTIGĂRII CRIMINALISTICE A INFRACȚIUNILOR DE SPĂLARE A BANILOR

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Abstract

Urmare a neadoptării unor legi noi specifice economiei de piață cum sunt: legea falimentului, legea de incriminare a evaziunii fiscale, legea privind transferul de valută etc., precum şi dezincriminarea infracțiunilor privind avutul public, fenomenul infracțional este în creştere. În acest context, aplicarea prevederilor referitoare la infracțiunile privind avutul public, prin cuantumul redus al pedepselor, nu mai realizează prevenția generală necesară, ele fiind chiar încurajatoare în unele cazuri. Nu întâmplător, factori cu funcții de decizie din economie au fost corupți ori s-au lăsat mituiți, participând direct la comiterea unor infracțiuni economice cu mari repercursiuni asupra avutului statului, a patrimoniului societăților cu capital public în favoarea agenților privați.

Cuvinte cheie : *spălarea banilor, investiigare criminalistică*

Introducere

Evoluția ascendentă a criminalității în România este consecința atât a impactului problemelor economico-sociale grave caracteristice perioadei de tranziție către economia de piață, cât şi a înțelegerii greşite a libertăților de către multe persoane interesate în obținerea de profituri prin eludare la care se adaugă şi tendința elementelor infractoare de a-şi crea legături infracționale în alte țări, îndeosebi în mediul celor aflați în grupurile de imigranți şi chiar în unele structuri ale "crimei organizate ".

Starea de provizorat care a existat în toate sectoarele vieții social-politice şi economice, inclusiv în domeniul respectării ordinii publice, a facilitat creşterea fenomenului infracțional, îndeosebi pe segmentul infracțiunilor cu violență şi a celor contra avutului public şi privat, nesoluționarea corespunzătoare a tuturor tensiunilor şi conflictelor sociale a creat precedente care au condus la escaladarea manifestărilor revendicative şi de justiție personală sau colectivă.

Complexitatea şi amploarea acestui fenomen, de spălare a banilor, este de natură să descurajeze orice încercare de control statal şi creează condiții de camuflare a banilor proveniți din operațiuni ilicite. Contrar unei impresii generale, nu este adevărat că cea mai mare parte a acestor bani provin din operațiuni criminale. Menționăm că banii "murdari" şi banii "fierbinți" nu reprezintă unul şi acelaşi lucru. Banii "murdari" reprezintă doar o mică parte din banii "fierbinți", iar în ceea ce priveşte prima categorie există o distincție clară între banii care sunt murdari pentru că provin din tranzacții criminale şi cei care, deşi câştigați legal, devin murdari deoarece deținătorii lor optează pentru alte practici, precum evaziunea fiscală şi exportul ilegal de capital.

Banii circulă în toată lumea pe aceleaşi canale geografice şi instituționale deschise crimei organizate şi folosite de aceasta. Pentru transferul dintr-un loc în altul aceşti bani folosesc aceeaşi tehnologie şi tind să se acumuleze în aceleaşi locuri sau la aceleaşi bănci.

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În aceste condiţii apare ca fiind deosebit de importantă analiza metodologiei de investigare a infracţiunilor care conduc la spălarea banilor.

I. Spălarea banilor, probleme de clarificat, obiect al probaţiunii

Legislaţia în vigoare prevede mai multe modalităţi de investigare a infracţiunilor economice, printre care se regaseste şi spălarea banilor:

- punerea sub supraveghere a conturilor bancare ale celor cercetati şi a conturilor asimilate acestora;
- punerea sub supraveghere sau sub ascultare a *liniilor* telefonice;
- accesul la sistemele informationale;
- solicitarea comunicarilor actelor autentice sau sub semnatura privata, a documentelor bancare, financiare ori contabi1e.[1]

A. Punerea sub supraveghere a conturilor bancare şi a conturilor asimilate acestora

Această instituţie probatoare se dispune pentru a verifica sumele de bani care se tranzacţionează de către persoane suspecte de a fi comis infracţiuni de spălarea banilor ori pentru a stabili operaţiuni financiar-bancare ilicite.

Pentru a dispune punerea sub supraveghere a conturilor- bancare şi a conturilor asimilate acestora, trebuie îndeplinite urmatoarele condiţii:

a) Să existe indicii temeinice ca se pregăteşte comiterea unei infracţiuni de spălarea banilor sau ca s-a comis o asemenea infracţiune.

b) Indiciile temeinice să privească savârsirea sau pregătirea unei infracţiuni de spălarea banilor atribuite prin lege în competenta Directia Naţionala Anticoruptie.

c) Persoana care pregăteşte comiterea uneia dintre infracţiunile de spălarea banilor prevăzute de lege sau a comis o asemenea infracţiune să aiba conturi bancare sau asimilate acestora şi să le foloseasca în operatiuni financiar-bancare.

d) Punerea sub supraveghere a conturilor bancare şi a conturilor asimilate acestora să fie utilă pentru aflarea adevărului.[2]

În legatura cu datele obtinute prin luarea acestei măsuri, art. 21 din O.U.G. nr. 43/2002 prevede în mod expres obligaţia persoanelor care efectueaza urmarirea penală, a specialistilor precum şi a personalului auxiliar de specialitate de a respecta secretul profesional.

B. Punerea sub supraveghere sau sub ascultare a liniilor telefonice

Punerea sub supraveghere sau sub ascultare a liniilor telefonice se face atunci când sunt indicii temeinice cu privire la savârsirea unei infracţiuni de spălarea banilor, şi se dispune în scopul strângerii de probe sau al identificarii făptuitorului.

Măsura poate fi dispusa de procurorii Directiei Nationale Anticorupţie o durata de cel mult 30 de zile, conform art. 16 alin. 1 din O.U.G. nr. 43/2002. Pentru motive temeinice, asura poate fi prelungita de procuror prin ordonanta motivata, fiecare prelungire neputând depasi 30 de zile. Merita să subliniem şi faptul ca aceasta măsura se ia numai dupa începerea urmaririi penale.[3]

C. Accesul la sistemele informaţionale

Pentru a se autoriza accesul la sistemele informationale, trebuie să fie îndeplinite, cumulativ, urmatoarele condiţii:

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[1] T. Butoi, în C. Aionioaie, V. Bercheşan, T. Butoi, I. Marcu, C. Pletea, I.E. Sandu, E. Stancu, *Tratat de tactică criminalistică*, Editura Carpaţi, Craiova, 1992, pag. 87.

[2] V. Bujor, *op. cit.*, pag. 225.

[3] L. Cârjan, *Tratat de criminalistică*, Editura PinguinBook, Bucureşti, 2005, pag. 300.

- să existe indicii temeinice cu privire la savârsirea unei infracţiuni de spălare a banilor;
- indiciile să privească pregătirea unei infracţiuni de spălarea banilor;
- persoana care pregăteşte comiterea unei infracţiuni de spălarea banilor să folosească asemenea sisteme informationale;
- accesul la aceste sisteme să fie util pentru strângerea de probe sau identificarea făptuitorului infracţiunii de spălarea banilor.[4]

Măsura se ia de către procurorul Directiei Naţionale Anticoruptie, prin ordonanţă, pe o durata de cel mult 30 de zile. Pentru motive temeinice, măsura accesului la sisteme informaţionale poate fi prelungită, prin ordonanţă motivata, de către acelaşi procuror, fiecare prelungire neputând depăşi 30 de zile.

Dispoziţiile art. 91^1-91^5 C. pr. pen., privind înregistrările audio sau video, la care actele normative speciale fac trimitere, se aplică în mod corespunzator.[5]

În doctrină se apreciază că accesul la sistemele informaţionale se poate face şi în cadrul percheziţiei. Organul judiciar, asistat de un specialist în informatică, va efectua percheziţia cu precautii speciale atât la dezasamblarea sau asamblarea echipamentelor unui computer, cât şi pentru integritatea şi accesibilitatea datelor pe care le conţin.

D. Înregistrările audio sau video

Înregistrările audio sau video au fost introduse prin Legea nr. 141/1996 pentru modificarea şi completarea Codului de procedură penală şi sunt reglementate în art. 91^1-91^5 C. pr. pen.

În doctrina juridică s-a opinat că înregistrarile audio sau video sunt procedee tehnice de relevare şi conservare a probelor, iar rezultatul folosirii lor - banda magnetica, filmul, fotografia, caseta video fac parte din categoria generala a mijloacelor materiale de proba.

Potrivit art. 91^1 C.pr.pen., convorbirile telefonice pot fi înregistrate pe banda magnetica dacă sunt date sau indicii temeinice privind pregătirea sau savârsirea unei infracţiuni pentru care urmarirea penală se face din oficiu, iar interceptarea este utila. înregistrarile audio sau video pot servi că mijloace de proba dacă din continutul convorbirilor înregistrate rezulta fapte sau împrejurari de natura să contribuie la aflarea adevărului[6].

Autorizarea procurorului se dă pentru durata necesară înregistrării, pâna la cel mult 30 de zile, în afară de cazul în care legea dispune altfel. Autorizarea poate fi prelungită în aceleaşi condiţii, pentru motive temeinice justificate, fiecare prelungire neputând depăşi 30 de zile.

Înregistrările audio sau video pot fi făcute şi la cererea motivată a persoanei vatamate privind comunicările ce-i sunt adresate, cu autorizarea procurorului anume desemnat de procurorul general.

Organul de urmărire penală este obligat că după efectuarea înregistrărilor să întocmească un proces-verbal care să cuprindă, pe lângă datele generale prevazute în art.91 alin. 1 lit. a-e C. pr. pen., urmatoarele menţiuni: autorizarea dată de procuror, numărul sau numerele posturilor telefonice între care se poartă convorbirile, numele persoanelor care le poartă, dacă sunt cunoscute, data şi ora fiecărei convorbiri, numarul de ordine al rolei sau casetei pe care s-a făcut imprimarea.[7]

Înregistrările convorbirilor telefonice sunt redate în forma scrisă şi se atasează la procesul-verbal dupa ce au fost certificate pentru autenticitate de catre organul de urmărire penală, verificate şi contrasemnate de procurorul care efectuează sau supraveghează urmarirea penală, La procesul-verbal se ataşează caseta cu rola care conţine înregistrarea convorbirii, în original, sigilată de către

[4] T. Amza, *Criminalitatea informatică*, pag. 97.
[5] Gr. Theodoru, *Tratat de drept procesual penal*, Editura Hamangiu, Bucureşti, 2007, p. 119.
[6] I. Neagu, *Tratat de procedură penală. Partea generală*, Editura Universul Juridic, Bucureşti, 2008, pag. 120.
[7] I. Neagu, *Drept procesual penal. Partea generală*, Editura Global Lex, Bucureşti, 2008, pag. 234.

organul de urmărire penală cu sigiliul sau propriu. Potrivit art. 91^5 C.pr.pen., înregistrările audio, video sau de imagini pot fi supuse expertizei tehnice la cererea procurorului, a părților ori din oficiu. De asemenea, aceste înregistrări pot servi ca mijloace de probă dacă nu sunt interzise de lege. Concluziile expertului, deşi nu sunt obligatorii pentru procuror, pot servi la lămurirea cauzei şi la aflarea adevărului.[8]

II. Aspecte de drept procesual penal, incidente în investigarea infracțiunii de spălare a banilor

În vederea rezolvării cauzelor penale, organele judiciare au nevoie de date sau informații care să conducă la concluzia existenței sau inexistenței infracțiunii, vinovăției sau nevinovăției făptuitorului.

Organele judiciare în scopul aflării adevărului, trebuie sa cunoască realitatea obiectivă a împrejurărilor cauzei, operațiune care se realizează prin administrarea probelor, astfel încât să se formeze o reprezentare exactă a celor petrecute. Procesul de informare a organului judiciar se realizează exclusiv pe baza surselor admise de lege şi numai în formele prescrie în normele juridice. Administrarea probelor nu se poate face decât cu evitarea oricărei atingeri care ar putea nesocoti demnitatea umană şi prestigiul justiției. Potrivit art. 68 C.pr.pen., este interzisă folosirea mijloacelor de constrângere, a promisiunilor false, a provocărilor ori înşelăciune, metode care aduc atingere demnității uname si chiar justiției.

Administrarea probelor presupune a da eficacitate juridică aspectelor concrete cuprinse în probe, astfel încât să permită soluționarea cauzei.

Ca activitate procedurălă, administrarea probelor este desfăşurată de către organele judiciare în colaborare cu părțile şi constă în îndeplinirea drepturilor şi obligațiilor prevăzute de lege cu privire la procurarea, verificarea şi prelucrarea, cu piese ale dosarului pricinii, a dovezilot prin prisma cărora urmează să fie elucidate faptele şi soluționată cauza.

Prin obiect al probațiunii se înțelege ansamblul faptelor şi împrejurărilor de fapt ce trebuie dovedite în vederea soluționării cauzei penale. În obiectul probațiunii sunt incluse numai faptele şi împrejurările de fapt, precum şi existența normelor juridice, prezumându-se că ele sunt cunoscute atât de organele judiciare cât şi de către justițiabili.

Fac parte din obiectul generic al probațiunii faptele care privesc incriminarea, împrejurările referitoare la agravarea sau atenuarea răspunderii penale, precum şi aspecte privind urmările infracțiunii.

Prin sarcina probațiunii se înțelege obligația administrării probelor în procesul penal.[9]

Potrivit art. 202 C.pr.pen., administrarea probelor pentru organele de urmărire penală presupune în primul rand strângerea probelor necesare pentru aflarea adevărului şi lămurirea cauzei sub toate aspectele.

Probele sunt definite ca fiind elemente de fapt cu relevanță informativă asupra tuturor laturilor cauzei penale. Proba nu poate fi confundată cu mijlocul de probă, aceasta fiind o cale legală prin care proba este administrată în procesul penal.

În conformitate cu art. 64 C.pr.pen. sunt considerate mijloace de proba: declarațiile învinuitului sau ale inculpatului, declarațiile părții vătămate, ale părții civile şi ale părții responsabile civilmente, declarațiile martorilor, înscrisurile, înregistrările audio sau video,

[8] I. Neagu, *Tratat de drept procesual penal. Partea generală*, Editura Universul Juridic, Bucureşti, 2008, pag. 221.

[9] I. Moldovan, *Drept procesual penal*, Editura Didactică şi Pedagogică, 1999, pag. 159.

fotografiile, mijloacele materiale de probă, constatările tehnico-stiintifice, constatările medico-legale si expertizele.[10]

În faza de urmarire penală, cercetarea locului faptei se efectuează *după începerea urmaririi penale***,** care se poate dispune *imediat sau pe parcursul investigării criminalistice*. De regulă se efectuează în prezența martorilor asistenți, afară de cazul când acest lucru nu mai este posibil.[11]

Cercetarea se poate efectua în prezența părților, dar neprezentarea părților încunostiințate nu împiedică efectuarea cercetării. Învinuitul sau inculpatul reținut ori arestat poate fi adus la cercetare. Dacă acest lucru nu este posibil, organul de urmărire penală îi pune în vedere că are dreptul să fie reprezentat şi îi asigura, la cerere, reprezentarea. Potrivit art. 172 C.pr.pen., modificat prin Legea nr. 32/1990, apărătorul învinuitului sau inculpatului are dreptul să asiste la efectuarea oricărui act de urmărire penală; deci, şi la cercetarea locului faptei.

În faza de judecată, potrivit art. 129 alin. 4 C.pr.pen., instanța de judecată efectuează şi cercetarea locului faptei în condiții de contradictorialitate, cu citarea părților şi în prezența procurorului, când participarea acestuia la judecata este obligatorie.

Persoanele care se află sau vin la locul faptei pot fi împiedicate, potrivit art. 129 alineat final C.pr.pen., să comunice între ele sau cu alte persoane, ori să plece înainte de terminarea cercetării.

Proceduri de identificare a clienților şi de prelucrare a informațiilor referitoare la spălarea banilor

Potrivit art.3 din Legea nr. 656/2002 cu modif. ulterioare, angajatii persoanelor jurdice sau persoana fizică dintre cele prevăzute la art.8[12] are obligația să respecte dispozițiile legale cu privire la prevenirea şi combaterea spălării banilor. Astfel, atunci când acestea au suspiciuni că print-o operațiune care urmează să aibă loc se urmăreşte spălarea banilor, sunt obligate de îndată să sesizeze persoana sau persoanele desemnate de conducerile instituțiilor arătate la art.8 să analizeze şi să prelucreze datele şi informațiile privitoare la asemena cazuri. La rândul lor, aceste persoane, pe baza unor indicii temeinice, vor informa ONPCSB. Primele persoane la care s-a făcut referire sunt anagajați ai entităților şi instituțiilor prevăzute în art.8 din lege sau chiar persoanele fizice ori juridice la care se referă în mod explicit art.8, iar următoarele sunt persoane anume desenate de

[10] V. Lăpăduşi, *Rolul şi contribuția probelor criminalistice şi medico-legale în stabilirea adevărului*, Editura Luceafărul, 2005, pag. 225.

[11] V. Stoica, *Cercetarea la fața locului*, în Buletinul intern, nr.2/1991.

[12] Conform art. 8, „intra sub incidenta prezentei legi urmatoarele persoane fizice sau juridice: a) instituțiile de credit şi sucursalele din România ale instituțiilor de credit străine; b) instituțiile financiare, precum şi sucursalele din România ale instituțiilor financiare străine; c) administratorii de fonduri de pensii private, în nume propriu şi pentru fondurile de pensii private pe care le administrează, agenții de marketing autorizați/avizați în sistemul pensiilor private; d) cazinourile; e) auditorii, persoanele fizice şi juridice care acordă consultanță fiscală sau contabilă; f) notarii publici, avocații şi alte persoane care exercită profesii juridice liberale, în cazul în care acordă asistență în întocmirea sau perfectarea de operațiuni pentru clienții lor privind cumpararea 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 ori desfăşurarea, potrivit legii, a altor activități fiduciare, precum şi în cazul în care îşi reprezintă clienții în orice operațiune cu caracter financiar ori vizând bunuri imobile; g) furnizorii de servicii privind societăți comerciale sau alte entități, alții decât cei prevăzuți la lit. e) sau f); h) persoanele cu atribuții în procesul de privatizare; i) agenții imobiliari; j) asociațiile şi fundațiile; k) alte persoane fizice sau juridice care comercializează bunuri şi/sau servicii, numai în măsura în care acestea au la bază operațiuni cu sume în numerar, în lei sau în valută, a căror limită minimă reprezintă echivalentul în lei a 15.000 euro, indiferent dacă tranzacția se execută printr-o singură operațiune sau prin mai multe operatiuni ce par a avea o legătura între ele”.

conducerea entităţilor şi instituţiilor prevazute la art.8, care au atribuţii în domeniul prevenirii şi combaterii spălării banilor.

În urma analizei pe care o face, în legătură cu sesizarea primită, Oficiul poate decide în mod justificat suspendarea efectuării tranzacţiei, în care sens comunică imediat şi în scris persoanei juridice sau fizice căreia i s-a cerut efectuarea tranzacţiei.

Pentru operaţiunile de depunere sau retragere de sume în numerar, în lei sau valuta, sume ce depăşesc echivalentul în lei a 10000 euro, personalul abilitat din cadrul instituţiilor menţionate la art.8 va raporta Oficiului în termen de maxim 24 de ore de la data efectuării operţiunii.

În toate aceste cazuri în care este sesizat, Oficiul procedează la analiza, prelucrarea şi completarea informaţiilor cuprinse în sesizari, iar dacă rezulta date şi indicii teminice referitoare la spălarea banilor, va trimite întregul material informativ Parchetului de pe lângă Inalta Curte de Casaţie şi Justiţie. Persoanele juridice menţionate la art.8 au obligaţia să stabilească identitatea clienţilor pentru orice tranzacţie a cărei limită maximă în lei sau valută reprezintă echivalentul a 10000 euro, indiferent dacă tranzacţia are loc printr-o singură operaţiune sau prin mai multe operaţiuni care au legătură între ele.

Totodată, persoanele juridice şi fizice prevăzute la art.8 sunt obligate să intocmească raport scris pentru fiecare tranzacţie care, în virtutea naturii ei sau a caracterului neobişnuit raportat la contextul activităţilor obişnuite ale clientului, poate fi legată de spălarea banilor. Este prevăzută de asemenea obligaţia persoanelor juridice sau fizice cărora li se aplică prevederile legii nr.656/2002 de a păstra într-o formă care poate fi folosită ca mijloc de probă în justiţie, evidenţa secundară sau operativă, precum şi înregistrări ale tuturor tranzacţiilor financiare care fac obiectul legii, pentru o perioadă de 5 ani de la executarea fiecărei tranzactii, dupa care vor fi predate Oficiului pentru arhivare.

Nu intră sub incidenţa Legii 656/2002 persoanele prevăzute la art.8 alin.1 lit.e, cu privire la informaţiile pe care le primesc sau le obţin de la unul dintre clienţii lor, în cursul determinării situaţiei juridice al acestuia, sau al apărării ori reprezentării acestuia în cadrul unor proceduri judiciare, ori în legătură cu acestea, inclusiv al acordării de consultanţă, cu privire la declanşarea unor proceduri judiciare, indiferent dacă aceste informaţii au fost primite sau obţinute înainte, în timpul ori după încheierea procedurilor. Persoanele prevăzute în textul prezentat mai sus sunt:

- auditorii, persoanele fizice şi juridice care acordă consultanţă fiscală, financiar-bancară sau contabilă;
- notarii publici, avocaţii şi alte persoane care exercită profesii juridice liberale.

Persoanele juridice prevăzute la art.8 vor desemna una sau mai mult persoane care au responsabilităţi în aplicarea prezentei legi. Instituţiile financiare au obligaţia de a desemna un ofiţer de conformitate la nivelul conducerii executive, care va avea atribuţiile prevăzute în Legea 656/2002, în art.14 alin.1.

În cazul infracţiunilor prevăzute la art.23 şi 24, precum şi în cazul infracţiunii de finaţare a actelor de terorism, secretul bancar şi secretul profesional nu sunt opozabile organelor de urmărire penală şi nici instanţelor de judecată. Datele şi informaţiile solicitate de procuror sau de instanţa de judecată se comunică de către persoanele menţionate la art.8 la cerea scrisă a organelor de cercetare penală, cu autorizarea procurorilor ori a instanţei.

În situaţiile în care există indicii temeinice cu privire la săvârşirea infracţiunii de spălare a banilor sau de finanţare a terorismului, în scopul strângerii de probe sau al identificării făptuitorului, procurorul sau judecătorul poate dispune următoarele măsuri:

a) punerea sub supraveghere a conturilor bancare şi a conturilor asimilate acestora;
b) punerea sub supraveghere, interceptare sau înregistrare a comunicaţiilor;
c) accesul la sisteme informatice.

Procurorul este împuternicit să dispună să i se comunice documente bancare, înscrisuri, acte financiare ori contabile, în situaţia existenţei indiciilor temeinice precizate mai sus.

În situaţiile în care există indicii temeinice şi concrete că s-a săvârşit sau că se pregăteşte săvârşirea unei infracţiuni de spălare a banilor ori de terorism, care nu poate fi descoperită sau ai cărei făptuitori nu pot fi identificaţi prin alte mijloace, pot fi folosiţi în vederea strângerii datelor privind existenţa infracţiunii şi identificarea făptuitorilor, investigatori sub acoperire, în condiţiile prevăzute de Codul de procedură penală.[13]

III. Reguli metodologice generale aplicateîn investigarea infracţiunii de spălare a banilor

Investigarea criminalistică a locului faptei în cazul infracţiunilor de spălarea banilor corespunde cerinţelor generale privind funcţiile, condiţiile, caracteristicile şi regulile generale ale desfăşurării şi materializării rezultatelor oricărei cercetări a locului faptei. Vom încerca să evidenţiem câteva aspecte procesuale şi practice specifice, precum şi unele reguli speciale în cazul investigării criminalistice a locului săvârşirii unor fapte de natura economica, aşa cum au rezultat acestea din activităţile de urmărire penală.[14]

Investigarea locului faptei în cazul infracţiunilor economice poate avea loc cu prilejul constătării infracţiunii flagrante, activitate plăsată, de regulă, în debutul cercetărilor sau într-un alt moment al urmăririi penale.

Principala activitate efectuată de organele de urmărire penală în cursul unei asemenea proceduri constă în investigarea locului faptei. Intr-o asemenea situaţie, rezultatele cercetării sunt materializate în procesul-verbal de constătare a infracţiunii flagrante care, ca mijloc de probă scris, capătă o valoare probatorie deosebită.

Sarcinile cercetarii locului faptei derivă atât din prevederile art. 129 Cod procedură penală, cât şi din experienta acumulată în practică şi literatura de specialitate:

- investigarea locului în care a fost savârsită infracţiunea pentru stabilirea naturii acesteia şi a împrejurărilor în care a fost comisă;
- descoperirea, fixarea, ridicarea şi examinarea urmelor şi a altor mijloace de proba;
- determinarea drumului parcurs de infractor (*iter criminis*);
- stabilirea modului de operare al făptuitorului (făptuitorilor);
- precizarea timpului savârşirii infracţiunii;
- identificarea persoanelor care au tangenţă cu cauza cercetata: făptuitori, martori, victime, persoane responsabile civilmente;
- elaborarea primelor versiuni pentru orientarea investigaţiilor ulterioare.[15]

O caracteristică importantă a infracţiunilor de spălarea banilor constă în caracterul ocult al săvârşirii acestora, determinat de interesul subiectului infracţiunii ca faptele lui să nu ajungă la cunoştinţa organelor judiciare.

Datorită însăşi naturii lor, modului şi împrejurărilor în care sunt săvârşite, infracţiunile economice sunt dificil de probat întrucât acestea sunt comise departe de ochii publicului, fără a lăsa prea multe urme materiale şi fără a fi întocmite sau utilizate înscrisuri. în acest sens, faţă de caracterul limitat al folosirii unor mijloace de probă clasice, cum ar fi declaraţiile martorilor,

[13] Gh. Mateuţ, *Tratat de procedură penală, Partea generală, vol. I*, Editura C.H. Beck, Bucureşti, 2007, pag. 92.

[14] V. Bercheşan, *Cercetarea penală. Îndrumar complet de cercetare penală*, Editura Icar, Bucureşti, 2001, pag. 251.

[15] V. Stoica, *op.cit.,* pag. 112-115.

înscrisurile sau mijloacele materiale de probă, deseori centrul de greutate al probațiunii se mută asupra cercetării la fața locului, procedeu probatoriu care utilizează, prin excelență, mijloace şi metode ştiințifice, în primul rând criminalistice, având un grad ridicat de exactitate şi obiectivitate.

O altă trăsătură distinctivă a investigării locului faptei în asemenea cazuri, constă în faptul că obiectivul principal îl constituie stabilirea faptelor, pornind de la persoanele vizate, care sunt, în cvasitotalitatea situațiilor, cunoscute echipei de cercetare şi nu invers, ca la infracțiunile de omor, spre exemplu, unde de multe ori, scopul constă în stabilirea exactă a faptelor în vederea identificării, în acest mod, a autorilor infracțiunii.

Ca activități premergătoare efectuării cercetării locului unei fapte de spălarea banilor, evaziune fiscală, spălarea banilor, sunt necesare stabilirea locului, scopului şi oportunității efectuării acesteia, precum şi dacă aceasta va fi inclusă într-un complex de activități procedural penale.[16]

În funcție de cele stabilite şi de activitățile concrete care urmează a fi efectuate, procurorul va stabili componența echipei de cercetare.

Membrii acesteia sunt procurori, ofițeri de poliție judiciară şi specialişti în diverse domenii, în funcție de caracteristicile locului faptei şi de specificul săvârşirii acesteia. Astfel, dacă la locul faptei se află sisteme şi echipamente I.T., prezența unui specialist informatician este absolut necesară.

O precizare importantă este aceea că totdeauna şeful echipei este procurorul, care, în temeiul autorității şi prerogativelor conferite de lege, trebuie să îşi asume responsabilitatea întregii activități şi să o coordoneze efectiv.

În plus, conducerea echipei tehnice să fie în toate cazurile unipersonală, aceasta asigurând coerența deciziilor, precum şi cunoaşterea de către şeful echipei a tuturor datelor şi informațiilor legate de desfăşurarea cercetării locului faptei.

Experiența a demonstrat faptul că un component de bază al echipei este specialistul criminalist, ale cărui cunoştințe specializate şi-au dovedit eficacitatea în cursul cercetărilor efectuate la locul comiterii unor infracțiuni de spălare a banilor.

După constituirea echipei, următorul pas îl constituie obținerea a cât mai multe informații cu privire la persoana, locul şi condițiile în care se va efectua cercetarea. Datele şi informațiile preexistente cercetării pot fi utilizate în vederea stabilirii metodelor de cercetare, a operațiunilor urgente, a succesiunii activităților, a zonelor şi obiectivelor de interes. Sursele de informație pot constă în bazele de date gestionate de diversele autorități publice, cele puse la dispoziție de serviciile şi structurile specializate în culegerea şi prelucrarea informațiilor sau chiar în studii premergătoare ale zonei în care se află locul faptei.[17]

Având în vedere modalitățile specializate de acțiune ale grupurilor criminale care comit acte de spălarea banilor organizată, pentru contracărarea acțiunilor acestora este necesară desfăşurarea activității de strângere a informațiilor în paralel cu efectuarea cercetării propriu-zise, astfel încât, prin intermediul cercetării locului faptei, datele obținute să poată fi verificate şi valorificate în mod imediat.

Spre exemplu, prin interceptarea în timp real a comunicațiilor şi transmiterea datelor obținute către echipa de cercetare au fost dejucate, în mai multe rânduri, planurile ca, sub pretextul rezolvării unor probleme urgente de serviciu sau al cumpărării de medicamente pentru un membru al familiei, unele dintre persoanele cercetate să părăsească pentru o perioadă locul faptei, fie pentru a-i alerta pe ceilalți participanți la săvârşirea faptei, fie pentru a ascunde obiectele care purtau urmele infracțiunii.

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[16] A. Ciopraga, I. Iacobuță, *Criminalistica*, Editura Chemarea, Iaşi, 1997, pag. 237.
[17] Gr. Theodoru, *op. cit.*, pag. 302.

Acţiunea echipei de cercetare a locului faptei trebuie să fie rapidă şi precisă, de aceea este necesară cunoaşterea exactă a adresei locuinţei sau instituţiei vizate, a poziţionării sale geografice, precum şi a căilor şi posibilităţilor de acces.

Datorită caracterului organizat pe care fenomenul spălării de bani l-a căpătat în perioada recentă, au devenit tot mai frecvente acţiunile complexe ale organelor de urmărire penală constând în efectuarea simultană şi conjugată a unor acte de procedură penală în mai multe locuri unde s-au comis astfel de acte.

Aceste locuri sunt, uneori, dispersate la mari distanţe, iar simultaneitatea acţiunilor este necesară pentru evitarea dispariţiei urmelor infracţiunilor, ca rezultat al comunicării dintre membrii grupului infracţional.[18]

Acestei tendinţe i-a fost opusă de către organele de urmărire penală, constituirea unor echipe de cercetare pluridisciplinare, având o componenţă fixă şi, care prin experienţa comună dobândită ajung să aibă un mod de acţiune omogen şi extrem de eficient.

După constituirea echipei de cercetare este necesară selecţia şi disponibilizarea resurselor materiale necesare acesteia, insistându-se asupra mijloacelor de transport, pentru deplasarea operativă a membrilor echipei, şi asupra mijloacelor de comunicaţie, foarte importante pentru coordonarea în timp real a acţiunilor.[19] O semnificaţie practică deosebită au unele mijloace materiale adiacente, a căror omisiune poate duce la dificultăţi practice greu de înlăturat. Ne referim la sigilii, etichete, ambalaje (saci şi pungi din polietilenă, cutii din carton, plicuri, recipienţi PET sau din sticlă), precum şi la accesorii cum ar fi sfoara, ceara, plastilina, substanţele adezive, care nu trebuie să lipsească niciodată din trusa criminalistică.

Cât priveşte asigurarea tehnică a echipelor de investigare a infracţiunilor de spălare a banilor, elementul de bază îl constituie, ca şi la alte categorii de infracţiuni, trusa criminalistică. In activităţile curente ale politiei pentru spălarea banilor se utilizează o trusă criminalistică specializată, care dispune de un instrumentar divers, împărţit în compartimente de utilizare generală şi compartimente specializate.

Pentru asigurarea, în spaţiul limitat al trusei criminalistice, al unui număr cât mai mare de mijloace criminalistice apte de a fi folosite în activitatea practică, metoda folosită a constat în includerea unor obiecte cu utilizare multiplă, precum şi în asigurarea compatibilităţii şi interschimbabilităţii componentelor.

Pentru fixarea rezultatelor cercetării locului faptei este necesară folosirea tehnicii fotografice, audio şi video. Datorită progresului tehnic, în prezent, sunt utilizate aparate fotografice digitale iar procesarea imaginilor se efectuează cu ajutorul calculatorului electronic. Această tehnologie prezintă avantajul obţinerii unor fotografii de calitate, care pot fi prelucrate într-un mod facil şi într-un timp foarte scurt.[20]

Înainte de începerea deplasării la locul efectuării cercetării, se impune şi stabilirea exactă a modalităţilor de acces în locul respectiv, indiferent dacă acesta constă într-o locuinţă, instituţie sau local public. în situaţia când accesul imediat nu este posibil, este necesară asigurarea şi supravegherea perimetrului, inclusiv prin instituirea de posturi de supraveghere sau pază ori prin sigilarea incintelor. Un element al succesului îl constituie caracterul inopinat al acţiunii, care exclude posibilitatea ca făptuitorii să şteargă urmele infracţiunii sau să schimbe starea şi poziţia mijloacelor de probă. Pentru obţinerea elementului surpriză pot fi efectuate activităţi adiacente cum ar fi: pătrunderea legendată până la locul faptei, blocarea căilor de acces şi ocuparea de către membrii echipei a poziţiilor cheie din zona de interes. In practică, în momentul accesului la locul

[18] E. Stancu, *Tratat de criminalistică*, Editura Universul Juridic, Bucureşti, 2007, pag. 504.

[19] O. Năstase, V.Greblea, *Prelegeri la cursurile de perfectionare a procurorilor criminalişti, din cadrul Parchetului de pe lângă Curtea Supremă de Justiţie a României*, Bucureşti, 1992.

[20] C-tin Aioanitoaie ş. a, *op.cit.,* pag. 259.

faptei, sarcinile componenților echipei sunt strict distribuite, în sensul că unii dintre aceştia merg la locul propriu-zis al cercetării, în timp ce alții au ca obiective declinarea calității şi scopului venirii, identificarea unor martori asistenți sau asigurarea perimetrului.

După sosirea la locul faptei, legitimarea şi prezentarea în mod neechivoc a calității şi scopului venirii, prima sarcină a echipei constă în identificarea şi supravegherea persoanelor care fac obiectul activității de cercetare - presupuşii autori ai infracțiunii de spălarea banilor şi complicii acestora - precum şi în identificarea şi legitimarea eventualilor martori aflați în zonă.

Pentru respectarea cerințelor procedurale este necesar ca toate activitățile de la locul faptei să se desfăşoare în prezența martorilor asistenți.

In activitatea curentă au existat deseori probleme legate de refuzul de cooperare al persoanelor solicitate pentru a asista în calitate de martor asistent, precum şi de atitudinea necooperantă a colegilor celor vizați sau chiar de conducerea instituției unde se desfăşoară cercetarea.

Asemenea atitudini pot fi evitate prin expunerea obiectivă şi impersonală a obiectului investigației, precum şi prin explicarea statutului martorului asistent astfel încât persoanele solicitate să înțeleagă semnificația şi importanța acțiunilor la care vor asista precum şi faptul că aceasta reprezintă o formă de implicare şi control civic al activității organelor judiciare.

O altă dificultate constă în aceea că, în anumite situații, cercetarea locului faptei poate dura timp îndelungat şi constă în mare parte în proceduri de rutină, astfel încât, treptat, are loc o scădere a atenției şi interesului martorilor asistenți pentru activitățile la care asistă. De aceea, se impune ca martorilor asistenți să li se inoculeze ideea că au căpătat o poziție oficială care implică anumite responsabilități, că au obligația de a asista în mod direct şi dreptul de a-şi folosi, în limitele legii, inițiativa, la toate actele care se efectuează în cadrul cercetării.[21]

Considerăm inutilă practica unor organe de cercetare penală, în special ale poliției, de a audia, în calitate de martori, persoanele care au participat la cercetarea locului faptei ca martori asistenți, atât timp cât rezultatele cercetării sunt fixate printr-un proces-verbal, care este semnat inclusiv de către martorii asistenți.

Totuşi, în ipoteza în care apar suspiciuni asupra exactității datelor înscrise în cuprinsul procesului-verbal, nu excludem posibilitatea audierii ulterioare a martorilor asistenți, cu privire la activitățile la care au asistat, de către organele de urmărire penală sau instanța de judecată.

Pentru garantarea dreptului la apărare, încă din momentele inițiale ale cercetării, în special în cazul infracțiunilor flagrante de spălarea banilor, procurorul trebuie să aducă la cunoştința persoanelor vizate faptul că au dreptul să fie asistate de avocatul pe care îl vor alege şi să le dea posibilitatea de a apela la serviciile acestuia, prin intermediul mijloacelor de comunicare sau în alt mod.

De regulă, activitățile propriu-zise de investigare a locului faptei se desfăşoară în prezența avocatului, dar există şi unele măsuri cu caracter de urgență care pot fi dispuse anterior sosirii acestuia. Exemplificativ, acestea pot constă în izolarea locului faptei şi a perimetrului acestuia, instituirea interdicției ca anumite persoane să părăsească locul faptei sau să comunice între ele, identificarea şi reținerea la locul faptei a participanților la săvârşirea faptei şi a altor persoane care pot furniza date referitoare la comiterea faptei, protejarea obiectelor şi conservarea urmelor existente la locul faptei.

În toate cazurile, în debutul procesului-verbal de consemnare a rezultatelor cercetării locului faptei, va fi făcută mențiunea că persoanei cercetate i-a fost adus la cunoştință obiectul activității şi i-a fost pus în vedere faptul că are dreptul să fie asistată de un avocat, cu descrierea demersurilor efectuate pentru asigurarea prezenței acestuia.

[21] G. Ungureanu, *Criminologie*, Editura Timpolice, Bucureşti, 2004, pag. 207.

În situaţia, când, din diverse motive, avocatul se prezintă pe parcursul cercetării, ora prezentării precum şi faptul că din momentul respectiv va participa la toate acţiunile desfăşurate vor fi de asemenea, consemnate ca atare în cuprinsul procesului-verbal. Totodată, în mod verbal şi prin citirea integrală a conţinutului procesului-verbal, avocatului îi vor fi aduse la cunoştinţă activităţile efectuate şi rezultatele obţinute anterior venirii acestuia.

Atunci când una dintre părţi nu cunoaşte limba română este necesară folosirea, pe tot parcursul cercetării, a unui interpret autorizat, iar la finele acesteia, actele întocmite vor fi citite şi traduse în limba respectivă. Datorită dificultăţilor practice legate de găsirea unui interpret autorizat şi deplasarea acestuia la locul faptei se impune fie desemnarea acestuia de către persoana în cauză, fie dispunerea anterior începerii cercetării locului faptei, a măsurilor necesare pentru asigurarea prezenţei acestuia.

În situaţia în care efectuarea cercetării locului faptei presupune accesul la informaţii clasificate, această împrejurare trebuie avută în vedere atât la compunerea echipei de cercetare cât şi la selectarea martorilor asistenţi.[22]

Respectarea cadrului legislativ privind informaţiile clasificate, imposibilitatea asigurării protecţiei imediate a martorilor asistenţi, amplasarea locului faptei într-o zonă izolată sau greu accesibilă constituie tot atâtea împrejurări în care,în mod justificat şi cu respectarea proporţionalităţii, procurorul poate lua decizia de a se renunţa la găsirea sau prezenţa unor martori asistenţi. Această decizie trebuie, însă, totdeauna menţionată şi temeinic motivată în cuprinsul procesului-verbal întocmit cu prilejul cercetării locului faptei.

Deseori, în activitatea curentă, cercetarea locului faptei implică şi efectuarea unor alte acte procedural penale, cum ar fi percheziţiile corporale sau domiciliare, ridicarea de obiecte sau înscrisuri, reconstituiri şi altele, situaţie în care trebuie respectate şi regulile tactice şi procesual penale specifice acestora.

In cazurile prevăzute de lege, prezenţa continuă la locul cercetării a reprezentantului unităţii este obligatorie, iar la sfârşitul activităţii, acestuia îi va fi înmânat un exemplar al procesului-verbal rezultat. Deseori, prin autoritatea şi cunoştinţele sale despre locul faptei, reprezentantul unităţii a furnizat date esenţiale pentru buna finalizare a actelor de cercetare a locului faptei.[23]

Procesul de investigare a locului faptei presupune depunerea unor eforturi fizice şi psihice deosebite, constituind o activitate care, deseori, necesită din partea celor care o efectuează menţinerea, pe durate mari de timp, a unei concentrări mentale intense.

Pe de altă parte, desfăşurarea să necorespunzătoare poate duce la omiterea unor mijloace de probă şi la compromiterea rezultatelor.

De aceea, între membrii echipei de cercetare trebuie să existe complementaritate şi o împărţire judicioasă a sarcinilor concrete ale fiecărui component, care vor fi grefate pe pregătirea să de specialitate.

Aşa cum experienţa a demonstrat, rolul şefului echipei trebuie să se rezume la coordonarea şi supravegherea acţiunilor, precum şi la fixarea rezultatelor cercetării, implicându-se personal doar în efectuarea actelor celor mai importante şi mai delicate. Aşadar, procurorul care conduce cercetarea locului faptei constituie "capul limpede" al echipei, persoana care are o viziune de ansamblu asupra întregii acţiuni, reprezintă echipa în raporturile cu terţii şi asigură comunicarea cu aceştia, precum şi coordonarea cu alte echipe care desfăşoară activităţi similare în locuri diferite.

Atingerea obiectivelor unei investigări a locului faptei necesită utilizarea imaginaţiei, spontaneitate şi valorificarea experienţei dobândite în acest domeniu, iar interpretarea urmelor şi elaborarea graduală a versiunilor constituie un proces continuu care avansează paralel cu desfăşurarea propriu-zisă a cercetării.

[22] V. Berchesan, *op.cit.,* pag. 275.
[23] V. Berchesan, *op. cit.*, pag. 258.

Delimitarea locului faptei este una pur convențională, aria cercetărilor putând fi extinsă treptat în funcție de rezultatele obținute anterior. Astfel, este posibil ca pretinderea să se consume într-un loc, iar primirea banilor sau altor foloase în alt loc ori ca banii să fie primiți sau chiar pretinşi prin intermediul unuia sau mai multor intermediari, complici la săvârşirea infracțiunilor.

Spre exemplu, prin extinderea graduală a cercetărilor în spațiile comune ale unui bloc de locuințe a fost găsit ambalajul unui aparat electrocasnic primit anterior de către proprietarul unui apartament drept mită. Într-o altă situație, într-un autoturism folosit ocazional de către o rudă a făptuitorului a fost găsită o sumă de bani precum şi înscrisuri care au dus la descoperirea unor alte fapte de spălarea banilor. Cercetarea locului faptei este aproape totdeauna un act irepetabil, de aceea trebuie efectuată cu mare atenție, astfel încât să fie evidențiate până şi cele mai mărunte aspecte care au relevanță în cauză, dar şi acele elemente susceptibile de a fi utilizate ulterior în vederea stabilirii adevărului.

Astfel de elemente care au fost surprinse în timpul cercetărilor s-au referit la banderolele sau benzile elastice cu care au fost prinse sumele de bani sau la particularitățile care fac posibilă identificarea obiectelor - marcă, tip, model, serie constructivă, culoare, dimensiuni, defecte, acte de proveniență şi altele.

Problemele generale pe care trebuie să le lămurească cercetarea locului faptei se grefează pe elementele constitutive ale faptelor de spălarea banilor, acestea fiind următoarele:

- Identitatea, calitatea şi participația persoanelor la săvârşirea faptelor de spălarea banilor;
- Acțiunile şi inacțiunile ilicite ale acestor persoane, inclusiv cele legate de atribuțiile de serviciu;
- Scopul activității infracționale;
- Banii sau foloasele care constituie obiectul activității infracționale.

De asemenea, vor fi căutate înscrisuri, valori şi alte mijloace de probă din care ar putea să rezulte aspecte conexe faptelor propriu-zise, dar care contribuie la soluționarea cauzei penale: atribuțiile de serviciu ale făptuitorului, raporturile cu denunțătorul, bunurile sau valorile susceptibile să facă obiectul măsurilor asiguratorii, sumele de bani sau alte foloase care ar putea proveni din săvârşirea altor fapte de spălarea banilor (bunuri care depăşesc nevoile reale de consum sau de folosință, multitudinea bunurilor de acelaşi gen şi cu aceleaşi caracteristici etc.). [24]

O categorie aparte de urme care, în procedură constătării infracțiunilor flagrante de spălarea banilor are o relevanță deosebită o constituie urmele de substanțe fluorescente. De altfel, într-o asemenea situație, investigarea locului faptei este intim legată de activitățile premergătoare şi simultane constătării infracțiunilor flagrante.

Urmele de substanțe fluorescente vor fi evidențiate cu ajutorul lămpii U.V. după care vor fi fotografiate şi filmate cu etalon şi descrise sub aspectul naturii, dimensiunii, valorii, formei şi poziționării.

Este necesară şi descrierea obiectului care le poartă şi care poate fi, eventual, ridicat pentru a fi fotografiat în condiții de laborator.

În unele situații, asemenea observații exacte au avut un impact deosebit asupra cursului anchetei, coroborându-se cu celelalte mijloace de probă. Spre exemplu, pe biroul (masa de lucru) al unui funcționar public a fost pusă în evidență o urmă de stratificare, care prezenta fluorescență şi care provenea de la substanța fluorescentă cu care anterior fusese tratată suma de bani primită drept mită.

Urma avea formă alungită şi rectilinie, iar după măsurarea acesteia s-a dovedit că avea exact lungimea bancnotelor care făcuseră obiectul mitei şi pe care funcționarul respectiv le aşezase, după primire, pe biroul său.

[24] V. Lăpăduşi, *op. cit.*, pag. 305.

Urmele şi microurmele de fluorescenţă pot furniza detalii interesante, prin poziţionarea acestora, atât cât priveşte locul unde au fost puse bancnotele tratate chimic, cât şi despre itinerarul parcurs ori obiectele atinse de către persoanele care au intrat în contact cu suma de bani. Un alt aspect important este acela că substanţele fluorescente folosite sunt formate din particule cu dimensiuni şi densitate reduse, astfel că au tendinţa de a se acumula pe muchiile şi adânciturile obiectelor iar, în anumite condiţii pot fi purtate la distanţă de către curenţii de aer.[25]

De aceea, descoperirea într-un anumit loc a doar câteva particule de substanţă fluorescentă, trebuie privită cu rezervă şi numai în ansamblul elementelor rezultate din cercetarea locului faptei. Un exemplu tipic pentru adaptarea investigării la condiţiile de mediu îl constituie cazul cercetării obiectelor dintr-o incintă unde nu exista posibilitatea creării, în mod artificial, a condiţiilor de obscuritate necesare, situaţie în care echipa de cercetare a aşteptat venirea serii pentru evidenţierea, în condiţii optime, a urmelor de fluorescenţă.

În cursul cercetării, trebuie evidenţiate şi descrise inclusiv împrejurările negative care, din punct de vedere probatoriu, pot furniza elemente foarte importante. Am mai făcut referire la absenţa urmelor de substanţă fluorescentă pe mâinile autorului unei infracţiuni flagrante de luare de mită, deşi suma de bani a fost găsită într-un alt loc decât cel unde o aşezase mituitorul.

Explicaţia a fost găsită abia ulterior, în sensul că, fiind iarnă, autorul avea asupra sa o pereche de mănuşi, cu ajutorul cărora a luat suma de bani şi a mutat-o într-un alt loc, unde a fost găsită de către organele de urmărire penală.[26]

Obiectele şi înscrisurile vor fi ambalate corespunzător după care vor fi etichetate, sigilate şi transportate în condiţii de siguranţă pentru evitarea distrugerii, degradării sau modificării însuşirilor. în practică, a creat probleme ridicarea în vederea cercetărilor şi conservarea componentelor sistemelor informatice care, datorită volumului şi greutăţii lor, nu pot fi întotdeauna ambalate şi sigilate, situaţie în care s-a procedat la izolarea şi sigilarea orificiilor de conectare ale acestora la sursa de energie şi la alte componente de acelaşi tip.

Cât priveşte fixarea rezultatelor cercetării locului faptei, procesul-verbal trebuie întocmit imediat după terminarea activităţii propriu-zise, de preferinţă în acelaşi loc. Excepţie fac locurile publice sau care prezintă alte particularităţi care fac imposibilă întocmirea imediată a procesului-verbal (factori climatici sau de mediu). [27]

În asemenea situaţii, actul de finalizare a cercetării va fi întocmit într-un alt loc corespunzător din vecinătatea locului faptei sau la sediul parchetului, pe baza însemnărilor efectuate în timpul cercetării locului faptei şi cu respectarea tuturor cerinţelor procedurale. Atunci când cercetarea are ca obiect spaţii extinse sau locuri diferite ori presupune genuri diferite de activităţi, se recurge la etapizarea acţiunilor şi la descrierea lor în mod paralel şi pe măsura desfăşurării acestora

Procesul-verbal trebuie să descrie în mod cronologic, precis şi amănunţit, toate activităţile şi toate constătările efectuate, într-un stil obiectiv, concis, sobru şi accesibil. Pentru completarea informaţiilor de la locul faptei vor fi întocmite, de preferinţă la scară, schiţe şi desene ale locului faptei sau ale unor obiecte; schiţele vor fi semnate de toate persoanele participante şi despre acestea se va face menţiune în procesul-verbal. De asemenea, în cuprinsul procesului-verbal trebuie consemnate declaraţiile persoanelor cercetate, inclusiv ale denunţătorului, insistându-se asupra relatărilor şi explicaţiilor care, prin prisma rezultatelor cercetării locului faptei, au relevanţă directă privind elementele constitutive ale infracţiunilor de spălarea banilor.

[25] Gh. Mocuţa, *Metodologia investigării infracţiunilor de spălare a banilor*, Editura Noul Orfeu, 2004, pag. 178.

[26] Gh. Mocuţa, *op. cit.*, pag. 283.

[27] I. Mircea, *Criminalistica*, Editura Didactică şi Pedagogică, Bucureşti, 1998, pag. 237.

Este preferabil ca întregul proces de investigare a locului faptei să fie filmat cu ajutorul camerei video, atât pentru că ulterior înregistrarea poate furniza elemente probatorii suplimentare cât şi pentru că poate constitui în sine un mijloc de probă sau chiar o dovadă procedurală, care atestă respectarea cerinţelor procesual penale.

În fapt, pe măsura derulării cercetării, obiectele şi urmele găsite, precum şi aspectele constătate sunt descrise detaliat prin voce în timp ce sunt filmate, astfel încât înregistrarea video constituie o extensie şi o redare în imagini a conţinutului procesului-verbal.Aspectele constatate la faţa locului vor face obiectul unei planşe fotografice care, împreună cu casetele video sau suporţii electronici conţinând imagini, se ataşează la procesul-verbal.[28]

Persoanele participante vor fi întrebate dacă au obiecţii sau observaţii privind desfăşurarea cercetării sau cele consemnate în procesul-verbal, iar în caz afirmativ, aceste observaţii vor fi menţionate, încercându-se pe loc eliminarea sau îndreptarea aspectelor necorespunzătoare care au fost sesizate.

În final, este necesară poziţionarea foarte exactă în timp atât a momentului începerii şi terminării cercetării, cât şi al desfăşurării principalelor etape ale activităţilor precum şi precizarea numărului total de pagini al procesului-verbal.

[28] V. Stoica, *op.cit.,* pag. 302.

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FREEDOM OF ADMINISTRATION IN THE TAX LAW AND ABUSE OF RIGHT

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Abstract

Taxes are „the evil" in the absence of which the established companies cannot exist. The states need taxes in order to be able to fulfill the tasks for which they exist, and people – social beings by their nature – need states. But in their increasing need for revenues, states misuse the taxation right and the defense means of taxpayers for this purpose are limited. Between the need of the state for resources and the tax liabilities of taxpayers there must be a balance, its lack being injurious for both parties to the legal and tax report.

Keywords: *tax, taxable matter and economic reality, tax authority, appreciation right, freedom of management, abuse of right*

Introduction

The tax continues to be associated with constraint and oppression because it is, incontestably, a burden. This nature of the tax is revealed by its very legal definition when speaking about it as a "mandatory deduction, without consideration and non-refundable, for meeting needs of general interest". Of course, it is a different burden than the robbery, the tribute or the requisitioning preceding it and in relation to which it represents progress, but just how big are the differences between the tax and the deductions preceding it? The impost, the tribute were levied sword in hand! The tax is usually paid willingly and, in case of refusal, it is levied by using more subtle means of coercion: enforcement by garnishment or by selling the tax debtor's assets. Therefore, in our opinion, the tax seems an advanced tribute while, according to some authors, it represents even a "liberal technique" since it is the means of making citizens contribute to the needs of society and the personal needs of their leaders, leaving them maximum freedom"[1].

Taxes, however coercive they are, should be regarded with understanding, because it is taxes that allow the operation of organized societies. For this reason, whether we pay them out of conviction or because we cannot avoid paying them (when avoiding paying them, people risk even criminal penalties), as long as the economies of countries are not sufficiently developed and the monetary resources are not sufficient for the population to be released from the burden of taxes, taxes will continue to be part of our life. And, as long as taxes exist, our individual freedom will be limited and the freedom of company administration will be limited, as well.

But how and why is this limitation of our freedom produced by means of taxes? The answer seems simple: the State collects a share of our revenue and our assets and it wants the share it collects to be as large as possible. And, in order for this share to be as large as possible, the State restricts our possibilities to decrease the taxable income, undertaking the right to control our documents and actions by which we attempt to ease our fiscal burden and to reconsider them according to its interests.

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[1] G. Ardant, Histoire de l`impot, quoted by M. Bouvier.

1. Ideally taxable economic reality

The State, the tax authority and the lawmaker, in particular, have their eyes on the economic reality because this is the income that can be taxed, this is the source that keeps them alive. Nevertheless, in fact, there are important differences between the economic and the legal reality, between the taxable and the taxed reality for multiple reasons, some of them assignable to the State, others to the tax payers. Of course, the State and the tax authorities intend to tax reality and not appearances, but the State must act this way even when reality is less favorable to it than appearances.

However, the State is interested in the economic reality under multiple aspects: it generates it by the way in which it regulates social relationships, it develops it or, on the contrary, it makes it regress through its policies and the measures it adopts and implements, as well as by the way and efficiency with which it manages its revenue, among which fees, taxes and contributions are the most important.

The legal position of the State in the relationship regulated by the tax law is difficult to be qualified: a third party with regard to the private law legal relationships in which tax payers enter, the State is interested in these relationships because they generate taxable income and because the State is the eternal creditor (the State is rarely a debtor) of its tax payers, to which, most often, it is related only by citizenship relationships, without such a relationship being absolutely necessary for them to hold the position of tax debtors. Yet, in addition to the fact that the State has the position of tax creditor directly from and according to the law, the State enjoys other privileges as well: it has on its side not only the law (that it makes itself), but also the public force (that it also organizes and maintains) and, in the legal relationship under the tax law, regulated by public law norms, the parties are not on an equal position and the tax payer is the one who, in the relationship regulated by the tax law, has a position of inferiority to the State. The tax payer has an obligation (fundamental duty) to pay taxes but, in exchange for it, the State has no obligation for a consideration[2]. As a principle, the tax payer's obligation to pay the tax has no correlative right. Of course, this is not the case for fees and contributions, the former usually being owed for a service supplied by a public institution and the contributions, for returning in various forms (pensions, aids, medical services) to the payers.

Being interested in the reality it taxes and in its claims and having full powers to act, the State also granted to itself the right of inspection over this economic reality, over the tax payers' documents and actions and undertook the right of assessment of such documents and actions and the right to decide by itself whether such documents and actions comply with the regulations that it adopted as well and to which, it is true, we have agreed through the representatives sent to the Parliament. It is a power that is often abused by the authority and before which the tax payer has few means of defense.

Nevertheless, in fact, nowhere in the world do the States tax everything that, theoretically, might be taxed, but only what should actually be taxed. Taxable reality and taxed reality are two different things. The State tries to get as much as possible, tax payers try to give as less as possible and each of them acts according to its goal. For this reason, the economic reality in the matter of taxes is always opposed, with more or less success, by the legal reality, but the latter also includes, unfortunately, the differentiated treatment of tax payers and the advantages (not always fair) granted to some of them by the State itself. The immeasurable rapacity of the State, in its chase for resources, is opposed by tax resistance in various forms: some of them legal, others illegal.

[2] The statement is valid only for taxes. As we have seen, taxes are usually owed for the service supplied and contributions return to their payers in the form of pensions, aids etc.

Between these extremes, only the midway is left, which is characterized by moderation, proportionality, dialogue, respect to the law and to the rights of others, equality before the law and authority, individual freedom and freedom of trade. And justice, which is called to temper the excesses of any party in the relationship regulated by the tax law and to penalize them.

2. Exercise of the right of assessment and the principle of proportionality

Since the State is interested in the economic reality, the right of assessment in relation to the tax payers' documents and actions is acknowledged to it, as a principle. Nevertheless, the principle thus stated in art. 6 of the Fiscal Procedure Code ("exercise of the right of assessment") **is not found in any other regulation**, and its clarification in the Romanian Tax Procedure Code seems to us to establish **not a normal rule of conduct**, but a provision likely to **grant to the tax body a right and full power of assessment**.

Indeed, according to art. 6 of the Tax Procedure Code, „***the tax authority is entitled to assess***, within the limits of its duties and competences, ***the relevance of fiscal situations and to adopt a solution admitted by law, grounded on full findings on all the clarifying circumstances in the case"***.

The agreement between the conduct of civil servants and their decisions, on the one hand, and the law, on the other hand, is the obligation of every civil servant, authority or magistracy and not just of the fiscal agent, an obligation derived from the principle of lawfulness, which is a fundamental principle in all the law systems, for all branches of law. This principle is also established by art. 1, paragraphs 3) and 5) and art. 16, paragraph 2) of the Constitution of Romania, which sets forth strict compliance with the law by all its recipients: the citizens and the State, the latter meaning its institutions and its civil servants. For this reason, the principle of the rule of law must be an integral part of the administrative-fiscal culture as well.

In a democratic country, the rule of law appears as an answer to the need for legitimacy, the rule of law being required for the exercise of public power. The collection of taxes, fees and contributions is vital for any State (because it allows its operation), but their good administration cannot be a goal in itself, but also a method of materializing the rule of law in the sensitive field of taxation, which is a part of our life, both as a society and as individuals.

In the Community law, **lawfulness, and not the exercise of the right of assessment, is regarded as a principle of good administration**, the idea being formulated in the Recommendation CM/Rec(2007)7 of 20.06.2007 of the Committee of Ministers of the Council of Europe to the member states of the Council of Europe on good administration. Art. 2 of this recommendation refers to the principle of lawfulness in administration, which also includes the tax planning, and has the following wording:

*„(1) Public authorities **shall act in accordance with the law.** They **shall not take arbitrary measures**, even when exercising their **discretion**.*

(2) They shall comply with domestic law, international law and the general principles of law governing their organization, functioning and activities.

*(3) They shall **act in accordance with rules defining their powers and procedures laid down** in their governing rules.*

*(4) They **shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose** for which **they have been conferred**".*

It results that, in compliance with the rules of national law, as well as with the rules of the Community law, the requirements of lawfulness of the administrative decisions also include those regarding their issuance by the competent body, based on and by enforcement of the law, since the relation between the administrative decisions and the law is one of subordination. The Constitutional Court has constantly decided, in agreement with our Constitution, as well as with

the ECHR and the CJEC case law, that lawfulness should lay at the basis of all legal relationships in a rule of law and that the rule of law governs the entire activity of public authorities.

However, if we admit that the exercise of the tax authority's right of assessment, as set forth in the Tax Procedure Code, has the value of a principle, then we should also show that **this right of assessment can only be limited**, because **where the citizen's right begins, the administration's right of assessment ends**.

Even where the lawmaker uses expressions related to the full power assigned to the tax authority (for instance, the use in the text of the law of the words „can", „is entitled" etc.), this cannot be interpreted as a freedom or as a power outside the law, but as one within its limits. In compliance with the principle established in art. 16, paragraph (2) of the Constitution, the exercise of the right of assessment cannot be conceived outside the law. In any case, the exercise of the right of assessment by the tax authority, by infringing the limits of competence or by infringing the tax law or the rights and freedoms of citizens, represents an infringement of the principle of lawfulness and is a form of manifesting the excess of power.

There are situations in which the tax authority has the obligation and not only the right to assess, but it seems that for the lawmaker there is no difference between the obligation to estimate and the right to estimate. Thus, art. 67 (Estimation of the tax base) of the Tax Procedure Code, in paragraph (1) states that „*If the tax authority* ***cannot establish the size of the tax base, then it has to estimate it****. In this case, all the data and documents relevant for the estimation must be taken into consideration. The estimation consists in identifying those elements that are the closest to the tax facts",* and paragraph (2) states that *„In the situations in which, according to the law, the tax authorities* ***are entitled to estimate the tax base****, they shall take into consideration the market price of the taxable transaction or good, as defined by the Tax Code".*

The Tax Code provides for situations in which the tax authority (as well as the tax payers, for instance art. 81 of the Tax Code[3]) has the obligation to make necessary estimations, in particular for establishing the taxable base and assessing it, when the tax payer fails to do it itself and sometimes sets forth criteria or strict rules within whose limits and based on which the tax authority can make estimations. Thus, art. 67 paragraph (2) sets forth as a criterion for assessing the tax base the market price of the transaction or the good. In case of tax documents lost, destroyed or deteriorated of economic agents paying excises, art. 213 of the Tax Code sets forth a strict rule stating that first of all, they have the obligation, within 30 calendar days after recording the loss, destruction or deterioration, to restore the excises related to such transactions based on the accounting records. In case of the economic operator's failure to restore the tax liabilities, *the competent tax authority* ***shall establish their amount by estimation, multiplying the number of documents lost, destroyed or deteriorated by the average of excises recorded in the delivery***

[3] Art. 81 – Estimated income statements of the Tax Procedure Code has the following content: (1) Tax payers, as well as unincorporated associations, starting an activity during the fiscal year shall submit to the competent tax authority a statement regarding the income and expenditure estimated for the fiscal year, within 15 days after the occurrence of such event. Tax payers obtaining income for which the tax is collected by tax deduction at source shall be exempted from the provisions of this paragraph. (2) Tax payers obtaining income from the assignment of the use of goods in their personal assets shall submit a statement regarding the estimated income, within 15 days after conclusion of the agreement between the parties. The statement regarding the estimated income shall be submitted upon registration of the agreement concluded between the parties with the tax authority. (3) Tax payers recording losses in the previous year and those recording income during shorter periods than the fiscal year, as well as those that, for objective reasons, estimate to obtain income different at least by 20% to the previous fiscal year, shall also submit the statement regarding the estimated income together with the statement regarding the obtained income. (4) Tax payers establishing their net income based on standard income, as well as those for whom expenses are established based on a fixed amount and who opted for establishing the net income in real system shall also submit the statement regarding the estimated income together with application for options.

invoices during the last 6 months of activity, *prior to the date of finding the loss, destruction or deterioration of the tax documents*.

However, things become more complicated when and if the tax authority is acknowledged a right of assessment regarding the description of legal operations, the interpretation of contractual provisions, the possibility of invoking the nullity of legal documents etc. When its right of assessment is exercised in relation to documents and operations presumed to be concluded or carried out according to the law and in good faith and the interpretation made has different consequences in respect of tax liabilities. For instance, could the tax authority describe a partnership agreement as actually being a lease agreement, claiming that this is the correct interpretation of the parties' operation? Could the same tax authority find a contractual provision null claiming that it infringes an imperative provision of the law or that the document is made by breaking the law? Could the tax authority do what only the judge can do: to find the simulation, nullity, to interpret the will of the parties or to conclude that the real will is not consistent with the will declared in the document?

However, not acknowledging any right of assessment to the tax authority in relation to the lawfulness of documents and operations means not only depriving the authority of the right and the possibility to suppress obvious tax evasion actions itself, but also putting it in the position of witnessing helpless their multiplication, by the reproduction of the tax evasion procedure by other tax payers as well. Acknowledging an unlimited right of assessment to the tax authority means endangering legal relationships and even eliminating the presumption of the parties' good faith in the legal documents that may also generate tax liabilities. However, refusing any right of assessment to the tax authority may result in creating conditions for the avoidance of tax payments or for hiding the tax base, by means of legal tricks that could not be subject to judicial review as well.

We believe that, in the exercise of the right of assessment, the tax authority is bound by the **principle of proportionality and moderation**, in agreement with which the use of the right cannot be discretionary, and its assessments, conclusions and measures cannot be arbitrary. **The tax authority must act, in fulfilling the duties falling upon it, reasonably and moderately, and its decisions must ensure a fair proportion between the goal pursued and the means used for its achievement**. However, the limits within which the tax authority acted cannot avoid judicial review under any circumstance.

3. Exercise of the right of assessment versus freedom of administration

The exercise of the right of assessment and the active role of the tax authority cannot have as consequence either the examination or the influencing, directly, of the tax payers' activity and tax planning, no matter their capacity (individual or legal entity, national or foreign), the nature of the capital (private, state-owned, mixed, national, foreign) etc., such an intervention being opposed by the **principle of the freedom of administration** (administration) **or prohibition of interference in the company administration**.

The **freedom of administration** means the taxpayer's right to **act and make administration decisions resulting in the decrease of the tax burden, the payment of the smallest tax**. The principle of the freedom of administration is a product of the judicial practice, priority having (apparently) the French and the Belgian courts, but which we also find in the case law of the Supreme Court of the United States. Nevertheless, the idea is old in the doctrine and we find it long before that, in a form that is quite close to the content, in Adam Smith's work „The Wealth of Nations" (resumed in recent works) and applied in the mentioned decision of the US Supreme Court, on which we will return.

For all taxpayers, tax planning has become an art, a science, an industry, where people speak more and more and even aggressively about "tax strategies", "optimization of decisions with tax impact", "tax optimization", "tax-planning" and even about the "eulogy to be brought to tax ability". Today, people admit that, just like in common law (civil, commercial) notions such as "good family father" or „prudent and well-advised administrator" are used, in the tax matter there is a "good tax planning" or a "good financial management".

Everywhere, the authority is abusive and excessive and in a permanent conflict with the taxpayers, who are unhappy with the increasing burden of taxes imposed on them by the states continuously searching for tax base and methods of increasing their share. Therefore, the fact that science has adopted a balanced position and has served not only the authority – to which it has provided arguments for justifying the right of taxation, as well as for perfecting the means and methods of taxation, also criticizing its excesses and proving their negative consequences – but also the taxpayers, to whom it has provided solid arguments not for justifying the useless forms of tax resistance, more or less violent, such as protests, anti-tax movements or illicit tax avoidance, but for reducing the tax burden weighing too much on their shoulders, with the means of and according to the law, cannot be random as well.

France is a good example in this respect because it is not just the country that, in the middle of last century, gave the world one of the most effective taxes (the value added tax), or the country that has experienced all forms of tax resistance: from violent protests and evasion to organized movements at national level (Poujadism and Nicoudism being the most recent and known ones)[4], but also the country in which a valuable and rich doctrine justifies the taxpayers' right to reduce their tax burden without breaking the law. Thus, the recent French doctrine shows that ***"since paying taxes is an honorable obligation, the good family father and the good administrator also have the duty to pay the lowest tax possible, of choosing the less taxable way"***[5]**,** and that "***wanting to pay the highest taxes may be, for some people, a proof of holiness or heroism, but most people will be convinced that it is rather a proof of craziness and, in no case, a model of family father worth to be followed***"[6]. Two centuries ago, in England, Adam Smith said almost the same thing and his arguments will be resumed and developed by judges of the US Supreme Court.

The freedom of administration does not exclude, but, on the contrary, it supposes the inclusion of taxation into the calculation of each taxpayer's administration decisions. The taxpayers' knowledge of the tax law and the tax burden imposed on them is necessary not only for them to be able to meet their numerous tax liabilities, but also for their decisions to be consistent with the interest in paying the lowest tax possible, by taking into consideration the tax liabilities it generates, since the law itself sometimes explicitly provides the taxpayers with the right to opt for one decision or another[7]. But even when the law does not explicitly say it, the taxpayers' decisions

[4] After World War II, France has seen two spectacular oppositions against the tax authority. The first one, in the 50s, also known as "the protest of small shopkeepers" (similar to the riot of peasants in the previous centuries), led by Pierre Poujade, the owner of a small stationery business, who created the "The Union for the Defense of Traders and Artisans" which sent to the Parliament elected in 1956 an important number of members. His movement, without any plan, which started from the south of France and expanded to the whole country, also had violent forms. The second opposition was led by Gerard Nicoud, started in 1969 and had as starting point a rich region of France. The members created a Committee of Initiative and Defense and it also had violent forms both against the tax authority and against some politicians. Apud M. Bouvier, Finances publiques, p. 603

[5] Patrick Serlooten in Droit fiscale des affaires, Precis Dalloz, 2006, 5th edition, p. 25.

[6] Maurice Cozian, Précis de fiscalité des entreprises, Litec, 2007, 31st edition, p. 534.

[7] For instance, for amortizing the technological equipment, namely the machines, tools and installations, as well as for computers and their peripheral equipment, the tax payer can opt for the straight-line method, decreasing or accelerated, and in case of any other depreciable fixed asset, the taxpayer can opt for the straight-line or decreasing depreciation method. See art. 24 letter b) and c) of the Tax Code.

having tax consequences can be limited only by imperative provisions of the law. Everything that is not explicitly prohibited by the law is allowed in the tax matter as well.

In a correct enforcement of this principle, the tax authority cannot take the place of auditors or financial examiners and cannot assess the quality or results of the activity, even improper, of the company's administrators, in relation either to the financial or the commercial administration. The tax authority cannot give administration lessons to the taxpayers, not even when their decisions are wrong, since any company has the right to do bad business. The company administrators can do anything that is in the company's interest and the way it is in the company's interest, since even the Romanian Tax Code in art. 3, letter b) acknowledges to the taxpayers not the right of "***following and understanding the tax burden imposed on them***", but that of "***establishing their influence as financial administrators on their tax burden***". In fact, we also find applications of this principle in the company law, in which only the control of the lawfulness of genera assembly decisions is allowed and not the control of their opportunity as well, and the case law in this matter has been constant in this respect.

The principle of the freedom of administration supposes that:

a) Taxpayers have the right to simply refuse to make a tax base by inactivity, by refusing to work, to obtain taxable income or profit, by refusing to invest their savings or to deposit them in banks subject to interest. However, we should note that this effect (of not making a tax base) is also produced by excessive taxation, when taxpayers are no longer interested in creating a tax base because this is (almost) entirely grasped by the state. Yet, in this case, the state incurs other consequences of its wrong tax policy as well, because inactivity increases the number of social assistance recipients, and implicitly the state's need for resources, but also increases pressure on the active taxpayers that the state must put in order to cover the deficit and/or the need for resources, a vicious circle thus being created.

b) Taxpayers have the right to choose the method that generates the smallest tax burden. Thus, taxpayers can choose to take loans – thus increasing their expenses – and, when they possess internal resources, they have the right to administer and keep their savings unproductively; they also have the right to purchase the goods necessary for carrying out the activity not at the lowest prices in the market etc. Thus, the state that, by means of unreasonable authority measures, since they are contrary to the economic reality, aims at increasing the taxpayers' tax base by limiting deductible expenses, for instance, obtains a result that is contrary to the one expected because, on the one hand, the profit on which the tax is calculated is not real and, on the other hand, because such policies cause evasional behaviors, when the entire tax base is withdrawn from tax, or abandonment of activities, or increase of expenses, by other means, and decrease of the tax base;

c) Taxpayers have the right, **uncensorable by the state authorities,** to be wrong, to do bad business or investment, to waste their money without profit and to oppose their decisions to the tax administration. Wrong decisions can be censored and sanctioned, in all situations, only by those with whom the decision-making factor is bound by relationships based upon which it has obligations of result and, in relation to the state, which is represented by the tax authority, the taxpayer has no such obligations, as a principle, and cannot be sanctioned because it does not produce profit, namely tax base. The taxpayer might still be in such a situation if, for instance, it received payment facilities or when the taxpayer, being subject to an insolvency procedure, was approved a reorganization plan that it does not implement.

4. Economic reality, freedom of administration and abuse of right

The reason behind the tax law is that of ensuring the legal framework for establishing the tax base and the tax and ensuring the collection of the income. Thus, in a rigorous interpretation of the tax law, any attempt to reduce the tax base and the tax owed can be only an infringement of the law and the action taken for the purpose mentioned can be regarded only as an action breaking the law. In other words, since taxation is based on the economic reality, the tax administration has not only the temptation, but also the obligation to oppose this economic reality to a "legal reality", by which the tax base is reduced.

However, the tax law does not stipulate that a taxpayer must pay the lowest tax possible, leaving to it the right to choose the method generating the lowest tax liability. Moreover, we should also remind the fact that, for the taxpayer, it is not the payment of taxes that is its reason of being, just like for the state, it is not the collection of the highest tax possible that is its reason of being. Moreover, the collection of the highest tax possible from the taxpayers, besides the fact that it can only occur for a short period, can only have one, catastrophic result for the state: the disappearance of the tax base and of the taxpayer. For this reason, the permanent dispute between the state and the taxpayer, besides the fact that should be regarded and accepted as something normal, is also generating positive results since it is the only way to follow in order to temper the parties' excesses and contribute to the improvement of tax laws.

Therefore, the taxpayers have the freedom to manage their individual household or business according to their interests, they have the uncensorable right to do good or bad business, they have the right to take advantage of the law and its shortcomings in their own interest and they have the **right to do everything that the law does not expressly prohibit**. They also have the right to choose, among all the possible methods, the one generating the lowest tax possible.

However, the freedom of administration that is acknowledged to taxpayers cannot be used so that, in its name, the rights of others could be overlooked, the rights of third parties could be infringed or the law could be broken. The exercise of the constitutional rights and freedoms, in good faith, is a fundamental duty of any taxpayer.

However, how does the bad faith, the abuse of right, the infringement of the rights of third parties and the infringement of law in tax matter manifest itself? Is the taxpayer trying to reduce its tax burden by legal constructions provided and admitted by law n offender? And who has the right to decide that a taxpayer reduced its tax burden legally or that it did it by infringing the law? Who and how can somebody draw the line separating the behavior allowed from the behavior punishable under the tax law? Can this right to assigned to a body or a civil servant of the tax administration or is it the exclusive prerogative of justice to state the right?

As a general rule, fraud represents an act of deception committed against the creditor by the debtor, an act by which the latter reduces its assets or causes or increases its insolvency. Every time a deed is concluded for the purpose of deceiving a third party, we are in the presence of a fraudulent act. Fraud, which coincides with bad faith and the abuse of right, may come in multiple forms (the doctrine has identified 11 forms of fraud), which can be classified in three large categories: ***i)*** fraud committed by one party to the detriment of the other contracting party (*de re ad rem fraud*), which presents no interest in tax matter; ***ii)*** fraud planned by the parties for deceiving third parties to the act (*de persona ad personam* fraud) and ***iii)*** fraud consisting in dissimulation in the form of a deed concluded by the parties for the purpose of avoiding an obligation imposed by law (*de contractu in contractum* fraud or *fraus legi)*.[8]

[8] See D. Gherasim, Buna credinţă în raporturile juridice civile, Editura Academiei, 1981, p. 91.

In case of the first two forms of fraud, ***the author or authors act with the intention to damage another person: the co-contracting party or the creditor third party***, the latter being whether an individual or a legal entity. In these cases, the author or authors are aware of the fact that, by means of the fraudulent act, they cause damage to the co-contracting party or, as the case may be, the third party (creditor).

In case of the **fraud to the law**, the malevolent intention has ***the purpose of eluding the imperative legal prescriptions in order to avoid their enforcement, by consciously and voluntarily adopting means that are illicit in their appearance but are directed against the obligations imposed by the imperative legal rule***. Fraud to the law does not represent a direct infringement of the law, but its indirect omission, by diverting some legal provisions from their finality.

Fraud to the law contains two elements: a material and an objective one, consisting in the procedure used, which, by itself, is not contrary to the law and the second one, intentional, which comprises the essence of this form of fraud and consists in eluding or avoiding the enforcement of a given text of law. **Fraud to the law is usually met and committed for the purpose of deceiving the administration bodies**, a category to which tax bodies also belong.

But when a legal act is done so that the parties or only one of the parties would avoid paying the tax liabilities, **will such act be considered concluded by fraud to the law** or **by fraud to the interests of a third party** to the legal act concluded**, namely the state,** which is the tax creditor?

The obligation to pay the tax, when the obligating event occurred or was supposed to occur, is a legal obligation and the legal act concluded for the purpose of avoiding the payment of the tax is an act done by fraud to the interests of the state, in its capacity as tax creditor, as well as by fraud to the law, which establishes the obligation to pay the tax for the tax base produced or that was supposed to be produced. In other words, when the legal act concluded is aimed at avoiding the payment of the tax, the fraud to the interests of the third party (the state) and the fraud to the law are, in fact, one and the same thing.

In common law, the first **form of fraud (to the detriment of the co-contracting party)** is punishable by the annulment of the deceiving act by the courts, upon the request of the party whose rights were damaged[9], and nullity is relative, therefore it can be invoked within the general three-year period of prescription.

In case of **the fraud committed for the purpose of deceiving third parties**, the fraudulent act, the concerted act of the parties[10], can be annulled by the paulian action (revocatory). The admission of such an action, which is aimed at protecting the rights of creditors (the general legal lien) against the debtor's bad faith (not against its negligence as well) manifested through fraudulent acts, will make the fraudulent act void in relation to the creditor. When the debtor's assets decreased following **materials actions**, which occurred beyond its will, the creditor feeling damaged does not have the remedy of the paulian action available to it because there is no fraudulent cooperation against it.

The category of acts that may be contested by using the paulian action is very large, including both the unilateral and the bilateral acts, such as donations, sale, release of a debt, undue payment, assignment of claim, release of a prescription fulfilled and even court orders obtained by the debtor in defrauding its creditor etc. However, from the principle according to which **there must be a reduction in the debtor's wealth in order to be able to file the paulian action**, it

[9] See for developments, D. Cosma, Teoria generală a actului juridic civil, Editura ştiinţifică 1969.

[10] In case of legal acts for valuable consideration, there must be a complicity of the co-contracting parties for the purpose of defrauding the interests of third parties. The bona fide purchaser is protected, except for the case in which it acquired free of charge. D. Cosma, Teoria generală a actului juridic civil, Editura ştiinţifică1969, p. 355.

results that, when the **debtor refuses to become rich, the revocatory action is inadmissible**, and this conclusion is important and is applicable in the tax matter as well.

In common law, the penalty for acts committed by fraud to the law if absolute nullity and this can only be enforced by the courts of law.

What will be the penalty and who will enforce it when the fraud to the law concerns the enforcement of the tax law? If a court of law is invested (either with a civil or with a criminal action), we believe that its right to find the absolute nullity of an act committed by fraud to the law, upon the request of the tax authority, cannot be questioned, since it has interest and, consequently, right and standing In case of the criminal proceedings, the court has the obligation to rule, ex officio, on the total or partial annulment of the documents, such documents also including the acts committed by fraud to the law (of course, if the criminal proceedings regard acts of fraud to the law in their most serious form: the offence).

Can the tax authority check, find the fraud, judge and enforce the penalty or this remains the exclusive prerogative of the court, whose right and power to do it is questioned by nobody even in tax matter? Nevertheless, we have seen that the law grants to the tax authority an (excessively large) right of assessment. However, the right of assessment is not the same thing as the right to find the potential fraud and to decide and enforce the penalty, even if the penalty is one of type „not taking into consideration" a transaction, an act etc., since between "not taking into consideration a transaction" and deciding that the transaction is null, as regards the effects, there is no difference. In fact, it is the theory of the abuse of right that justifies the right of the tax authority to reclassify the taxpayers' acts and actions, according to their economic goal, and such right of the tax authority represents a limitation of the freedom of company administration.

However, making a distinction between the fraudulent act and the normal and legal act of administration, as well as between what the law allows or prohibits, is not an easy task, it is not a task that could be assigned to anybody since it required not only a thorough knowledge (legal and economic), but also experience and good faith. This is where the importance of the right of assessment and the limits within which it can be admitted are obvious.

The provisions of art. 11 (Special provisions for the enforcement of the Tax Code) are relevant for the power conferred through our Tax code to the tax authorities and the exercise of the right of assessment, and such provisions stipulate that:

(*1) When establishing the amount of a tax or of a fee for the purpose of this code, the tax authorities* ***may not take into consideration a transaction having no economic purpose or may reclassify the form of a transaction so that it would reflect the economic content of the transaction***.

(1^1) Tax authorities ***may not take into consideration a transaction*** *carried out by a taxpayer that was declared inactive by order of the President of the National Agency for Tax Administration.*

(1^2) Also, the ***tax authorities shall not take into consideration transactions carried out with a taxpayer that was declared inactive*** *by order of the President of the National Agency for Tax Administration. The procedure of declaring taxpayers inactive shall be established by an order. The list of taxpayers declared inactive shall be published on the website of the Ministry of Public Finance – the portal of the National Agency for Tax Administration and shall be made public in compliance with the requirements established by order of the President of the National Agency for Tax Administration.*

(2) ***In a transaction carried out between affiliates****, the tax authorities* ***may adjust the amount of the income or expenditure of any of the persons, as the case may be, so that it would reflect the market price of the goods or services provided under the transaction****. When*

establishing the market price of the transactions carried out between affiliates, the most adequate of the following methods shall be used:

a) the method of comparing prices, by which the market price is established based on the prices paid to other persons selling comparable goods or services to independent persons;

b) the cost-plus method, by which the market price is established based on the costs of the good or the service provided under the transaction, which is increased by the corresponding profit margin;

c) the resale price method, by which the market price is established based on the resale price of the good or the service sold to an independent person, which is decreased by the expenses with the selling, other expenses of the taxpayer and a profit margin;

d) any other method acknowledged in the guidelines regarding transfer prices issued by the Organization for Economic Cooperation and Development.

5. Taxation of income obtained from illicit activities

The state does not seem to be interested in morals when it comes to its revenue, a reason for which the income obtained from illicit activities is taxable. Of course, the tax on the income obtained from illicit activities shall be owed when the illicit income is not taken over by the state as an effect of special seizure, for instance.

However, the taxation of income from illicit activities is also justified from the point of view of the principle of equality before the law and the authorities: since all income received in a professional context is taxed, how could the income received from illicit activities remain untaxed? Yet, if we admit that the income from illicit activities is taxable in the same way as the income received in a legal professional context, then we have to admit that the expenses made for receiving such (illicit) income are deductible.

In our law, there is no Tax Code provision regarding the taxation of income received from illicit activities. However, budgetary laws contain applications of this rule when they stipulate that such income is taxable and even forecast the amounts to be collected in this category. For instance, Law no. 11/2010 regarding the state budget for 2010, in Appendix no. 1 (detailing no. 1), estimates the state income from the taxation of illicit business activities to the amount of 129 thousand lei, but the budgetary laws for the previous years contain similar provisions as well.

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CONSIDERATIONS ON REGULATING THE ENGAGEMENT IN THE NEW ROMANIAN CIVIL CODE[1)] AND SOME FOREIGN LEGISLATION

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Abstract

The new Civil Code brings back into the Romanian legal landscape a very rare and apparently obsolete institution – the engagement. This article analyses the evolution of engagement, its substantial and formal conditions, the content of this sui generis act and also the sensible issues concerning the judicial effects of the engagement, especially as regards its cessation. Also, elements of comparative law are depicted, highlighting the correlation between the consequences of breeching the engagement and the fault of parties in other law systems.

Keywords: *engagement, the promise to marry, breeching the engagement, accountability, gifts.*

1. Introduction

The engagement has a considerable history, being mentioned even in the Old Testament, under the Hebrew term of „*aras*" having the meaning of „engagement to marry"[2)] or „vow to marry".

As regards the religious implications, the man and woman were already considered as husband and wife, without the right to sexual relations until the marriage[3)]. According to Vasile the Great, breech of these interdictions was sanctioned with exclusion from communion for 11 years.

Considering the engaged persons as being married also implied a series of extremely severe consequences. For example, the priest could refuse to wed a person who was initially engaged during a religious ceremony with another person than the one the former intended to marry. Also, the 98th Canon of the Sixth Synod considered wedding a woman engaged to another man as adultery (and punished the offender).

The engagement – a symbol of the union between a man and a woman – after the solemn vow to marry, was also known in the Roman law[4)] by the term „*sponsalia*".

According to the Roman tradition, the engagement ring – awarded for this occasion – must be worn on the left ring finger considering that at the base of this finger starts „*vena amoris*" (love vein) that went up to the heart.

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[2] In English, the promise to marry is defined by the term „engagement".

[3] See also: Christian Moldavia. The reality from Bible's outlook – www.moldovacrestina.net.

[4] See also: I. Chelaru – *Marriage and divorce. Judicial issues on civil, religious and comparative law matters* – Publishing House „A92 Acteon", page 27.

In our country, it was the custom for the parents of the boy (the future "greater" parents-in-law) to go and "ask in marriage" at the parents of the girl (the future "smaller" parents-in law). The two families mutually agreed the details of the wedding (term, place, guests) and the dowry. Sometimes, the girl was asked in marriage from her parents only by the future husband.

In certain geographic areas it was used to bring a pledge (usually an amount of money, named „capără" or „arvună"), that was returned if the engagement was breeched[5)].

The engagement was sealed by putting the engagement ring on the ring finger of the girl's right hand[6)]. Subsequently, in order to receive the divine blessing, the two partners went to church where the "ceremonial of engagement", was performed at least one month before the marriage[7)]. On this occasion, the engagement rings (usually made of silver) were put on, and were worn on the right hand of the future married couple, until the wedding ceremony.

The involvement of the church strengthened the engagement to be considered as "conform and solid".

This custom is somehow kept until today, the wedding ceremony being preceded, in the same day, by the engagement ceremony.

The traditional pattern of the wedding proposal suffered severe transformations: thus, in some situations, even the roles are inversed, so that the man is now proposed.

As regards the spiritual side, the engagement is almost as important as the marriage because it signifies the mutual declaration of the feelings and the vow to wed, supplemented by the blessing of the relationship by the parents and priest.

It is also important from the legal point of view only if it acknowledged by the law to this end.

Our old regulations[8)], as well as the old French law[9)], regulated the engagement, as a covenant, generating for the parties the obligation to do, namely to conclude of the marriage. Non execution of this obligation triggered the punishment of the party who without reasons refused to do so, to pay reimbursements to the other party.[10)]. Still, the agreement on damages (clauza penala) was not admitted.

Starting with the 17th century, under the powerful influence of the legal doctrine and of the case-law, in order to ensure the full liberty of the agreement of the parties to wed, it was set the engagement has no legal validity as a contractual matter[11)], still the practice admitted the possibility for a tort responsibility in the case of a faulty breech of the engagement.

Due to the fact that, lacking a legislative consecration, the courts admitted for "a young man deceived in his hopes by the unlawful breech of the engagement, the right to ask the restitution of

[5] See also: I. Ceterchi, and others – *History of Romanian Law*, volume I, Bucharest, 1980, page 505.

[6] According to an opinion, the custom that a boy shall give an engagement ring to a girl exists since 1447 when Emperor Maximilian I of Habsburg (1459 – 1519) gave to his girlfriend – Maria de Burgundia – a diamond ring.

[7] See also: www.grace.ro.

[8] „Pravila" (*ancient term for regulation*) of Matei Basarab and „Pravila" of Vasile Lupu (in force during 1652 – 1711), Code of Andronachi Donici (in force until 1817), Calimach Code and Caragea Code (in force between 1817 – 1832), etc.

[9] See also: D. Alexandresco – *Theoretical and practical explanation of the Romanian civil law as compared to the older law and with the main foreign legislations*, National Printing House, Iaşi, 1898, page 140.

[10] See also: A.R. Ionaşcu – *Romanian civil law*, *Vol. II, Family Law*, Sibiu, 1941, page 18; C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – *Treaty of Romanian Law*, Vol. I (republished), All Publishing House, Bucharest 1998, page 188.

[11] For the solutions of Italian Civil Code and Austrian Civil Code of that time, see also: D. Alexandresco – mentioned works, page 140.

gifts and fair damage claims"[12], sharp criticism appeared[13] and some states reconsidered their point of view on engagement.

On this backdrop, the engagement was regulated by the Civil Code of Carol II in 1940[14], that never entered into force. At that time the engagement was also regulated in Transilvania (where the Law XXXI of 1894 was applicable), and also in Bucovina (where the General Austrian Code was applicable).

2. Legal framework

The new Romanian Civil Code regulates the engagement in the Second Book (On Family), Title II (Marriage), Chapter I (Engagement), articles 266 – 270.

Also, this institution is regulated by foreign legislation, for example the engagement exists in the Swiss Confederation, Italy and also in the Anglo – Saxon system.

3. Definition and legal nature

According to the influence of some older regulations, the engagement was defined in the specialized literature as being "the mutual agreement between two persons in order to wed"[15] or „the mutual promise of two persons to wed in the future"[16].

Basically, both definitions comprise the same elements, namely: the expression of will, enacted by the mutual confidence; the bilateral type of agreement; the object of the agreement: sealing the marriage in the future.

The new Civil Code uses the following enunciation: „Engagement is the mutual promise to wed"[17]. The same normative act defines marriage as being a „ (…) freely accepted union between a man and a woman, concluded according to the provisions of law"[18].

Comparing the two texts of law it can be noticed that for engagement it is underlined, exclusively, the mutual agreement and for the marriage the highlight is put on the legal status subsequent to the expression of will.

Is this differentiation justified?

In our opinion the answer must be negative, considering that both institutions have the origin in a legal act, but generate a judicial status regulated by law that can not be ignored.

Consequently, the term of "engagement" has a double sense: of legal act and of legal status.

The legal act of engagement is the previous agreement of the future married couple which shall be perfected by sealing the marriage.

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[12] See also: Reasoning on the regulation of engagement in the Civil Code of Carol the Second, lectured by the ministry of justice, Victor Iamandi, in November 1939.

[13] The French teacher Josserand considered this system of jurisprudence as being faulty and contradictory: „of two one, or the promise to wed has no compulsory value and than it is not understood how its non execution could sometime generate accountability; or the author of breeching may be declared accountable for the prejudice and this means he was somehow engaged by his promise" [Josserand – *Le problème juridique de la rupture des fiançailles*, Chronique D.H., 1927, page 21. (quotation by A.R. Ionaşcu – mentioned works, pages 18 – 19)].

[14] See also: Civil Code of Carol the Second, enforced by the High Royal Decree no. 3993 of 7 November 1939 and published in the Official Journal no. 259, Part I, of 8 November 1939 (Title V, Chapter I, articles 135 – 156).

[15] See also: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – mentioned works, page 188.

[16] See also: A. R. Ionaşcu – mentioned works, page 17.

[17] See also: article. 266 paragraph (1).

[18] See also: article 259 paragraph (1).

The use by the legislator of terms as "mutual promise" may lead to the idea of covenant, more precisely that of "pre-covenant". Furthermore, on this backdrop, the bilateral essence of the agreement may be considered.

All those issues may thus legitimate the conclusion that a contract is present in this case?

In our opinion, this conclusion is not possible, because there are several differences between the act of engagement and a covenant as regards: the quality of parties; appearance of the approval; breeches of approval; capacity of the parties; the scope; the method for appraising the judicial effects; the possibility to be affected by modalities; cases of nullity and the regime of nullity, etc.

In fact, this is a legal act within the family law or, in other terms, a legal act *sui generis,* that involves a certain legal status for engaged persons.

It can be noticed that the legal definition of marriage perfectly matches the engagement that is, in essence, still a "union" (as regards the concept of association, connection between two persons for a common goal) freely accepted between a man and a woman, concluded according to the provision of the law.

The difference is mainly provided by the pursued goal: by closing the engagement the sealing of marriage is "prepared" that also aims at establishing a family. In other words, the engagement is only a project for marriage.

It is necessary to underline that marriage is not conditioned by the engagement, as the engagement does not transform itself into a marriage.

Concluding those issues, we define the engagement as being the *optional legal status, preliminary to marriage, born from the mutual promise made, according to the provisions of law, between a man and a woman to wed.*

Thus, the engagement is a real civil institution grounded on the expression of will of the future grooms, as materialized in a legal act.

4. Legal characteristics[19)]

The institution of engagement has the following judicial characteristics:

1) The engagement is a union between two persons

The act of engagement involves an association (connection) between the two persons for a common goal: to wed.

2) The engagement is between a man and a woman

As a judicial status preliminary to wedding, the engagement borrows these essential characteristics, being forbidden the engagement between persons of the same sex.

On the other side, as marriage is governed by the principle of monogamy, as a consequence of the exclusive character of love, the engaged persons can not engage again as long as the previous one did not cease. *(lato sensu).*

3) Engagement is freely accepted

Thus, nothing forbids the involved persons to mutually promise to wed.

4) The engagement is mutually accepted

According to article 266 paragraph (3) thesis I of the new Civil Code: „The engagement is not subject to any formality (…)". Thus, it is not necessary the intervention of any authority in order to notice the engagement, the parties having the full liberty of choosing the concrete way for expressing their consent.

[19] On the judicial characteristics of marriage, *de lege lata*, see also: I.P. Filipescu, A.I. Filipescu – mentioned works, page 26.

Different from the marriage, where the fundamental law itself provides for the possibility of religious celebration, but only after the civil wedding[20)], for engagement there is no such regulation. Still, traditionally, the engagement is a civil institution that subsequently may be celebrated in a religious manner.

5) The engagement is in force until the marriage

According to our old regulations, the engagement must be followed by the marriage, in a term of two up to four years.

The current regulation does not provide for a term in this respect.

From this outlook, the parties may agree, at the engagement, on the term for wedding (according to the provisions of the law), but also the parties have the liberty to not decide on this issue. Irrespective of the chosen option, the duration of engagement can not be prolonged after the wedding.

6) The engagement is grounded on the equality of rights and obligations for the engaged persons

The equality between a man and a woman exists in all the domains of social life[21)].

As regards the engagement, this equality concerns both the conditions of engagement and the relations between the involved parties.

7) The engagement is concluded with the purpose of marriage

The mutual promise made by the parties is aimed at marriage, of which goal is the setting of family.

In other words, by engagement it is not set up a family but only a possible premise for its birth.

5. Fundamental conditions

5.1. Preliminary remarks

According to article 266 paragraph (2) of the new Civil Code: „The provisions on the fundamental conditions for marriage are also applicable, excepting the medical endorsement and the authorization from the administrative competent body".

The exception mentioned by the provision quoted before considers the engagement of the juvenile of at least 16 years of age but also the engagement between the relatives in a collateral line of fourth level. In both situations, different to marriage, it is not necessary the "medical endorsement" or the "authorization". But, it is wrong mentioned "the authorization from the administrative competent body" when, actually, the authorization it is granted by the "wardship court" that, in our opinion, has not an administrative nature but a judicial one.

Of those mentioned above we conclude the engagement is possible only for the persons who fulfill the conditions necessary for wedding.

Fundamental conditions may be positive – they must exist for the engagement to be possible – or negative – they must not exit for the engagement to be possible. The latter can be defined as "obstacles against engagement".

5.2. Positive fundamental conditions for the engagement

1) Age requirements for the engagement

As a rule, the engagement may be contracted only if the involved parties have at least 18 years. Thus, only the civil age is relevant and not gaining full civil capacity [22)] to contract (full exercise).

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[20] See also: article 48 paragraph (2) second thesis of Constitution, republished.

[21] See also: Law no. 202/*2002 on the equality of chances and treatment between men and women*, republished in the Official Journal, Part I, no. 150 of 1st March 2007

[22] For the capacity to engage, see also article 90 paragraph (2) of Swiss Confederation Civil Code.

As an exception, the juvenile who is 16 years old may become engaged with the approval of the parents (from the marriage, outside the marriage or adoptive) or as the case may be, of the legal guardian, only if there are "solid reasons" not defined by law[23)].

In case of divergence between the parents on the approval of engagement, the wardship court[24)] shall decide, considering the superior interest of the child.

If one of the parents is deceased (physically attested death or death declared by a court) or does not have the possibility to express the a valid will (a judicial court interdiction, coma, judicial court declaration of disappearance, mental alienation or debility) it is sufficient the approval of the other parent. Also, in the situation of splitting the parental guardianship (divorce, nullity or annulment of marriage) it is sufficient the approval of the parent exercising the parental authority.

If there are no parents or legal guardians, it is necessary the approval of the person or, of the authority that has the authority to exercise parental rights, as the case may be.

Endorsement of engagement is a component of the parental guardianship, being by its nature, a unilateral judicial act, revocable until the engagement.[25)].

As the case is for the marriage of a juvenile[26)], both the abusive refuse to approve the engagement and the abusive revocation of the approval may be censored within the court of law, following the procedure for non contentious matters.

Law does not impose any formal conditions for endorsement, thus we consider the approval may be granted in a verbal or written manner.

There is no limit of maximum age[27)] for engagement or any condition on the difference of age[28)] between the engaged persons.

2) Different gender

As in the case of marriage[29)], the engagement may be only between a man and a woman. Although it was not necessary a special provision to this end – considering the general notification

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[23] The same situation it is encountered for the marriage of juvenile. Of *lege lata*, on the content of the notion „solid reasons", in doctrine it was considered there are such grounds: gravidity, birth, severe illness, concubinage (see e.g. I.P. Filipescu, A.I. Filipescu – *Treaty of Family Law*, 8th Edition, reviewed and supplemented, „Universul Juridic" Publishing House, Bucharest, 2006, page 12; A. Bacaci, V. Dumitrache, C. Hageanu – *Family law*, „All Beck" Publishing House, Bucharest, 1999, pages 18 – 19; E. Florian – *Family law*, „Limes" Publishing House, Cluj – Napoca, 2003, pages 26 – 27.

[24] According to the Civil Code of 1864, as further amended in 1906, if for the marriage of a boy and girl under 21 years it was necessary to have the endorsement of the parents, and there were disputes between parents, the approval of the father it was sufficient (article 131). If both parents were dead or unable to express their will "the grandparents from the father side or if missing, the grandparents from the mother side shall substitute those" and if the grandparents were not available, it was necessary the approval of the guardianship) (article 133). See also: C. Hamangiu, N. Georgean – *Commented civil code*, 1st Volume, republished, All Beck Publishing House, Bucharest, 1999, pages 175 – 176.

[25] In this respect, on the analysis of the necessary conditions for granting the age exemption for the marriage of juvenile, see also: F.A. Baias, M. Avram, C. Nicolescu – Amendments to Family Code brought by *Law no. 288/2007*, in „Law" Review no.3/2008, pages. 9 – 41.

[26] See also: F.A. Baias, M. Avram, C. Nicolescu – mentioned works, page. 18

[27] In czarist Russia the marriage was forbidden for persons having the age of 80 or more see also: A.R. Ionaşcu –mentioned works, page 25.

[28] On the age of persons to wed, „Îndreptarea legii" (The Great „Pravila" of Matei Basarab) stipulated the following: „(…) it shall not be a man of 50 years old and the woman of only 12 or 15 years or the woman of 50 years old and the man of 20(…) it shall not be an old man and a young woman or an old woman and a young man (…) because this is not right but it is even shameful, guilt and derision" (Glava 198) – see also: I. Chelaru – mentioned works., pages. 25 – 26.

[29] The marriage between persons of same gender it is acknowledged by the following states: Netherlands, Belgium, Great Britain, Canada, Spain, Norway, Sweden, Portugal, South Africa, Nepal and U.S.A. (only Connecticut, Iowa, Massachusetts, Vermont and North Carolina). Public debates, with the support of the political

made by article 266 paragraph (2) for the fundamental conditions of marriage – the legislator still intended to remove any doubts.[30)]

The gender of each person is mentioned into the birth act and, respectively, into the birth certificate.

For the persons having certain medical problems (uncertain gender, modifications in the sex life, psychological issues on the sex life) action may be lodged before a court of law in order to determine the exact gender or to change the gender[31)], as the case may be,

3) Consent to engage

The consent to engage represents the expression of will of the two persons in order to wed.

This approval shall not be assimilated to the simple proposal to wed, as the consent to marry represents a different issue.

The consent for engagement must fulfill the following conditions:

a) to be expressed by a person having power of discernment, namely from a person having both intellectual capacity and capacity of will; thus, the lack of discernment (in case of mental alienation or debility and of the person who temporary does not have all the mental capabilities: drunkenness, delirium, hypnosis) shall trigger the lack of consent.

b) to be personally expressed by those willing to engage, being excluded the engagement by representation[32)];

c) to be free, meaning there is no impediment for choosing the future partner (social class limitations, racial or judicial limitations). In a judicial sense the consent is free if there are no errors of consent. Possible errors of consent are: mistake on identity (only on the physical identity of the other partner), dolus and violence.

d) to be completed, not affected by modalities (term, condition, tasks);

e) to be expressed in a non-equivocal manner.

5.3. Fundamental negative conditions for engagement (impediments to engagement)

There are certain facts preventing the engagement, namely:

1) Civil status as married or engaged person

As bigamy is a fundamental negative condition for wedding[33)], also applicable to the engagement[34)], it shall be concluded that a married person can not become engage to another person.

Thus, due to the specificity of the marriage project and its grounds, we consider that engaged persons can not enter into a new engagement.

2) Kinship

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parties currently governing, in order to acknowledge this union take place in: Island, Slovenia, Luxemburg, Argentina and Venezuela.

[30] See also: article 266 paragraph (5) of the new Civil Code.

[31] At the level of European states there is no joint approach on the transgender issues, a phenomenon that is not encouraged. In the same time, after Decision of 11 July 2002, adopted in the Case of Christine Goodwin vs. United Kingdom, the main current is to acknowledge the new sexual identity.

[32] In Roman law, the suitor or the intermediary of marriages (*proxeneta or conciliator nuptiarum*) had the right to a payment (*Proxenetica jure licito petuntur*). In our country this convention was considered as contrary to ethics, thus being null, so that the suitor or the intermediary of marriages did not receive any payment. (see also: D. Alexandresco – mentioned works, page 142).

[33] According to article 273 of the new Civil Code: „It is forbidden for a married person to contract a new marriage".

[34] See also: article 266 paragraph (2) of the new Civil Code.

It is necessary to distinct between the direct kinship – when engagement is forbidden irrespective of the level of kinship – and collateral kinship – when engagement is forbidden only up to the fourth level inclusive.

For solid grounds – as in the case of juveniles' engagement – the relatives in a collateral line up to the fourth level (cousins) may become engaged.

3) Adoption

According to article 451 of the new Civil Code: „Adoption is the judicial act by which it is set up a connection of filiation between the adopter and the adopted person, but also creates kinship between the adopted person and the relatives of the adopter".

Thus, the engagement is forbidden between the adopted person and his relatives from adoption, under the same conditions as for those applicable to his natural relatives.

4) Wardship

The legal guardian, due to moral reasons, can not become engaged to the juvenile under his wardship.

5) Mental alienation, debility, or temporary absence of mental capacities

The person suffering from mental alienation or debility can not become engaged, irrespective of the existence of court decision to this end.

For those temporarily lacking the mental capacities (drunkenness, delirium, and hypnosis) the engagement is forbidden as long as the discernment is missing.

6. Framework conditions

As it is regulated by the principle of consent, the engagement is not subject to any formality[35)].

Still, we consider there is no impediment for the parties to engage within a solemn ceremony (e.g. in front of the notary public) and to seal in writing the mutual promise to wed.

The law does not impose any requirement as regards the gifts (e.g. engagement ring or other gifts) so their inexistence has no influence on the validity of the engagement.

Also, it is not required to register the engagement in the records of any institution.

7. Proof of engagement

The engagement may be proved by evidence admitted by law, such as: interrogatory, witnesses, presumptions, documents. We consider those very facile conditions of proof could lead in practice to the difficulties on establishing the factual situation, because the real relations between the engaged parties are difficult to be appraised by outsiders (in many cases a witness may narrate the descriptions of one of the engagement parties; rarely the witnesses see directly the mutual promise).

8. Engagement effects

Law does not provide for the effects of engagement, but regulates only the material consequences of breeching the engagement.

The legal act of engagement generates the legal status of engaged persons. From this a series of moral and judicial consequences result.

[35] See also: article 266 paragraph (3) thesis I of the new Civil Code.

Between the two parties (man and woman) a special relation is created that must dominate their conduct in achieving the mutual promise to marry. From the point of view of Christian dogmas, the engagement represents a type of „moral or spiritual kinship".

Due to fact that the person who ends the engagement in an abusive manner or in a culpable manner determines the other person to break the engagement is sanctioned by law, we can assert that between engagement parties there are a series of rights and personal duties, similar in principle to those in a marriage.

Thus, as an expression of the full equality in rights and obligations, the parties mutually decide on their future marriage.

Without making a perfect similarity between the two judicial institutions, because both are grounded on the friendship and affection between a man and a woman, we believe it is not exaggerated to sustain the existence of certain mutual obligations (respect, fidelity, and moral support).

Besides the rights and obligations appeared from the nature of the engagement itself, we consider that may exist some other rights, namely correlative obligations, according to the concrete content of the agreement between parties. We refer to those issues on which the parties may convene (according to the principle of free will) and that are compatible with the engagement.

If in the past the engagement compulsory involved the observance of chastity vow until the wedding and even the spiritual purification of the future husband, today they may convene to live and eventually to dwell together, a situation in which the engagement may become a layer over the concubine status.

If from the engagement children are born, those are considered as outside the marriage, following the respective judicial regime.

The engaged persons may chose to wed, an agreement that shall produce effects from the start of the marriage. From this point of view they have the following options: legal community, separation of goods; conventional community. If they chose another marriage regime than that provided by the legal community, they must stand in front of notary public in order to sign a matrimonial covenant in the framework of a certified document.

Because the engaged persons are not subject of the matrimonial regime, the goods gained in a common manner during the engagement are subject to the rules of co-propriety (common propriety on shares). It must be mentioned that a relative presumption of co-propriety for the goods held in common exists.[36)].

For the engagement or during its length, considering the final scope of marriage, the engaged persons may make mutual gifts (donation, according to the rules of the common law) or may receive gifts from other persons. This final alternative may be a devise/legacy (legat) or a donation, and the nature of the ownership on the respective good shall be determined according to the will of owner.

The engaged persons may convene to mutually provide material support to each other (the obligation to support together the expenditures of a possible common dwelling and the obligation of alimony).

According to the concrete content of the parties agreement their rights and obligations shall be appraised and, in a final stage, the eventual abusive attitude of breaking the engagement or of culpable determination to break the engagement.

[36] See also: article 633 of the new Civil Code.

9. Nullity of engagement

Because the law provides that for engagement the fundamental conditions of wedding are applicable – with the abovementioned exceptions[37] –, we consider that it must also be accepted the consequence of not observing those conditions, namely: nullity.

Nullity of engagement is the applicable sanction for non observance of the requirements provided for by the law for its conclusion..

According to the type of nullity, absolute nullity and relative nullity may exist.

The nullity of engagement is absolute in the following cases:

a) the involved persons did not have the age required for engagement; we consider the juveniles less than 16 years of age, who can not engage under any circumstances.

b) the engagement was between two persons of the same gender;

c) the consent does not fulfill the abovementioned conditions[38] (excepting the error on consent);

d) the engaged person was married;

e) the engaged persons are relatives in a straight connection (irrespective of level) or in a collateral connection (up to the fourth level inclusive); in the case of relatives in a collateral connection up to the fourth level inclusive, if there are solid grounds, the engagement is valid.

The mentioned case appraises both natural and civil kinship.

f) the engaged person is suffers of mental alienation or debility.

The action for declaring the absolute nullity of the engagement is indefeasible[39] and may be lodged by any interested person, including the prosecutor.

Exceptionally, if the condition on the minimal age for engagement is not observed, the nullity is covered if, until the term of a definitive judicial decision, the persons involved achieved the legal age.

The nullity of engagement is relative in the following cases:

a) the juvenile who has at least 16 years of age engaged without the approval provided for by the law;

b) the consent was affected by error, *dolus* or violence;

c) at the date of engagement the persons was temporarily affected by a lack of discernment;

d) the guardian engaged the juvenile under the wardship.

The right to sue for the annulment of engagement expires after 6 month, starting from different points in time, as follows:

a) in the case of lack of consent for the engagement of the minor, the term starts from the date when those requested to endorse the engagement have became aware of it;

b) in the case of corrupted consent or of temporary lack of discernment, the term starts from the date when the violence stopped or, as the case may be, from the date when the interested person has became aware of the error, dolus or temporary lack of discernment;

c) in the case of the tutor engaged with the minor in his tutelage, the term starts from the date when the engagement was sealed.

The action for annulment has a personal character and can be instituted only by the one whose interest was harmed, respectively: the person (persons) or authority requested to endorse the engagement of the minor under 16 years of age; the fiancé whose consent was corrupted; the person temporary destitute of discernment; the minor under legal guardianship.

[37] See also: Supra, 5.1.
[38] See also: Supra, 5.2., pct. 3).
[39] See also: article 2502 paragraph (2) point 3 of the new Civil Code.

The right to action is not transmitted to the successors. Nevertheless, if the action was instituted by the titular, it can be continued by the successors.

In the case of engagement of the minor under 16 years of age, the relative nullity is covered if the endorsement was obtained, until the judicial decision remained definitive.

The final judicial decision that admits the action for determining the nullity or the action for the annulment of the engagement produces retroactive effects, since the moment when the engagement was concluded. As an effect of admitting the action, it is considered that the engagement never existed. Therefore no legal effect was produced.

10. Ceasing the engagement

In our opinion, "ceasing the engagement" can be analyzed both in *lato sensu* and *stricto sensu*.

Lato sensu, ceasing the engagement also includes breaking it.

The engagement ceases *(strico sensu*) when its purpose was achieved (conclusion of marriage) or in the situation of demise (physically determined or declared through a definitive judicial decision) of one of the fiancés. In the first case, the former fiancés become husband and wife, with rights and obligations which derive from marriage. In the second case, all the effects of the engagement cease *(ex nunc)*, and the gifts that the fiancés received when considering, or during, the engagement, are not liable to restitution[40)]. In this case – as the former minister of justice, Victor Iamandi, said, when presenting the draft of the Carol the 2nd Civil Code before the Parliament – „(…) the material interest of the successors to reclaim the gifts must surrender before the moral duty to cover the memory of the deceased of any insult.". This concerns both the gifts that the fiancés gave to themselves and the gifts received from third parties. The restitution exemption aims at the successors of the deceased fiancé, as well as at the surviving fiancé.

11. Breaking the engagement

11.1. The conditions for breaking the engagement

The new Romanian Civil Code does not provide for the cases in which the engagement may be broken, but regulates only for the judicial consequences of breaking the engagement.

In our opinion, breaking the engagement may intervene by a unilateral or a bilateral act.

Thus, as the engagement is based on the mutual agreement of the parties, nothing restrains them to agree to break it.[41)].

We consider that the parties may decide to break the engagement even in the cases when the engagement is affected by nullity[42)], as long as the judicial inefficiency was not established by a court. Not accepting this solution means that the parties should be forced to needless expenses, forcing them to address to justice.

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[40] See: Art. 268 para. (3) of the new civil code

[41] The romans applied, also in this matter, the principle: *„Quae consensu contrahuntur, contrario consensu dissolvuntur"* (The contracts which are formed with consent, are dissolved by contrary consent).

Also, our old regulations provided that "an engagement is broken when, without grounds, the fiancés will regret". (See: Andronachi Donici Code – Chapter 30, § 7, and Caragea Code – Part III, Chapter 15, art. 3 letter h) – quoted by D. Alexandresco – op. cit., page 462).

[42] Our old regulations spoke of the fact that "the engagement is broken" in situations which refer to the non-validity of it, such as: the engagement was not made "by the volition and knowledge of parents and guardians"; „when they will find that they are relatives", etc [See: Andronachi Donici Code (Chapter 30, § 7) – quoted by D. Alexandresco – op. cit., page 461).

Breaking the engagement by only one party can be made on grounded or ungrounded reasons.

In the old legislation, the following reasons were considered grounded: a long absence of one of the fiancés[43]; the conviction of the fiancé to a discreditable punishment; contracting a "shameful disease"; "becoming pregnant with foreign seed"; loss of wealth, etc.[44]

In relation to the current regulations, we consider that the validity of reasons is assessed by relating to the rights and obligations which provide concrete content to the respective engagement. Assessing the validity of reasons is made by the court, according to each case. The court will consider the interpretation of the parties' will expressed into a written act (when the engagement is recorded by a written document which contains the rights and obligations of the parties), or the one which results from the assessment of other evidence administered before the court (when the engagement is not recorded by a written act or its provisions are not sufficiently clear with regard to the rights and obligations of the parties).

Hence, we consider that, for example, the following could represent grounded reasons: the breach of the fidelity obligation; the violent attitude of one of the fiancés towards the other; the judicial decision which ascertains the disappearance; sealing an engagement with another person, etc.

On the contrary, leaving the fiancé out of pure caprice, without a legitimate reason, may bring the judicial liability of the one who abusively broke the engagement.

In other words, determining the validity of the reasons for breaking the engagement presents importance from the perspective of the action in compensation for due prejudice.

In what regards the formal conditions for breaking the engagement, the new civil code resumes the idea based on the symmetry form principle, stating that: "Breaking the engagement is not subject to any formality and can be proven with any kind of evidence"[45].

Breaking the engagement has, as main effect, the cease of the rights and obligations born from the engagement act.

According to law, the fiancé who breaks the engagement cannot be obliged to conclude the marriage[46]. The solution is natural, because the engagement is not a contract and the consent to marry must be freely expressed.[47].

11.2.The effects of breaking the engagement

The new civil code focuses on the patrimonial effects of breaking the engagement[48], having in view two issues: a) restitution of gifts; b) engaging the liability for abusive breach[49].

11.2.1.Obligation for restitution of gifts

The object of the restitution is "the gifts that they received when considering the engagement, or during the engagement, in order to become married."[50]

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[43] In the Roman law, the fiancé must have waited for at most three years for the other to return. Breaking the engagement operated if the union was prolonged over three years (after the Caragea Code) and over four years (after the Andronachi Donici Code). (See: D. Alexandresco – op. cit., page 460).

[44] See: D. Alexandresco – op. cit., pages 460 – 461.

[45] See: Art. 267 para. (3) of the new civil code.

[46] See: Art. 267 para. (1) of the new Civil code. In the same way, see also art. 90 para. (3) of the Swiss civil code.

[47] In the way that "the consent of the future husbands must be expressed freely and unforced, because it cannot make the object of prior conventions". (See: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – op. cit., page 188).

[48] See: Art. 267 – 270 of the new civil code.

[49] With regard to the regulation of this issue, the Romanian legislator inspired from the Swiss civil code (art. 91 – 93) and Italian civil code (art. 80 – 81).

[50] See: Art. 268 para. (1) of the new civil code.

Although it may be assumed that the regulation focuses, in principal, on the gifts between fiancés, the correct interpretation of the text is that the gifts received by one fiancé, or both, from third persons, should also be restituted. (*ubi lex non distinguit, nec nos distinguere debemus).*

Our opinion is that those gifts are "conditional gifts", meaning that they are donations subject to a resolutive condition.

The above provision must be correlated to the provisions of art. 1030 para. (1) of the new civil code, according to which: „The donations given to future husbands or only to one, under the condition of sealing the marriage, do not produce effects if marriage is not concluded." Although the marginal denomination of this article speaks of caducity, we consider that, in reality, it is about the non-fulfillment of a condition, because the caducity assumes the intervention of a situation independent of the will of the parties involved in the legal act.[51)]. Moreover, the obligation of restitution of those gifts is independent of the idea of guilt of one of the fiancés for breaking the engagement.

We underline that, according to art. 268 para. (1) of the analyzed normative act, "the common gifts" are exempted from restitution. The concept of common gifts is found in the new civil code in several domains, such as: art. 144 para. (1) provides that the tutor cannot make donations on behalf of the minor, except for the common gifts, according to the material state of the minor; art. 146 para. (3) provides that the minor cannot make donations, except for the common gifts, according to his material state; art. 346 para. (3) provides that the common gifts are exempted from the rule according to which the joint goods of the husbands may be alienated only with the consent of both; according to art. 1091 para. (3), the succession reserve is established without having in mind the common gifts; also, art. 1150 para. (1) letter c) provides that the common gifts are not subject to the donations' obligation report.

We consider that the common gifts should be assessed in relation to the context or situation when they were offered (for example, the birthday) and, according to the provisions of art. 144 and 146 of the new civil code, should be assessed in relation with the material state of the concerned persons. Nevertheless, we consider that the common gifts must not be confused with the manual gifts, regulated at art. 1011 para. (4) of the new civil code, whose application area is more extensive.

In the case of the given amounts of money, the restitution must have in view the actual value, without interest (civil fruits), because the restitution is independent to the good or bad faith of the fiancés. The interest could be due only starting with the date when the restitution of the amount is requested.

If the restitution in kind is not possible, this can be made "to the extent of enrichment"[52)].

The restitution of gifts or their equivalent in money, when the restitution in kind is not possible, will be achieved by free will, or by a judicial action before a court. In the latter case, the right to action is prescribed in a term of one year, which starts from the date when the engagement was broken.[53)].

11.2.2. The liability for abusively breaking the engagement

The Carol II Civil Code contained a more detailed regulation of the patrimonial effects of breaking the engagement. Thus, according to art.: „The fiancé who breaks the engagement owes to

[51] The caducity represents that cause of inefficiency which consists of depriving the valid civil judicial act of any effects, due to the intervention of an ulterior circumstance, which is independent of the volition of the author/authors of the judicial act – See: G. Boroi – *Civil law. General part. Persons.,* Ed. All Beck, 2002, page 225.

[52] See: Art. 268 para. (2) 2nd thesis of the new civil code.

[53] See: Art. 270 of the new civil code.

the other fiancé, his parents or the persons that replaced the latter, an equitable compensation for the expenses or for the obligations contracted in view of marriage, because they were according to the circumstances.

Also, the one who breaks the engagement owes an equitable compensation to the other fiancé for the prejudice that he suffered when altering, in good faith, the composition of his patrimony, or his means to acquire in view of marriage.If breaking the engagement caused a moral prejudice to the other, he has a right to compensation".

Art. 138 of the same normative act stated: „The one who breaks the engagement for good reasons does not owe compensations."

The fiancé that, by his fault, determines the other to break the engagement is held by the obligations provided in the previous article.".

The engaged minor had a special situation, namely, according to art. 139: „The minor does not owe compensations if the persons entitled to consent to the marriage did not consent to the engagement".

With regard to gifts, art 140 contained the following regulation:

„Breaking the engagement entitles the fiancés to request the restitution of the gifts.

The gifts are restituted in kind or, if this is not possible, to the extent of the enrichment.

The gifts are not restituted if the engagement was broken through death".

At present, according to art. 269 of the new civil code, liability arises in the following cases: 1) if a party "abusively breaks the engagement"; 2) if a party, "with guilt, determined the other to break the engagement".

Unlike the restitution of received gifts during the engagement, which can be achieved by free will or by means of a legal action, the compensation, being based on the idea of consideration of guilt, could be obtained only through jurisdictional means.

With regard to compensations[54)], the problem of establishing the judicial nature of the liability appears: contractual or tort [55)].

In our opinion, for the arguments that we are going to present, it is about a civil contractual liability. Thus, in the case of the civil tort liability, the breached obligation is a legal obligation, with general character, which is incumbent to everyone, while with regard to the contractual liability, the breached obligation is a concrete obligation, established through a contract[56)]. Although this is not a properly contract, the engagement is a legal act, which generates rights and obligations, including the obligation to be liable for due prejudice. Also, the essence of the engagement is that the "promise to marry" cannot be executed in kind by the coercive force of the state, and the only "legal effect" of this act is the obligation to be liable for the prejudice caused by non-fulfillment of the obligation to conclude the marriage. In the regulation of the new civil code, the breached obligation (to seal the marriage), does not represent a "conduct rule which the law or the custom imposes", according to art. 1349 of the new civil code (tort liability). On the contrary, the provisions of art. 1350 para. (2) would apply, provisions which refer to the obligation to compensate the prejudice "when, without justification", a person does not fulfill the obligations which he contracted.

[54] In order to grant compensations when dissolving the marriage – See: Art. 388 of the new civil code.

[55] Under the incidence of the current civil code, although the engagement is not regulated anymore, at past, the interested prejudices were granted to the abandoned fiancé, in the basis of art. 998 of the mentioned normative act, considering that the fiancé who has the guilt for breaking the engagement has committed an offence, which draws his liability (See: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – op. cit., page 188. The authors quote jurisprudence solutions in this regard).

[56] See: C. Stătescu, C. Bârsan – *Civil law. General theory of obligations*, Ed. All Beck, 2002, page 146.

It may be observed that the liability for breaking the engagement depends on the consideration of the idea of guilt. We discover, from this perspective, that the regulation of the engagement follows an opposite direction than the configuration of marriage in the new civil code. Thus in case of divorce, when the couple agrees with the divorce and there are no minor children, it is considered as formality which is fulfilled without the implication of the court, by the civil servant or the public notary, without any consideration of guilt or liability. We consider that the evolution of the legislation in conditioning the liability for breaking the engagement with the idea of guilt is not benefic, because the interpretation of guilt is a matter so sensible, that it could be subjective. Thus, it was rightfully affirmed in the American jurisprudence, that "breaking the engagement that would have led to an unhappy marriage is a moral thing and, therefore, how can we talk about guilt?"[57)].

In the ancient law system, the abandoned fiancé had a right to compensation, without considering the guilt of the one who broke the engagement, by non-fulfilling the contractual obligation to seal the marriage, and the obligation to prove the guilt did not exist.[58)].

The content of the judicial liability for abusively or guilty breaking the engagement is provided, as well, in art. 269: the guilty party is obliged to "compensations for the expenses made or contracted in view of marriage, as well as for any other prejudice". The final thesis leads to the conclusion that any prejudice suffered by one of the parties, as a result of breaking the engagement in a guilty manner by the other party, can be subject to reparation.

Therefore, from the interpretation of this text, it would mean also that the non-patrimonial/moral prejudice, is included, (as it is expressly recognized, according to art. 1531 para. (3) of the new Civil Code)……..

Also, both the *damnum emergens,* and the *lucrum cessans*[59] would be covered, due to the fact that the regulations regarding the execution of obligations by equivalent, from the new civil code, provided at art. 1531-1537, would apply. With regard to *lucrum cessans,* although art. 1532 para (2) of the new Civil Code provides that "the prejudice that would be caused by losing a chance may be repaired to the extent of its possibility to be achieved", we consider that, in the matter of the engagement, those provisions are difficult to be applied in practice, due to the special character of the relations between fiancés (it may be imagined, however, the situation of a fiancé which can be put in the position to not be able to become a priest, due to the culpable non-fulfillment of the other fiancé's promise to seal the marriage).

In the same way as in the action for restitution, the right to action for obtaining compensations is prescribed in a one year term since the breaking of the engagement.[60)]

With regard to the reparation of the prejudice, it is necessary to underline that art. 267 para. (2) provides: „The agreement on damages (clauza penala) stipulated for breaking the engagement is considered unwritten.". In the doctrine, the agreement on damages (clauza penala) is considered "an accessory convention by which the parties determine, with anticipation, the equivalent of the prejudice suffered by the creditor, as a result of the non-execution, execution with delay or inadequate execution of the obligation, by his debtor"[61)].

Thus, the meaning of the legal provision is the interdiction for the parties to agree in advance over eventual compensations for breaking the engagement. If, however, they have done it,

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[57] H. F. Wright, Note – *The Action for Breach of the Marriage Promise*, 10, VA. L. REV. 361, 361 (1924)

[58] See: A.R. Ionaşcu – op. cit., page 18.

[59] In the way that the action in prejudice cannot be filed for "the benefit that a party would have been restrained to gain" (*lucrum cessans*) – See: old doctrine and jurisprudence, quoted by professor D. Alexandresco – op. cit., pages 140 – 141.

[60] See: Art. 270 of the new civil code.

[61] See: C. Stătescu, C. Bârsan – *Civil law. General theory of obligations,* Ed. All Beck, 2002, page 357;

such a clause will not have legal force. By this provision, the possibility to freely express the consent for marriage is ensured.

12. Comparative law elements

12.1. The Anglo-Saxon law

The Anglo-Saxon system has experienced major jurisprudence changes[62)], with regard to the effects of breaking the engagement, during the last two centuries. Those changes were produced due to the belief that certain abuses were made when exerting such actions, as well as to the current of opinion according to which "law and love are incompatible".

In the first phase of the Anglo-Saxon law in the United States, the holder of action was the woman who was promised to be taken into marriage and abandoned at a later stage. She could have requested compensation through the "broken promise" action.[63)]". The action was known since the Victorian age of the Anglo-Saxon Law in Great Britain[64)]. The compensations could have mean, for start, the reparation of the material prejudice. However, starting with the 20th century, the compensations included the prejudice for the unachieved benefit, which the woman would have had as a result of marriage, the prejudice for losing the chance to marry with someone else (for example, due to the loss of virginity or to the birth of a child), but also the prejudice for emotional suffering as a result of breaking the engagement. The change was produced with regard to the displacement of the center of attention from economic benefits, as a result of non-fulfillment of marriage, to the moral benefits, which are attached to the emotional suffering of the woman. Subsequently, the American courts had major difficulties in considering such compensations for moral prejudices[65)].

Between 1930 and 1950, as a result of the frequent situations in which women made blackmail attempts over wealthy men through the "broken promise" action, several states of America[66)] abrogated this possibility.

The main reasons that led to the abrogation were those related to invoking the equal statute of men and women. The marriage did not represent the vision of the feminist current, the essence of woman's existence, and the action only encouraged women to look upon the economic benefits of the relation with a man and not treat him from an equal position[67)]. The reformists[68)] supported the declining importance of the institution of seduction, due to the fact that loss of virginity was not considered as a fact that would ruin a woman's life anymore; more often, those women were able to find a work place and another man to marry. Moreover – they said – the marriage was wrongly understood, because it should be a relation incapable of being evaluated in money. As long as the woman was freer to make plans in life, the marriage became more and more a relationship based on affection and less on economic aspects, as it was the case in the past. As a

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[62] R.Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2.

[63] In English "breach of promise" or "heartbalm action", according to R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2

[64] M. Grossberg – *Governing the hearth: Law and the family in nineteenth century America*, 1985, pag. 33-38; G. S. Frost – *Promises broken: courtship, class and gender in Victorian England*, 1995, pag. 80-97

[65] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2;N.P. Feinsinger – *Legislative Attack on "Heart Balm*", 33 MICH. L. REV. 979, 986-96, 1935; Lea Vander Velde – *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996).

[66] Indiana was the first state that adopted this change, in 1935, according to M.B.W. Sinclair–*Seduction and the Myth of the Ideal Woman*, 5 LAW&INEQ. J. 33, 65&n.n.237-39 (1987).

[67] H. Spiller Daggett – *Legal essays on family law*, 1935, pag. 39.

[68] J. E. Larson – *Women understand so little, they call my good nature deceit: A feminist rethinking of Seduction*, 93 COLUM. L. REV. 374, 379, 397-99 (1993).

result, the elimination, from the "broken promise" action, of the economic elements was bound to modernize this action. The only economic element which was accepted, as being in the object of the action, was the one related to the issue of engagement gifts, and those could have been regarded as a symbol of love, and not an intrinsic economic element.

From a legal point of view, the action was considered as an anomaly of the common-law system, because it contained elements of a contract, due to the existence of a marriage promise, as well as elements of tort civil liability, because the existence of an agreement among the two was not requested, but only the simple declaration of the woman, which could have been supported by witnesses.[69)]. Also, the evaluation of the moral prejudice, consisting in the emotional suffering produced by breaking the engagement, was subject to criticism with the argument that "love cannot be treated as a market transaction"[70)], and the relations specific to marriage and engagement cannot be expressed into money.

After the 1950s, breaking the engagement could only cause an emotional suffering, and this cannot be expressed into money. Only the gifts given with anticipation between partners, in order to seal the marriage, could have represented the object of an action. Such a gift is the engagement ring[71)], which is, traditionally, offered when considering marriage, unlike other gifts, such as: cars, clothes, which can be given with the occasion of birthdays or other events.[72)]. The action for restitution of those goods is based on concepts such as: the conditional gift, restitution, enrichment without just reason[73)], but still combines elements of a contract with those of tort civil liability, as was the case of the action „heartbalm", in the past.

The action for restitution of goods given between fiancés had three jurisprudence stages in the United States of America[74)].

Thus, in a first stage, the fiancés were obliged to return the goods when they broke the engagement. Later on, having in view the changes in family law according to which the human relations are too complex to qualify in terms of guilt, the restitution of goods was not grounded on guilt anymore. Recently, this concept evolved to the theory of conditional gift, the condition was sealing the marriage and the gift must have been returned if the marriage does not take place.

In the first stage, the ground for the return of gifts given between fiancés was the existence of a guilt: the woman should have returned the engagement ring if she had broken the engagement, but, not the same thing happened if the engagement was broken by the man. The guilt consisted of breaking the engagement, irrespective of any reasons, the guilty person being the one that announced the breaking of the engagement.[75)].

The second stage started in 1965, when the state of New York modified the legislation, in the way that the action was admissible for the restitution of gifts given when considering marriage, if that did not take place. The action was not based on the necessity of proving guilt, but was only justified by the objective fact that the marriage was not concluded.[76)].

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[69] M. Grossberg – *Governing the hearth: Law and the family in nineteenth century America*, 1985, pag. 33. 38; N. P. Feinsinger – *Legislative Attack on "Heart Balm*", 33 MICH. L. REV. 979, 986-96, 1935.

[70] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.4.

[71] M. F. Brinig – *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 206 (1990); Viviana A. Zelizer – *The social meaning of money* 99-101 (1994).

[72] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.4.

[73] *Heartbalm Statues and Deceit Actions,* 83 MICH. L. REV., 1770, 1786-87 (1985).

[74] R.Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.4.

[75] Case Spinnell v. Quigley, 785 P. 2d 1149, 1150-51 (Wash. Ct. App. 1990), Case Stanger v. Epler, 115 A. 2d 197 (Pa. 1955)

[76] Case Heiman v. Parrish, 942 P. 2d 631, 635-38 (Kan. 1997), Case Vigil v. Haber, 888 P. 2d 455, 457 (N.M. 1994); E. M. Tomko, Annotation – *Rights in respect of engagement and courtship presents when marriage does not ensue*, 44 A.L.R. 5th 1 68-78 (1997).

In the third stage, according to the theory of conditional gift, the gift given under a condition, which, as a rule, must be explicit, must be returned if the condition was not fulfilled.[77]. In the case of the engagement ring, the condition of marriage is implicit[78]. The condition was interpreted either as the donor's will to marry[79], either as the marriage itself[80]. In the cases regarding the restitution of the engagement ring, the American courts have chosen the second interpretation.

As opposed to the American law, the British legislation presumes that the engagement ring is an absolute gift of the woman, unlike other engagement gifts, which are conditional and must be returned if the engagement is broken, except for the case when the engagement was broken by the fault of the donor.[81].

12.2. Italian civil code

The regulation of the Italian civil code is succinct (art. 79 – 81) and starts by affirming the regulation according to which a marriage promise cannot oblige the party that does not respect it to seal the marriage.

According to article 80, the fiancé can request the return of the gifts given when considering the promise to marriage, in the case when the marriage does not take place. It may be observed that, in a similar way with the regulation from the Romanian new civil code, the obligation to restitution is not limited to gifts given between fiancés. For that, the law does not exclude *ab initio* the restitution of the gifts given by third parties to both of the fiancés.

Article 81 introduces the liability for breaking the engagement in a culpable manner, but this operates only in the case when the engagement was concluded through an authentic act or under private signature (therefore, a written document which presumes a higher certainty of the real intention of the parties in order to seal the marriage. The appearance of liability operates when a party breaks the engagement "with no grounded reason". It may be observed that the expression "in an abusive manner", utilized in the Romanian legislation, is not used, but the idea of justification or, even guilt, remains. The second paragraph of art. 81 underlines, similar to the regulation from the Romanian law, that the person that promises and, who "out of his guilt, gave a grounded reason to the other to break the engagement", has similar obligations.

An important element is represented by the fact that art. 81 of the Civil Code obliges the person who promised and then broke the engagement for no grounded reason to compensate the other for the prejudice caused as a result of the "expenses made and obligations contracted in view of marriage", but, doesn't provide for the extension of liability for any other due prejudice. As a matter of fact, the possibility of repairing the moral prejudice or of compensating the unachieved benefit is eliminated by law, the liability being limited strictly to the presented elements.

The Italian law also provides that reimbursing the expenses and obligations is made within the limit in which they were made, according to the state of the parties.

As a general element, we may observe the more restrictive character of the conditions of liability for breaking the engagement, in relation with the new Romanian civil code. Synthesizing, the Italian law allows the liability only when the engagement was sealed through an authentic act or under private signature and the composition of the liability is limited only to expenses and obligations assumed in view of marriage, without giving the possibility to repair another prejudice.

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[77] 38 AM. JUR. 2D *Gifts*, par. 81 (1996).

[78] Case Fierro v. Hoel, 465 N. W. 2d 669, 671 (Iowa Ct. App. 1990).

[79] Case Coconis v. Christakis, 435 N.E. 2d 100, 102 (Ohio County Ct. 1981).

[80] Case Lindth v. Surman, 702 A. 2d 560, 561 (Pa. Super. Ct. 1997).

[81] S. Cretney, Statues – *Law Reform (Miscellaneous Provisions) Act 1970*, 33 MOD. L. REV. 534, 536 (1970).

12.3. Swiss civil code

The regulation of engagement in Switzerland is made through articles 90-93 of the Civil Code. As the Romanian and Italian Civil Codes provide, the Swiss Civil Code underlines, in article 90, that the law does not grant a right to action in order to force to seal the marriage that the fiancé refuses. In addition to the two mentioned codes, there are certain regulated rules regarding the capacity of the persons that could seal a valid engagement, namely the minors and the convicts under judicial disability have this right only by a representative. The provision is liable to criticism, on the argument that the engagement is a personal act and it should be left at the consideration of the concerned person with full exercise capacity.

The provisions of article 91 of the Swiss Civil Code regarding the restitution of gifts in the case of breaking the engagement are similar to the ones from the new Romanian Civil Code. Thus, the fiancés can request the restitution of gifts in the case of engagement dissolution, except for the case when the death of one of the fiancés happened or in the case of common gifts. If the gifts no longer exist in kind, the restitution is made to the extent of the enrichment without just cause. Although, in the Swiss Civil Code it is not underlined expressly, as in the new Romanian Civil Code, it would be interpreted that it is about the gifts given in consideration of marriage and not any gift given during the engagement.

In what regards the incidence of good will, this represents a new element than in the Romanian and Italian civil codes. Article 92 of the Swiss Civil Code provides the following: „In the case when one of the fiancés, with good will, has taken decisions in view of marriage, which generated expenses or the loss of a benefit, he could demand an adequate financial participation from the other fiancé, with the condition that this would not be inequitable in relation the ensemble of circumstances". The difference towards the Romanian regulation regarding compensation is based, in principle, on: a) the new Romanian Civil Code refers to the party that can be obliged to compensations, namely the one that abusively broke the engagement, while, the Swiss Civil Code mentions the party that can request such compensations, namely, the one that made such expenses with good will. We consider that the Romanian regulation, although liable to criticism with regard to the lack of a definition or of circumstances which qualify an attitude as being abusive, when breaking the engagement, is preferable to the Swiss one, which highlights the good will of the person which can request and not of the one which may be obliged to pay the compensations, as it would be natural when engaging the civil liability of a person; b) the new Romanian Civil Code extends the area of possibilities to request compensations for "any other prejudices" also, other than the Swiss civil code, which only focuses on engaging certain expenses or losing a benefit in relation with the proposed marriage. We consider that the Swiss regulation, as well as the Italian one, under this aspect, is more concise and less susceptible to a non-unitary interpretation, as it may be possible in the case of the Romanian legislation.

Conclusions

At first sight, despite the arguments related to tradition and certain (few) foreign legislation, it could be affirmed that the regulation of the engagement within the new Romanian Civil Code does not respond to a social need. However, we consider that an assessment from an obsolete perspective would be wrong, due to the fact that the engagement could be the antechamber of marriage. Therefore, this explains the interest of knowing who can be engaged, in what conditions, how can it be ended and, more important, the consequences of breaking the engagement.

The provisions of the new Romanian Civil Code, comprised in articles 266-270 are subject to criticism at least for the following aspects: a) does not establish the legal nature of this union; b) does not impose the written form as a condition when sealing the marriage; c) grounds the concept

of liability for prejudice based on the idea of guilt; d) leaves the categories of prejudices which could draw liability of that who abusively breaks the engagement to the consideration of the court.

What it would be desired in the future regulation would be the separation of the effects of breaking the engagement of the idea of guilt or abuse. Without assuming a certain model, it can be observed that in the American system, as well as in other law systems, the evolution of jurisprudence and regulation was in view of elimination of a subjective consideration over elements so sensible as the inter-human relations and in view of a more strict probation (not with any evidence means) of a promise to marry, when this implies effects such as the draw of judicial liability.

Having in view the increasing incidence of the concubinage type relations, we consider that it would have been useful to regulate a concubinage relation, after the model of certain states, such as: Iceland, Denmark, Sweden, Great Britain, The Netherlands, etc. Such a convention may clarify the rights and obligations of the concubines, the legal nature of the goods attained during the concubinage, etc.

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UNELE CONSIDERAŢII PRIVIND REGLEMENTAREA LOGODNEI ÎN NOUL COD CIVIL ROMÂN[1)] ŞI ÎN UNELE LEGISLAŢII STRĂINE

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Abstract

Noul Cod civil readuce în peisajul juridic român o instituţie rarisimă şi aparent vetustă – logodna. Prezentul articol analizează evoluţia logodnei, natura juridică, condiţiile de fond şi de formă, conţinutul acestui act juridic sui generis, precum şi aspectele sensibile referitoare la efectele juridice ale logodnei, în special ale ruperii acesteia. De asemenea, sunt prezentate elemente de drept comparat, fiind subliniată în special corelaţia dintre efectele ruperii logodnei şi culpa părţilor în alte sisteme de drept.

Cuvinte cheie: *logodna, promisiune de căsătorie, ruperea logodnei, răspundere, daruri.*

1. Introducere

Logodna are o vechime considerabilă, fiind menţionată chiar în vechiul testament, unde era desemnată prin termenul ebraic „*aras*", cu semnificaţia de „angajament de căsătorie"[2)] sau „legământ de căsătorie".

Sub aspect religios, bărbatul şi femeia logodiţi erau consideraţi deja soţ şi soţie, fără a avea însă dreptul să întreţină relaţii sexuale până la nuntă[3)]. Încălcarea acestei interdicţii era sancţionată, după Vasile cel Mare, cu excluderea de la împărtăşanie timp de 11 ani.

Considerarea persoanelor logodite ca şi căsătorite atrăgea o serie de consecinţe extrem de severe. De pildă, preotul putea refuza să cunune o persoană care fusese mai întâi logodită bisericeşte cu o altă persoană decât aceea cu care dorea să se căsătorească. Tot astfel, Canonul al 98-lea al Sinodului al şaselea considera că săvârşeşte adulter (şi-l osândea ca atare) pe cel care lua în căsătorie femeia logodită cu altul.

Logodna – simbol al uniunii dintre un bărbat şi o femeie – în urma legământului solemn al acestora de a se căsători, era întâlnită şi în dreptul roman[4)], fiind desemnată prin termenul „*sponsalia*".

Potrivit tradiţiei romane, inelul de logodnă – dăruit cu această ocazie – trebuia purtat pe inelarul stâng, considerându-se că de la baza acestui deget începea „*vena amoris*" (vena dragostei), care ajungea la inimă.

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[1] Noul Cod civil român (Legea nr. 287/2009) a fost publicat în Monitorul Oficial, Partea I, nr. 511 din 24 iulie 2009.

[*] Conf. univ. dr., Facultatea de Drept, Universitatea "Nicolae Titulescu, Bucureşti; magistrat judecător, membru cu activitate permanentă al Consiliului Superior al Magistraturii (e-mail: danlupascu@csm1909.ro). tudiul a fost elaborat în cadrul proiectului de cercetare "Uniformizarea practicii judiciare şi armonizarea cu jurisprudenţa CEDO, imperativ al înfăptuirii justiţiei. Propuneri legislative privind asigurarea unei practice judiciare unitare" (finanţat CNCSIS-UEFISCSU, proiect nr. 860/2009, cod CNCSIS ID-1094).

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[2] În limba engleză, logodna este definită prin termenul „engagement" (angajament).

[3] A se vedea: Moldova creştină. Realitatea din perspectiva Bibliei – www.moldovacrestina.net.

[4] A se vedea: I. Chelaru – *Căsătoria şi divorţul. Aspecte juridice civile, religioase şi de drept comparat* – Editura „A92 Acteon", pag. 27.

La noi, exista obiceiul ca părinţii băiatului (viitorii socri mari) să meargă „în peţit" la părinţii fetei (viitorii socri mici). Cele două familii stabileau, de comun acord, detaliile nunţii (dată, loc, invitaţi, etc.), precum şi zestrea. Alteori, fata era peţită de la părinţii ei doar de către viitorul soţ.

În anumite zone geografice se obişnuia şi aducerea unui gaj (de regulă, o sumă de bani, numită „capără" sau „arvună"), care se restituia în cazul ruperii logodnei[5)].

Logodna se încheia prin punerea pe degetul inelar de la mâna dreaptă a fetei a inelului de logodnă[6)]. Ulterior, pentru a primi binecuvântarea divină, cei doi parteneri mergeau la biserică, unde se oficia „slujba de logodnă", cu cel puţin o lună înaintea încheierii căsătoriei[7)]. Cu această ocazie se puneau verighetele de logodnă (de regulă, din argint), care, până la taina cununiei, erau purtate de către viitorii soţi pe mâna dreaptă.

Implicarea bisericii făcea ca acea logodnă să fie considerată „în regulă şi cu tărie".

Acest obicei se păstrează oarecum şi astăzi, slujba de cununie fiind precedată, în aceeaşi zi, de slujba de logodnă.

Tiparul tradiţional al cererii în căsătorie a suferit mutaţii profunde, inversându-se, în anumite situaţii, până şi rolurile, în sensul că bărbatul este cel cerut în căsătorie.

Sub aspect spiritual, logodna este aproape la fel de importantă ca şi căsătoria, pentru că semnifică declararea reciprocă a sentimentelor şi legământul de a încheia căsătoria, la care se adaugă, eventual, binecuvântarea relaţiei de către părinţi şi preot.

Ea prezintă însă importanţă din punct de vedere juridic numai în măsura în care legea o recunoaşte ca atare.

Vechile noastre legiuiri[8)], ca şi vechiul drept francez[9)], reglementau logodna, socotită un contract, care genera obligaţia de a face, şi anume: încheierea căsătoriei. Neexecutarea acestei obligaţii atrăgea condamnarea logodnicului, care s-a desistat fără motive, la plata de despăgubiri faţă de celălalt[10)]. Cu toate acestea, clauza penală nu era admisă.

Începând cu secolul al XVII-lea, sub puternica influenţă a doctrinei juridice şi a jurisprudenţei, în ideea asigurării deplinei libertăţi a consimţământului părţilor la căsătorie, s-a stabilit că logodna nu are validitate juridică în domeniul contractual[11)], admiţându-se însă în practică posibilitatea unei responsabilităţi delictuale în cazul ruperii culpabile a logodnei.

Faptul că, în lipsa unei consacrări legislative, instanţele recunoşteau „tânărului amăgit în speranţele lui prin ruperea pe nedrept a logodnei, dreptul de a cere restituirea darurilor şi o despăgubire echitabilă"[12)] a suscitat critici vehemente[13)] şi a determinat unele state să-şi reconsidere poziţia în privinţa logodnei.

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[5] A se vedea: I. Ceterchi, ş.a. – *Istoria dreptului românesc*, vol. I, Bucureşti, 1980, pag. 505.

[6] Potrivit unei opinii, obiceiul ca băiatul să dăruiască fetei un inel de logodnă există din anul 1447, când împăratul Maximilian I de Habsburg (1459 – 1519) i-a dăruit iubitei sale – Maria de Burgundia – un inel cu diamant.

[7] A se vedea: www.grace.ro.

[8] Pravila lui Matei Basarab şi Pravila lui Vasile Lupu (în vigoare în perioada 1652 – 1711), Codul Andronachi Donici (în vigoare până la 1817), Codul Calimach şi Codul Caragea (în vigoare între 1817 – 1832), etc.

[9] A se vedea: D. Alexandresco – *Explicaţiune teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi şi cu principalele legislaţiuni străine*, Tipografia Naţională, Iaşi, 1898, pag. 140.

[10] A se vedea: A.R. Ionaşcu – *Curs de drept civil român*, *Vol. II, Dreptul familiei*, Sibiu, 1941, pag. 18; C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – *Tratat de drept civil român*, Vol. I (reeditare), Editura All, Bucureşti, 1998, pag. 188.

[11] Pentru soluţiile Codului civil italian şi Codului civil austriac din acea vreme, a se vedea: D. Alexandresco – *op. cit.*, pag. 140.

[12] A se vedea: Motivarea cu privire la reglementarea logodnei în Codul civil Carol al II-lea, susţinută de ministrul justiţiei, Victor Iamandi, în noiembrie 1939.

[13] Profesorul francez Josserand socotea acest sistem jurisprudenţial defectuos şi contradictoriu: „din două una, sau promisiunea de căsătorie este fără valoare obligatorie şi atunci nu se înţelege cum neexecutarea sa ar putea

În acest context, logodna a fost reglementată şi în Codul civil Carol al II-lea din 1940[14)], care însă nu a mai intrat în vigoare. La acea vreme logodna era legiferată şi în Transilvania (unde se aplica Legea XXXI din 1894), precum şi în Bucovina (unde era incident Codul general austriac).

2. Sediul materiei

Noul Cod civil român reglementează logodna în Cartea a II-a (Despre familie), Titlul II (Căsătoria), Capitolul I (Logodna), art. 266 – 270.

Şi alte legislaţii reglementează această instituţie, fiind întâlnită, de exemplu, în Elveţia, Italia, precum şi în sistemul anglo – saxon.

3. Noţiune şi natura juridică

Sub imperiul unor reglementări mai vechi, logodna a fost definită în literatura de specialitate ca fiind „învoiala reciprocă între două persoane de a se căsători”[15)] sau „promisiunea reciprocă a două persoane de a se căsători în viitor”[16)].

În esenţă, ambele definiţii surprind aceleaşi elemente, respectiv: manifestarea voinţei, constând în promisiunea reciprocă; caracterul bilateral al înţelegerii; obiectul acordului de voinţe: încheierea căsătoriei în viitor.

Noul Cod civil utilizează următoarea formulă de redactare: „Logodna este promisiunea reciprocă de a încheia căsătoria”[17)]. Acelaşi act normativ defineşte căsătoria ca fiind „(…) uniunea liber consimţită între un bărbat şi o femeie, încheiată în condiţiile legii”[18)].

Comparând cele două texte de lege se poate observa că, în vreme ce în cazul logodnei se subliniază, în mod exclusiv, acordul de voinţă, la căsătorie accentul cade pe starea juridică subsecventă exprimării consimţământului.

Este oare justificată această diferenţiere?

În opinia noastră răspunsul negativ se impune, întrucât ambele instituţii izvorăsc dintr-un act juridic, dar generează o stare juridică, un statut reglementat de lege, ce nu poate fi ignorat.

Prin urmare, termenul „logodnă” are o dublă accepţie: de act juridic şi de stare juridică.

Actul juridic al logodnei este înţelegerea prealabilă a viitorilor soţi, care urmează a fi desăvârşită prin încheierea căsătoriei.

Faptul că legiuitorul operează cu termenii „promisiune reciprocă” ne poate conduce spre ideea de convenţie, mai precis de „antecontract”. Mai mult, din această perspectivă prezintă relevanţă şi caracterul bilateral al înţelegerii.

Toate acestea pot oare legitima concluzia că ne aflăm în prezenţa unui contract?

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fi uneori generatoare de responsabilitate; sau autorul rupturii poate fi declarat responsabil de prejudiciul cauzat, şi atunci înseamnă că el era angajat, prin promisiunea sa, cel puţin într-o oarecare măsură” [Josserand – *Le problème juridique de la rupture des fiançailles*, Chronique D.H., 1927, pag. 21. (citat de A.R. Ionaşcu – op. cit., pag. 18 – 19)].

[14] A se vedea: Codul civil Carol al II-lea, promulgat cu înaltul Decret regal nr. 3993 din 7 noiembrie 1939 şi publicat în Monitorul Oficial nr. 259, Partea I, din 8 noiembrie 1939 (Titlul V, Capitolul I, art. 135 – 156).

[15] A se vedea: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – op. cit., pag. 188.

[16] A se vedea: A. R. Ionaşcu – op. cit., pag. 17.

[17] A se vedea: art. 266 alin. (1).

[18] A se vedea: art. 259 alin. (1).

În opinia noastră nu, întrucât între actul logodnei şi contract există numeroase deosebiri, cu privire la: calitatea părţilor; formarea consimţământului; viciile de consimţământ; capacitatea părţilor; scopul urmărit; modul de determinare a efectelor juridice; posibilitatea afectării de modalităţi; cazurile de nulitate şi regimul nulităţii, etc.

În realitate, este vorba despre un act juridic de drept al familiei sau, în alţi termeni, un act juridic *sui generis,* care atrage un anume statut legal pentru persoanele logodite.

Observăm că definiţia legală a căsătoriei se potriveşte perfect şi în cazul logodnei, care, în esenţă, este tot o „uniune" (în accepţiunea de asociere, legătură între două persoane pentru un scop comun) liber consimţită între un bărbat şi o femeie, încheiată în condiţiile legii.

Ceea ce le diferenţiază însă este, în principal, scopul urmărit: prin încheierea logodnei se „pregăteşte" încheierea căsătoriei, care, la rândul ei, vizează întemeierea unei familii. Cu alte cuvinte, logodna este doar un proiect de căsătorie.

Se impune sublinierea că încheierea căsătoriei nu este condiţionată de încheierea logodnei, după cum logodna nu se transformă automat în căsătorie.

Conchizând pe aceste aspecte, definim logodna ca fiind *starea juridică facultativă, premergătoare căsătoriei, izvorâtă din promisiunea reciprocă intervenită, în condiţiile legii, între un bărbat şi o femeie de a încheia căsătoria.*

Suntem, aşadar, în prezenţa unei veritabile instituţii civile, care se întemeiază pe acordul de voinţă al viitorilor soţi, materializat într-un act juridic.

4. Caractere juridice[19)]

Instituţia logodnei prezintă următoarele caractere juridice:

1) Logodna este uniune între două persoane

Actul logodnei presupune o asociere (legătură) între cele două persoane pentru realizarea unui scop comun: încheierea căsătoriei.

2) Logodna se încheie între un bărbat şi o femeie

Fiind o stare juridică premergătoare căsătoriei, logodna împrumută această trăsătură esenţială, fiind interzisă logodna între persoane de acelaşi sex.

Pe de altă parte, după cum căsătoria este dominată de principiul monogamiei, ca o consecinţă a caracterului exclusiv al sentimentului de dragoste, tot astfel cei logodiţi nu pot încheia o altă logodnă, câtă vreme cea anterioară nu a încetat *(lato sensu).*

3) Logodna este liber consimţită

Astfel, nimic nu împiedică persoanele respective de a-şi promite reciproc încheierea căsătoriei.

4) Logodna este consensuală

Potrivit art. 266 alin. (3) teza I din noul Cod civil: „Încheierea logodnei nu este supusă niciunei formalităţi (…)". Prin urmare, nu este necesară intervenţia vreunei autorităţi pentru constatarea încheierii logodnei, părţile având libertatea deplină de a alege modalitatea concretă de exprimare a consimţământului.

Spre deosebire de căsătorie, unde însăşi legea fundamentală prevede posibilitatea celebrării religioase, însă numai după încheierea căsătoriei civile[20)], la logodnă nu există o asemenea reglementare. Totuşi, în mod tradiţional, logodna este o instituţie civilă, care, ulterior, poate fi celebrată şi religios.

[19] Cu privire la caracterele juridice ale căsătoriei, *de lege lata*, a se vedea: I.P. Filipescu, A.I. Filipescu – op. cit., pag. 26.

[20] A se vedea: art. 48 alin. (2) teza a II-a din Constituţie, republicată.

5) Logodna se încheie până la căsătorie

Potrivit legiuirilor noastre vechi, logodna trebuia să fie urmată în termen de doi ani până la patru ani de căsătorie.

Actuala reglementare nu mai stabileşte niciun termen în acest sens.

Din această perspectivă, părţile pot să convină, cu ocazia logodirii, asupra datei încheierii căsătoriei (în condiţiile legii), după cum au libertatea să nu stabilească nimic în acest sens. Indiferent de variantă, durata logodnei nu poate depăşi momentul încheierii căsătoriei.

6) Logodna se întemeiază pe egalitatea în drepturi şi obligaţii a persoanelor logodite

Egalitatea dintre bărbat şi femeie există în toate domeniile vieţii sociale[21)].

În privinţa logodnei, această egalitate se referă atât la condiţiile încheierii, cât şi la relaţiile dintre cei logodiţi.

7) Logodna se încheie în scopul căsătoriei

Promisiunea reciprocă pe care şi-o fac părţile vizează încheierea căsătoriei, al cărui scop este întemeierea unei familii.

Cu alte cuvinte, prin încheierea logodnei nu se creează o familie, ci doar o eventuală premisă a naşterii sale.

5. Condiţii de fond

5.1. Precizări prealabile

Potrivit art. 266 alin. (2) din noul Cod civil: „Dispoziţiile privind condiţiile de fond pentru încheierea căsătoriei sunt aplicabile în mod corespunzător, cu excepţia avizului medical şi a autorizării organului administrativ competent".

Excepţia la care face referire dispoziţia reprodusă mai sus are în vedere, pe de o parte, logodna minorului de cel puţin 16 ani, iar, pe de altă parte, logodna între rudele în linie colaterală de gradul al patrulea. În ambele situaţii, spre deosebire de căsătorie, nu este nevoie de „aviz medical" şi nici de „autorizare". Numai că, în mod greşit, se vorbeşte de „autorizarea organului administrativ competent", când, în realitate, autorizarea se dă către „instanţa de tutelă", care, în opinia noastră, nu are natură administrativă, ci judiciară.

Din cele ce preced conchidem că se pot logodi numai persoanele care îndeplinesc condiţiile necesare încheierii căsătoriei.

Condiţiile de fond pot îmbrăca forma pozitivă – în sensul că trebuie să existe pentru a se putea încheia logodna – sau forma negativă – în sensul că nu trebuie să existe pentru a se putea încheia logodna. Acestea din urmă pot fi definite drept „impedimente la logodnă".

5.2. Condiţii de fond pozitive pentru încheierea logodnei

1) Vârsta necesară pentru logodnă

Ca regulă, logodna se poate încheia numai dacă persoanele respective au împlinit vârsta de 18 ani. Prin urmare, prezintă relevanţă majoratul civil şi nu dobândirea capacităţii[22)] depline de exerciţiu.

Cu titlu de excepţie, minorul care a împlinit vârsta de 16 ani se poate logodi cu încuviinţarea părinţilor (din căsătorie, din afara căsătoriei sau adoptivi) sau, după caz, a tutorelui, numai dacă există „motive temeinice", pe care legea nu le defineşte[23)].

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[21] A se vedea: Legea nr. 202/*2002 privind egalitatea de şanse şi de tratament între femei şi bărbaţi*, republicată în Monitorul Oficial, Partea I, nr. 150 din 1 martie 2007.

[22] Pentru capacitatea de a încheia logodna, a se vedea şi art. 90 alin. (2) din Codul civil elveţian.

[23] Aceeaşi situaţie se întâlneşte în cazul căsătoriei minorului. De *lege lata*, cu privire la conţinutul sintagmei „motive temeinice", în doctrină s-a considerat că sunt asemenea motive: graviditatea, naşterea, boala gravă,

În caz de divergenţă între părinţi cu privire la încuviinţarea logodnei, hotărăşte instanţa de tutelă[24)], având în vedere interesul superior al copilului.

Dacă unul dintre părinţi este decedat (moarte constatată fizic ori declarată judecătoreşte) sau se află în imposibilitate de a-şi manifesta voinţa (interdicţie judecătorească, stare de comă, declararea judecătorească a dispariţiei, alienaţia sau debilitatea mintală, ş.a.) este suficientă încuviinţarea celuilalt părinte. De asemenea, în cazul scindării ocrotirii părinteşti (divorţ, constatarea nulităţii sau anularea căsătoriei, etc.) este suficientă încuviinţarea părintelui care exercită autoritatea părintească.

În situaţia în care nu există nici părinţi, nici tutore, este necesară încuviinţarea persoanei sau, după caz, autorităţii care a fost abilitată să exercite drepturile părinteşti.

Încuviinţarea logodnei este o componentă a ocrotirii părinteşti, fiind, în esenţă, un act juridic unilateral, revocabil până în momentul încheierii logodnei[25)].

La fel ca şi în cazul căsătoriei minorului[26)], atât refuzul abuziv de încuviinţare a logodnei, cât şi revocarea abuzivă a încuviinţării pot fi cenzurate la instanţa de judecată, urmându-se calea procedurii necontencioase.

Legea nu impune vreo condiţie de formă pentru încuviinţare, situaţie în care opinăm că aceasta poate fi dată verbal sau în scris.

Nu există vreo limită de vârstă maximă[27)] pentru logodnă ori vreo condiţie privind diferenţa de vârstă[28)] dintre logodnici.

2) Diferenţa de sex

Ca şi în cazul căsătoriei[29)], logodna poate fi încheiată numai între un bărbat şi o femeie. Deşi nu era necesară o prevedere expresă în acest sens – având în vedere trimiterea generală pe care o face art. 266 alin. (2) la condiţiile de fond ale căsătoriei – totuşi legiuitorul a vrut să înlăture orice dubiu[30)].

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concubinajul, etc. (A se vedea, spre exemplu: I.P. Filipescu, A.I. Filipescu – *Tratat de dreptul familiei*, Ediţia a VIII-a, revăzută şi completată, Editura „Universul Juridic", Bucureşti, 2006, pag. 12; A. Bacaci, V. Dumitrache, C. Hageanu – *Dreptul familiei*, Editura „All Beck", Bucureşti, 1999, pag. 18 – 19; E. Florian – *Dreptul familiei*, Editura „Limes", Cluj – Napoca, 2003, pag. 26 – 27.

[24] Potrivit Codului civil din 1864, astfel cum a fost modificat în 1906, în cazul băiatului şi fetei sub 21 de ani care doreau să se căsătorească era necesar consimţământul părinţilor, iar în caz de neînţelegeri între părinţi, consimţământul tatălui era de ajuns (art. 131). Dacă ambii părinţi erau morţi sau în neputinţă de a-şi manifesta voinţa „atunci bunul şi buna despre tată şi în lipsa lor, bunul şi buna despre mamă ţin locul acestora", iar în lipsă de buni, era necesar consimţământul tutorelui (art. 133). A se vedea: C. Hamangiu, N. Georgean – *Codul civil adnotat*, Vol. I, reeditare, Editura All Beck, Bucureşti, 1999, pag. 175 – 176.

[25] În acelaşi sens, cu privire la analiza condiţiilor necesare pentru acordarea dispensei de vârstă pentru încheierea căsătoriei minorului, a se vedea: F.A. Baias, M. Avram, C. Nicolescu – *Modificările aduse Codului familiei prin Legea nr. 288/2007*, în Revista „Dreptul" nr.3/2008, pag. 9 – 41.

[26] A se vedea: F.A. Baias, M. Avram, C. Nicolescu – op. cit., pag. 18

[27] În sensul că, în Rusia ţaristă căsătoria era prohibită peste 80 de ani, a se vedea: A.R. Ionaşcu – *op. cit.,* pag. 25.

[28] Referitor la vârsta celor ce se căsătoresc, Îndreptarea legii (Pravila cea mare din timpul lui Matei Basarab) prevedea următoarele: „(…) să nu fie bărbat de 50 de ani şi muiarea de 12 sau de 15 ani sau muiarea de 50 de ani şi bărbatul de 20 (…) să nu fie bărbat bătrân şi muiare tânără sau muiare bătrână şi bărbat tânăr (…) fiindcă acest lucru nu iaşte numai cum se cade, ci încă e ruşinos, dosadă, imputare şi batjocură" (Glava 198) – A se vedea: I. Chelaru – op. cit., pag. 25 – 26.

[29] Căsătoria între persoane de acelaşi sex este recunoscută în următoarele state: Olanda, Belgia, Marea Britanie, Canada, Spania, Norvegia, Suedia, Portugalia, Africa de Sud, Nepal şi SUA (doar Connecticut, Iowa, Massachusetts, Vermont şi Carolina de Nord). Dezbateri publice, cu susţinerea partidelor politice aflate la putere, în vederea recunoaşterii acestei uniuni se regăsesc în state precum: Islanda, Slovenia, Luxemburg, Argentina şi Venezuela.

[30] A se vedea: art. 266 alin. (5) din noul Cod civil.

Sexul fiecărei persoane este menţionat în actul de naştere şi, respectiv, certificatul de naştere.

În cazul persoanelor cu anumite probleme medicale (sex incert, modificări în planul sexualizării, tulburări psihologice de sexualizare) se poate promova acţiune în justiţie pentru stabilirea exactă a sexului sau, după caz, pentru schimbarea sexului[31)].

3) Consimţământul la logodnă

Consimţământul la logodnă reprezintă manifestarea de voinţă a celor două persoane în vederea încheierii logodnei.

Acest acord de voinţă nu se confundă cu simpla cerere în căsătorie, după cum este diferit de consimţământul la căsătorie.

Consimţământul la logodnă trebuie să îndeplinească următoarele condiţii:

a) să provină de la o persoană cu discernământ, adică de la o persoană care are atât capacitate intelectivă, cât şi capacitate volitivă; Aşa fiind, lipsa discernământului (cazul alienatului mintal, debilului mintal şi persoanei lipsită vremelnic de facultăţile mintale: ebrietate, delir, hipnoză, etc.) atrage şi lipsa consimţământului.

b) să fie exprimat personal de către cei ce vor să se logodească, fiind exclusă încheierea logodnei prin reprezentare[32)];

c) să fie liber, în sensul că nu există nicio piedică în alegerea viitorului logodnic (limitări de castă, rasiale, religioase, juridice, ş.a.). În sens juridic, consimţământul este liber dacă nu există vicii de consimţământ; Sunt vicii de consimţământ eroarea (care poartă numai asupra identităţii fizice a celuilalt logodnic), dolul şi violenţa.

d) să fie deplin, adică neafectat de modalităţi (termen, condiţie, sarcină);

e) să fie exprimat neîndoielnic.

5.3. Condiţii de fond negative pentru încheierea logodnei (impedimente la logodnă)

Sunt acele împrejurări care împiedică încheierea logodnei, şi anume:

1) Starea civilă de persoană căsătorită sau persoană logodită

Cum bigamia este o condiţie de fond negativă pentru încheierea căsătoriei[33)], aplicabilă în mod corespunzător şi în cazul logodnei[34)], rezultă că persoana căsătorită nu se poate logodi cu o altă persoană.

Tot astfel, dat fiind specificul proiectului de căsătorie şi fundamentul acestuia, apreciem că persoanele logodite nu pot încheia o nouă logodnă.

2) Rudenia

Este necesar să se distingă între rudenia în linie dreaptă (directă) – caz în care logodna este interzisă indiferent de grad – şi rudenia în linie colaterală – caz în care logodna este interzisă doar până la al patrulea grad inclusiv.

Pentru motive temeinice – la fel ca şi în cazul logodnei minorului – rudele în linie colaterală de gradul al patrulea (adică verii primari) se pot logodi.

3) Adopţia

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[31] La nivelul statelor europene nu există o abordare comună în privinţa transsexualismului, fenomen care nu este încurajat. În acelaşi timp, după Hotărârea din 11 iulie 2002, pronunţată în Cauza Christine Goodwin versus Regatul Unit, tendinţa dominantă este de recunoaştere a noii identităţi sexuale.

[32] În dreptul roman, peţitorul sau mijlocitorul de căsătorii (*proxeneta sau conciliator nuptiarum*) avea dreptul la o plată (*Proxenetica jure licito petuntur*). La noi această convenţie era considerată ca fiind contrară bunelor moravuri, fiind lovită de nulitate, astfel că peţitorul sau starostele nu primeau vreo plată. (A se vedea: D. Alexandresco – op. cit., pag. 142).

[33] Potrivit art. 273 din noul Cod civil: „Este interzisă încheierea unei noi căsătorii de către persoana care este căsătorită".

[34] A se vedea: art. 266 alin. (2) din noul Cod civil.

Potrivit art. 451 din noul Cod civil: „Adopția este operațiunea juridică prin care se creează legătura de filiație între adoptator şi adoptat, precum şi legături de rudenie între adoptat şi rudele adoptatorului".

Drept urmare, logodna este oprită între adoptat şi rudele sale din adopție, în aceleaşi condiții ca şi între rudele fireşti.

4) Tutela

Tutorele, din rațiuni de ordin moral, nu se poate logodi cu persoana minoră aflată sub tutela sa.

5) Alienația mintală, debilitatea mintală ori lipsa temporară a facultăților mintale

Alienatul sau debilul mintal nu se pot logodi, indiferent dacă se află sau nu sub interdicție judecătorească.

În cazul celor lipsiți vremelnic de facultățile mintale (stare de ebrietate, hipnoză, delir, etc.) este oprită logodna doar cât timp nu au discernământ.

6. Condiții de formă

Dominată de principiul consensualismului, logodna nu este supusă niciunei formalități[35)].

Cu toate astea, considerăm că nimic nu împiedică părțile să încheie logodna într-un cadru solemn (de ex.: în fața notarului public), consemnând în scris promisiunea reciprocă de a se căsători.

Legea nu impune vreo cerință privitoare la daruri (ex.: inelul de logodnă ori alte daruri), astfel că inexistența acestora nu influențează validitatea logodnei.

De asemenea, nu se cere ca logodna să fie înregistrată în evidențele vreunei instituții.

7. Dovada logodnei

Logodna poate fi dovedită cu orice mijloace de probă admise de lege, cum ar fi: interogatoriu, martori, prezumții, înscrisuri, etc. Apreciem că aceste condiții deosebit de facile privind proba ar putea să conducă în practică la dificultăți de stabilire a situației de fapt, în condițiile în care relațiile reale dintre logodnici sunt dificil de apreciat în mod obiectiv de către terți (în numeroase ocazii, un martor poate declara ceea ce unul dintre logodnici i-a relatat; în rare situații martorii asistă direct la formularea promisiunii reciproce).

8. Efectele logodnei

Legea nu arată care sunt efectele logodnei, ci se limitează doar să reglementeze consecințele predominat patrimoniale ale ruperii logodnei.

Actul juridic al logodnei generează starea juridică de persoane logodite. De aici decurg o serie de consecințe morale, dar şi juridice.

Între cei doi (bărbat şi femeie) se creează o relație specială, care trebuie să le domine conduita în realizarea promisiunii reciproce de a se căsători. Din punct de vedere al dogmelor creştineşti, logodna reprezintă o formă de „înrudire morală sau spirituală".

Din împrejurarea că este sancționată juridicește persoana care rupe logodna în mod abuziv sau, în mod culpabil, îl determină pe celălalt să rupă logodna putem afirma că între logodnici există o serie de drepturi şi îndatoriri personale, asemănătoare, în principiu, celor din căsătorie.

[35] A se vedea: Art. 266 alin. (3) teza I din noul Cod civil.

Astfel, ca expresie a deplinei egalităţi în drepturi şi obligaţii, logodnicii hotărăsc de comun acord în tot ceea ce priveşte proiectata lor căsătorie.

Fără a pune semnul egalităţii între cele două instituţii juridice, dat fiind faptul că ambele au la bază prietenia şi afecţiunea dintre un bărbat şi o femeie, credem că nu este exagerat a se susţine existenţa unor obligaţii reciproce (respect, fidelitate şi sprijin moral).

În afara drepturilor şi obligaţiilor care decurg din însăşi natura logodnei, suntem de părere că pot să existe şi alte drepturi şi, respectiv, obligaţii corelative, în raport de conţinutul concret al înţelegerii dintre părţi. Avem în vedere acele aspecte asupra cărora cei doi pot conveni (în virtutea principiului autonomiei de voinţă) şi care sunt compatibile cu logodna.

Dacă în trecut logodna presupunea în mod obligatoriu respectarea unui legământ de castitate până la cununie şi chiar purificarea spirituală a viitorilor soţi, astăzi ei pot conveni să locuiască şi, eventual, să se gospodărească împreună, situaţie în care logodna se poate suprapune pe starea de concubinaj.

Dacă din relaţia celor logodiţi s-au născut copii, aceştia sunt din afara căsătoriei, urmând regimul juridic respectiv.

Logodnicii pot să aleagă regimul matrimonial, înţelegere care va produce efecte din momentul încheierii căsătoriei. Din acest punct de vedere au următoarele alternative: comunitatea legală; separaţia de bunuri; comunitatea convenţională. Dacă aleg un alt regim matrimonial decât cel al comunităţii legale, trebuie să se prezinte la notarul public pentru încheierea unei convenţii matrimoniale, care îmbracă forma unui înscris autentificat.

Întrucât logodnicii nu sunt supuşi regimului matrimonial, bunurile dobândite împreună pe perioada logodnei sunt supuse regulilor coproprietăţii (proprietatea comună pe cote – părţi). De menţionat că există chiar o prezumţie relativă de coproprietate, în cazul bunurilor stăpânite în comun[36)].

În considerarea logodnei sau pe durata acesteia, în vederea căsătoriei, logodnicii pot să-şi facă daruri (donaţie, după regulile dreptului comun) ori să primească daruri de la terţi. Această din urmă variantă poate îmbrăca forma legatului sau donaţiei, iar natura proprietăţii asupra bunului respectiv se va stabili în raport de voinţa dispunătorului.

Logodnicii pot conveni să-şi acorde reciproc sprijin material (obligaţia de a suporta împreună cheltuielile eventualului menaj în comun şi obligaţia de întreţinere).

În raport de conţinutul concret al învoielii dintre părţi se apreciază drepturile şi obligaţiile acestora şi, în ultimă instanţă, eventuala atitudine abuzivă de rupere a logodnei sau de determinare culpabilă la ruperea logodnei.

9. Nulitatea logodnei

Întrucât legea prevede că în cazul logodnei sunt aplicabile – cu excepţiile menţionate mai sus[37)] – condiţiile de fond pentru încheierea căsătoriei, considerăm că trebuie să se accepte şi consecinţa nerespectării acestora, şi anume: nulitatea.

Nulitatea logodnei este sancţiunea aplicabilă în cazul nerespectării cerinţelor prevăzute de lege pentru încheierea acesteia.

În raport de caracterul nulităţii, aceasta se împarte în nulitate absolută şi nulitate relativă.

Logodna este lovită de nulitate absolută în următoarele cazuri:

a) persoanele respective nu aveau vârsta necesară pentru logodnă; Avem în vedere minorii sub 16 ani, care nu se pot logodi în nicio situaţie.

[36] A se vedea: Art. 633 din noul Cod civil.
[37] A se vedea: Supra, 5.1.

b) logodna s-a încheiat între două persoane de acelaşi sex;

c) consimţământul nu îndeplineşte condiţiile analizate mai sus[38)] (cu excepţia vicierii consimţământului);

d) persoana logodită era căsătorită;

e) persoanele între care s-a încheiat logodna sunt rude în linie dreaptă (indiferent de grad) sau rude în linie colaterală (până la gradul patru inclusiv); În cazul rudelor în linie colaterală de gradul patru inclusiv, dacă există motive temeinice, logodna este valabilă.

Cazul prezentat are în vedere deopotrivă rudenia firească şi rudenia civilă.

f) persoana logodită este alienat mintal sau debil mintal.

Acţiunea în constatarea nulităţii absolute a logodnei este imprescriptibilă[39)] şi poate fi introdusă de orice persoană interesată, inclusiv de către procuror.

În mod excepţional, în cazul nerespectării condiţiei privind vârsta necesară pentru logodnă, nulitatea se acoperă dacă, până la rămânerea definitivă a hotărârii judecătoreşti, persoanele în cauză au devenit majore.

Logodna este lovită de nulitate relativă în următoarele cazuri:

a) minorul care a împlinit 16 ani s-a logodit fără să aibă încuviinţarea prevăzută de lege;

b) consimţământul a fost viciat prin eroare, dol sau violenţă;

c) la data încheierii logodnei persoana era lipsită vremelnic de discernământ;

d) tutorele s-a logodit cu persoana minoră aflată sub tutela sa.

Acţiunea în anularea logodnei se prescrie în termen de 6 luni, care curge de la date diferite, după cum urmează:

a) în cazul lipsei încuviinţării pentru logodna minorului, termenul curge de la data la care cei chemaţi să încuviinţeze logodna au luat cunoştinţă de aceasta;

b) în cazul vicierii consimţământului ori a lipsei vremelnice a discernământului, termenul curge de la data încetării violenţei sau, după caz, de la data la care cel interesat a cunoscut eroarea, dolul sau lipsa vremelnică a discernământului;

c) în cazul tutorelui logodit cu persoana minoră aflată sub tutela sa, termenul curge de la data încheierii logodnei.

Acţiunea în anulare are caracter personal, putând fi intentată doar de către cel al cărui interes a fost vătămat, respectiv: persoana (persoanele) sau autoritatea chemate să încuviinţeze logodna minorului sub 16 ani; logodnicul al cărui consimţământ a fost viciat; persoana lipsită vremelnic de discernământ; minorul aflat sub tutelă.

Dreptul la acţiune nu se transmite moştenitorilor. Cu toate acestea, dacă acţiunea a fost pornită de către titularul său, ea poate fi continuată de moştenitori.

În cazul logodnei minorului care a împlinit 16 ani, nulitatea relativă se acoperă dacă, până la rămânerea definitivă a hotărârii judecătoreşti, s-a obţinut încuviinţarea.

Hotărârea judecătorească definitivă de admitere a acţiunii în constatarea nulităţii sau în anularea logodnei produce efecte retroactiv, din momentul încheierii logodnei. Ca efect al admiterii acţiunii se consideră că acea logodnă nu a existat, astfel că nu a produs nicio consecinţă juridică.

10. Încetarea logodnei

În opinia noastră, se poate vorbi despre „încetarea logodnei" atât în sens larg, cât şi în sens restrâns.

[38] A se vedea: Supra, 5.2., pct. 3).

[39] A se vedea: Art. 2502 alin. (2) pct. 3 din noul Cod civil.

Lato sensu, încetarea logodnei include şi ruperea acesteia.

Logodna încetează *(strico sensu*) în cazul realizării scopului său (încheierea căsătoriei) ori în situaţia morţii (constatată fizic ori declarată prin hotărâre judecătorească definitivă) a unuia dintre logodnici. În primul caz, foştii logodnici devin soţi, cu drepturile şi obligaţiile ce derivă din căsătorie. În cazul secund, încetează toate efectele logodnei *(ex nunc)*, iar darurile pe care logodnicii le-au primit în considerarea logodnei sau, pe durata acesteia, în vederea căsătoriei nu sunt supuse obligaţiei de restituire[40)]. În acest caz – după cum bine spunea fostul ministru al justiţiei, Victor Iamandi, cu ocazia susţinerii în Parlament al proiectului Codului civil Carol al II-lea – „(…) interesul material al moştenitorilor de a primi înapoi darurile trebuie să cedeze în faţa datoriei morale de a feri de orice jignire memoria celui dispărut". Este vorba atât de darurile pe care logodnicii şi le-au făcut între ei, cât şi cele primite de la terţi. Dispensa de restituire vizează atât moştenitorii logodnicului mort, cât şi logodnicul supravieţuitor.

11. Ruperea logodnei

11.1. Condiţiile ruperii logodnei

Noul Cod civil român nu prevede cazurile în care se poate rupe logodna, ci reglementează doar consecinţele juridice ale ruperii logodnei.

În opinia noastră, ruperea logodnei poate interveni printr-un act bilateral sau printr-un act unilateral.

Astfel, cum logodna are la bază acordul de voinţă al părţilor, nimic nu le împiedică pe acestea să convină ruperea logodnei[41)].

Apreciem că părţile pot decide ruperea logodnei chiar şi în cazurile în care logodna ar fi lovită de nulitate[42)], atâta timp cât nu s-a constatat judecătoreşte ineficienţa juridică. A nu accepta această soluţie înseamnă a supune părţile la cheltuieli inutile, forţându-le să se adreseze justiţiei.

Ruperea logodnei doar de către una dintre părţi se poate face din motive întemeiate sau din motive neîntemeiate.

În legislaţia veche erau considerate drept motive întemeiate: absenţa îndelungată a unuia dintre logodnici[43)]; condamnarea logodnicului la o pedeapsă infamantă; contractarea unei „boli ruşinoase"; „îngreunarea de către sămânţă străină"; pierderea averii, ş.a.[44)]

În raport de reglementarea actuală, considerăm că temeinicia motivelor se apreciază prin raportare la drepturile şi obligaţiile care dau conţinut concret logodnei respective. Aprecierea temeiniciei motivelor se va face de către instanţa de judecată de la caz la caz. Se va avea în vedere interpretarea voinţei părţilor exprimată fie în mod expres într-un act scris (atunci când logodna este consemnată într-un înscris care cuprinde drepturile şi obligaţiile părţilor), fie cea rezultată prin

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[40] A se vedea: Art. 268 alin. (3) din noul Cod civil.

[41] Romanii aplicau şi în această materie principiul: *„Quae consensu contrahuntur, contrario consensu dissolvuntur"* (Contractele care se formează prin consimţământ, se dizolvă prin consimţământ contrar).

Şi vechile noastre legiuiri prevedeau că „se strică logodna când, fără pricină, logodnicii se vor căi". (A se vedea: Codul Andronachi Donici – Capitolul 30, § 7, şi Codul Caragea – Partea a III-a, Capitolul 15, art. 3 lit. h) – citate de D. Alexandresco – op. cit., pag. 462).

[42] Vechile noastre legiuiri făceau vorbire de faptul că „se strică logodna" în situaţii care ţineau de nevalabilitatea acesteia, cum ar fi: logodna nu s-a făcut „prin voinţa şi ştirea părinţilor şi a epitropilor"; „când se va afla pricină de rudenie", ş.a. [A se vedea: Codul Andronachi Donici (Capitolul 30, § 7) – citate de D. Alexandresco – op. cit., pag. 461).

[43] În dreptul roman logodnicul trebuia să aştepte cel mult trei ani întoarcerea celuilalt. Desfacerea logodnei opera dacă s-a prelungit cununia peste trei ani (după Codul Caragea) şi peste patru ani (după Codul Andronachi Donici). (A se vedea: D. Alexandresco – op. cit., pag. 460).

[44] A se vedea: D. Alexandresco – op. cit., pag. 460 – 461.

aprecierea altor probe care sunt administrate în fața instanței (atunci când logodna nu este consemnată într-un înscris sau prevederile acestuia nu sunt suficient de clare din punctul de vedere al consemnării drepturilor şi obligațiilor părților).

Aşa fiind, apreciem că ar putea constitui motiv temeinic, de exemplu: încălcarea obligației de fidelitate; atitudinea violentă a unuia dintre logodnici față de celălalt; declararea judecătorească a dispariției; încheierea unei logodne cu o altă persoană, etc.

Dimpotrivă, părăsirea logodnicului din pur capriciu, fără un motiv legitim poate antrena răspunderea juridică a celui care a rupt abuziv logodna.

Cu alte cuvinte, stabilirea temeiniciei motivelor ruperii logodnei prezintă importanță din perspectiva acțiunii în despăgubiri pentru prejudiciile cauzate.

În ceea ce priveşte condițiile de formă ale ruperii logodnei, noul Cod civil reia ideea bazată pe principiul simetriei de formă, dispunând că: „Ruperea logodnei nu este supusă niciunei formalități şi poate fi dovedită cu orice mijloc de probă”[45)].

Ruperea logodnei are drept consecință principală încetarea drepturilor şi obligațiilor născute din actul logodnei.

Potrivit legii, logodnicul care rupe logodna nu poate fi obligat să încheie căsătoria[46)]. Soluția este firească, întrucât logodna nu este un contract, iar consimțământul la căsătorie trebuie să fie exprimat în mod liber[47)].

11.2.Efectele ruperii logodnei

Noul Cod civil se ocupă de efectele patrimoniale ale ruperii logodnei[48)], având în vedere două chestiuni, şi anume: a) restituirea darurilor; b) angajarea răspunderii pentru ruperea abuzivă[49)].

11.2.1.Obligația de restituire a darurilor

Restituirea are ca obiect „darurile pe care logodnicii le-au primit în considerarea logodnei sau, pe durata acesteia, în vederea căsătoriei”[50].

Deşi s-ar putea presupune că reglementarea vizează, în principal, darurile făcute între logodnici, interpretarea corectă a textului este că trebuie restituite inclusiv darurile primite de unul sau de ambii logodnici de la terți (*ubi lex non distinguit, nec nos distinguere debemus)*.

Suntem de părere că aceste daruri sunt „daruri condiționale”, adică donații supuse unei condiții rezolutorii.

Dispoziția de mai sus trebuie corelată cu prevederile art. 1030 alin. (1) din noul Cod civil, potrivit cărora: „Donațiile făcute viitorilor soți sau unuia dintre ei, sub condiția încheierii căsătoriei, nu produc efecte în cazul în care căsătoria nu se încheie”. Deşi denumirea marginală a acestui articol face vorbire de caducitate, apreciem că, în realitate, este vorba despre neîndeplinirea unei condiții, deoarece caducitatea presupune intervenția unei împrejurări independente de voința

[45] A se vedea: Art. 267 alin. (3) din noul Cod civil.

[46] A se vedea: Art. 267 alin. (1) din noul Cod civil. În acelaşi sens, a se vedea şi art. 90 alin. (3) din Codul civil elvețian.

[47] În sensul că, „consimțământul viitorilor soți trebuie exprimat în mod liber şi nesilit, întrucât nu poate face obiectul unor convenții anterioare”. (A se vedea: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – op. cit., pag. 188).

[48] A se vedea: Art. 267 – 270 din noul Cod civil.

[49] Cu privire la reglementarea acestei chestiuni legiuitorul român s-a inspirat din Codul civil elvețian (art. 91 – 93) şi Codul civil italian (art. 80 – 81).

[50] A se vedea: Art. 268 alin. (1) din noul Cod civil.

părților actului juridic[51)]. În plus, obligația de restituire a acestor daruri este independentă de ideea de culpă a unuia dintre logodnici pentru ruperea logodnei.

Precizăm că, în conformitate art. 268 alin. (1) din actul normativ analizat, sunt exceptate de la restituire „darurile obişnuite". Noțiunea de daruri obişnuite se regăseşte în noul Cod civil în mai multe domenii, cum ar fi: art. 144 alin. (1) prevede că tutorele nu poate face donații în numele minorului, cu excepția darurilor obişnuite, potrivite cu starea materială a minorului; art. 146 alin. (3) dispune că minorul nu poate face donații, cu excepția darurilor obişnuite, potrivite cu starea sa materială; art. 346 alin. (3) prevede că darurile obişnuite sunt exceptate de la regula potrivit căreia bunurile comune ale soților pot fi înstrăinate numai cu acordul ambilor soți; potrivit art. 1091 alin. (3), rezerva succesorală se stabileşte fără a ține seama de darurile obişnuite; de asemenea, art. 1150 alin. (1) lit. c), prevede că darurile obişnuite nu sunt supuse obligației de raport a donațiilor.

Apreciem că darurile obişnuite trebuie apreciate în raport cu contextul sau situația oferirii acestora (de exemplu, ziua de naştere) şi, aşa cum prevăd art. 144 şi 146 din noul Cod civil, trebuie apreciate în raport cu starea materială a persoanelor în cauză. Totuşi, considerăm că darurile obişnuite nu trebuie confundate cu darurile manuale, reglementate la art. 1011 alin. (4) din noul Cod civil, a căror sferă de aplicare este mai largă.

În cazul sumelor de bani dăruite, restituirea va avea în vedere valoarea actualizată, fără dobânzi (fructe civile), deoarece restituirea este independentă de buna sau reaua credință a logodnicilor. Dobânda ar putea fi datorată numai începând de la data la care se solicită restituirea sumei respective.

Dacă restituirea în natură nu mai este posibilă, aceasta se face „în măsura îmbogățirii"[52)].

Restituirea darurilor sau a echivalentului în bani atunci când restituirea în natură nu mai este posibilă se va putea realiza fie de bună-voie, fie prin intermediul unei acțiuni în justiție. În acest din urmă caz, dreptul la acțiune se prescrie în termen de un an, care începe să curgă de la data ruperii logodnei[53)].

11.2.2. Răspunderea pentru ruperea abuzivă a logodnei

Codul civil Carol al II-lea conținea o reglementare mai detaliată a consecințelor patrimoniale ale ruperii logodnei. Astfel, potrivit art. 137: „Logodnicul care rupe logodna datoreşte celuilalt logodnic, părinților acestuia sau persoanelor care au înlocuit pe aceştia din urmă, o despăgubire echitabilă pentru cheltuielile făcute sau obligațiunile contractate în vederea căsătoriei, întrucât au fost potrivite cu împrejurările.

De asemenea, cel care rupe logodna datoreşte o despăgubire echitabilă celuilalt logodnic pentru prejudiciul ce a încercat modificând cu bună credință, în vederea căsătoriei, fie alcătuirea patrimoniului său, fie mijloacele sale de a dobândi.

Dacă ruperea logodnei a pricinuit celuilalt logodnic un prejudiciu moral, el are drept la despăgubiri".

Art. 138 din acelaşi act normativ dispunea: „Cel care rupe logodna pentru un motiv întemeiat nu datoreşte despăgubiri.

Logodnicul care prin vina sa determină pe celălalt să rupă logodna, este ținut de obligațiunile prevăzute de articolul precedent".

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[51] Caducitatea reprezintă acea cauză de ineficacitate ce constă în lipsirea actului juridic civil valabil încheiat de orice efecte datorită intervenirii unei împrejurări ulterioare încheierii sale şi care este independentă de voința autorului/autorilor actului juridic – A se vedea: G. Boroi – *Drept civil. Partea generală. Persoanele,* Ed. All Beck, 2002, pag. 225.

[52] A se vedea: Art. 268 alin. (2) teza a II-a din noul Cod civil.

[53] A se vedea: Art. 270 din noul Cod civil.

O situație specială o avea minorul logodit, în sensul că, potrivit art. 139: „Minorul nu datorește despăgubiri dacă persoanele care ar fi fost în drept să consimtă la căsătorie nu au consimțit la logodnă".

Cu privire la daruri, art. 140 conținea următoarea reglementare:

„Ruperea logodnei îndreptățește pe logodnici să ceară restituirea darurilor ce şi-au făcut.

Darurile sunt restituite în natură, sau dacă aceasta nu este cu putință, în măsura îmbogățirii.

Darurile nu se restituie dacă logodna a fost ruptă prin moarte".

În prezent, potrivit articolului 269 din noul Cod civil, angajarea răspunderii se produce, în următoarele cazuri: 1) dacă o parte „rupe logodna în mod abuziv"; 2) dacă o parte „în mod culpabil, l-a determinat pe celălalt să rupă logodna".

Spre deosebire de restituirea darurilor primite în timpul logodnei, care se poate realiza fie de bună voie, fie prin acțiune în justiție, despăgubirile, fiind bazate pe ideea de apreciere a culpei, vor putea fi obținute doar pe cale judecătorească.

În legătură cu despăgubirile[54)], apare problema stabilirii naturii juridice a răspunderii: contractuală sau delictuală[55)].

În opinia noastră, pentru argumentele ce le vom prezenta în continuare, este vorba despre o răspundere civilă contractuală. Astfel, în cazul răspunderii civile delictuale, obligația încălcată este o obligație legală, cu caracter general, care revine tuturor, în timp ce în cazul răspunderii contractuale, obligația încălcată reprezintă o obligație concretă, stabilită printr-un contract[56)]. Deşi nu este un contract propriu-zis, logodna este un act juridic, care generează drepturi şi obligații, inclusiv obligația de a răspunde pentru prejudiciile cauzate. De asemenea, esența logodnei este aceea că „promisiunea de căsătorie" nu poate fi executată în natură prin forța coercitivă a statului, singurul „efect legal" al actului juridic fiind obligația de a răspunde pentru prejudiciul cauzat prin neexecutarea obligației de a încheia căsătoria. În reglementarea noului Cod civil, obligația încălcată (de a încheia căsătoria) nu reprezintă o „regulă de conduită pe care legea sau obiceiul locului o impune", conform art. 1349 din noul Cod civil (răspunderea delictuală). Dimpotrivă, ar fi aplicabile prevederile art. 1350 alin. (2), care se referă la obligația de reparare a prejudiciului „atunci când, fără justificare", o persoană nu îşi îndeplineşte obligațiile pe care le-a contractat.

Se observă că angajarea răspunderii pentru ruperea logodnei depinde de aprecierea ideii de culpă. Constatăm, din această perspectivă, că reglementarea logodnei urmează o direcție opusă configurării căsătoriei în noul Cod civil, în condițiile în care divorțul, în situația când soții sunt de acord cu divorțul şi nu au copii minorii, este privit ca o formalitate care se îndeplineşte inclusiv fără implicarea instanței, de către ofițerul de stare civilă sau notarul public, făcând abstracție de ideea unei culpe. Socotim că evoluția legislației în sensul condiționării răspunderii pentru ruperea logodnei de ideea de culpă nu este benefică, întrucât aprecierea culpei într-o chestiune atât de sensibilă poate fi subiectivă. În acest sens, pe bună dreptate s-a afirmat în jurisprudența americană că „ruperea logodnei care ar fi dus la o căsătorie nefericită era un lucru moral şi, prin urmare, cum ar putea să fie vorba de culpă?"[57)].

În sistemul dreptului vechi logodnicul părăsit avea drept la despăgubire, fără a se ține cont de culpa celui care a rupt logodna, prin faptul neîndeplinirii fără motiv a obligațiunii contractuale de încheiere a căsătoriei, neexistând nici obligația de a dovedi culpa[58)].

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[54] Pentru acordarea de despăgubiri în cazul desfacerii căsătoriei – a se vedea: Art. 388 din noul Cod civil.

[55] Sub incidența Codului civil în vigoare, cu toate că logodna nu mai era legiferată, în trecut daunele interese erau acordate logodnicului părăsit pe temeiul art. 998 din actul normativ menționat, considerându-se că logodnicul din a cărui culpă s-a rupt logodna a comis un delict, care îi angajează responsabilitatea. (A se vedea: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – op. cit., pag. 188. Autorii citează unele soluții jurisprudențiale în acest sens).

[56] A se vedea: C. Stătescu, C. Bârsan – *Drept civil. Teoria generală a obligațiilor*, Ed. All Beck, 2002, pag. 146.

[57] H. F. Wright, Note – *The Action for Breach of the Marriage Promise*, 10, VA. L. REV. 361, 361 (1924)

[58] A se vedea: A.R. Ionaşcu – op. cit., pag. 18.

Conţinutul răspunderii juridice pentru ruperea abuzivă sau culpabilă a logodnei este precizat, de asemenea, de art. 269: partea în culpă este obligată la „despăgubiri pentru cheltuielile făcute sau contractate în vederea căsătoriei, precum şi pentru orice alte prejudicii". Teza finală duce la concluzia că orice prejudiciu suferit de una dintre părţi, ca urmare a ruperii logodnei în mod culpabil de către cealaltă parte, poate face obiectul reparaţiei. Astfel, din interpretarea acestui text ar rezulta că inclusiv prejudiciul nepatrimonial (aşa cum se recunoaşte expres conform articolului 1531 alin. (3) din noul Cod civil). De asemenea, s-ar acoperi atât *damnum emergens,* cât şi *lucrum cessans*[59], fiind aplicabile regulile din noul Cod civil referitoare la executarea obligaţiilor prin echivalent, prevăzute de art. 1531-1537. În ceea ce priveşte *lucrum cessans,* deşi articolul 1532 alin. (2) din noul Cod civil prevede că „prejudiciul ce ar fi cauzat prin pierderea unei şanse poate fi reparat în măsura probabilităţii sale de realizare", apreciem că în materia logodnei aceste dispoziţii sunt dificil de aplicat în practică, datorită caracterului special al relaţiilor dintre logodnici (se poate imagina, totuşi, de pildă situaţia unui logodnic care poate fi pus în situaţia de a nu mai fi numit preot datorită neîndeplinirii culpabile a promisiunii celuilalt logodnic de încheiere a căsătoriei).

La fel ca la acţiunea în restituire, dreptul la acţiunea pentru obţinerea de despăgubiri se prescrie în termen de un an de la ruperea logodnei[60].

În ceea ce priveşte repararea prejudiciului, este necesar să precizăm că art. 267 alineatul (2) prevede: „Clauza penală stipulată pentru ruperea logodnei este considerată nescrisă". În doctrină, clauza penală este considerată drept o „convenţie accesorie prin care părţile determină anticipat echivalentul prejudiciului suferit de creditor ca urmare a neexecutării, executării cu întârziere sau necorespunzătoare a obligaţiei de către debitorul său"[61].

Aşa fiind, semnificaţia dispoziţiei legale de mai sus este instituirea interdicţiei părţilor de a conveni anticipat asupra eventualelor despăgubiri pentru ruperea logodnei. Dacă totuşi au făcut-o, o atare cauză nu va avea eficienţă juridică. Prin această prevedere se asigură posibilitatea exprimării libere a consimţământului la căsătorie.

12. Elemente de drept comparat

12.1. Dreptul anglo-saxon

Sistemul anglo-saxon a cunoscut în decursul ultimelor două secole schimbări majore[62] de jurisprudenţă în ceea ce priveşte efectele desfacerii logodnei. Aceste schimbări s-au produs datorită convingerii că s-au făcut abuzuri în exercitarea unor astfel de acţiuni, precum şi datorită curentului de opinie potrivit căruia „dragostea şi legea sunt incompatibile".

Într-o primă fază a dreptului anglo-saxon în Statele Unite al Americii, titularul acţiunii era femeia căreia i se promisese a fi luată în căsătorie, iar ulterior era părăsită. Aceasta putea cere despăgubiri prin intermediul acţiunii „de încălcare a promisiunii[63]". Acţiunea era cunoscută încă din epoca victoriană a dreptului anglo-saxon din Marea Britanie[64]. Despăgubirile puteau consta la

[59] În sensul că, acţiunea în daune nu poate fi intentată „pentru câştigul ce o parte ar fi fost împiedicată de a realiza" (*lucrum cessans*) – A se vedea: doctrina şi jurisprudenţa veche, citate de profesorul D. Alexandresco – op. cit., pag. 140 – 141.

[60] A se vedea: Art. 270 din noul Cod civil.

[61] A se vedea: C. Stătescu, C. Bârsan – *Drept civil. Teoria generală a obligaţiilor,* Ed. All Beck, 2002, pag. 357;

[62] R.Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2.

[63] În engleza "breach of promise" sau "heartbalm action", conform R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2

[64] M. Grossberg – *Governing the hearth: Law and the family in nineteenth century America*, 1985, pag. 33-38; G. S. Frost – *Promises broken: courtship, class and gender in Victorian England*, 1995, pag. 80-97

început în repararea prejudiciului material. Începând însă cu secolul al XX-lea, despăgubirile includeau prejudiciul pentru beneficiul nerealizat pe care femeia l-ar fi avut ca urmare a încheierii căsătoriei, prejudiciul pentru pierderea şansei de a se căsători cu altcineva (de exemplu, datorită pierderii virginităţii sau naşterii unui copil), dar şi prejudiciul pentru suferinţa emoţională produsă ca urmare a ruperii logodnei. Schimbarea s-a produs în ceea ce priveşte mutarea centrului de atenţie de la beneficiile economice ca urmare a neîncheierii căsătoriei la cele de ordin moral ce ţin de suferinţa emoţională a femeii. Ulterior acestei schimbări, instanţele americane au întâmpinat greutăţi în aprecierea unor astfel de despăgubiri pentru prejudicii morale[65)].

Între 1930 şi 1950, ca urmare a deselor situaţii în care femeile ajungeau să şantajeze bărbaţii înstăriţi prin intermediul acţiunii „de încălcare a promisiunii", numeroase state ale Americii[66)] au abrogat aceasta posibilitate.

Principalele motive care au dus la abrogare au fost cele legate de invocarea statutului egal al femeii cu cel al bărbatului. Căsătoria nu mai reprezenta, în viziunea curentului feminist, esenţa existenţei femeii, iar acţiunea în discuţie nu făcea decât să încurajeze femeile să privească doar beneficiile economice ale relaţiei cu un bărbat, şi nu să-l trateze de pe o poziţie de egalitate[67)]. Reformiştii[68)] susţineau importanţa în declin a instituţiei seducţiei, deoarece pierderea virginităţii nu mai era privită ca un fapt ce putea ruina viaţa femeii; tot mai des aceste femei erau capabile să-şi găsească un loc de muncă şi un alt bărbat cu care să se căsătorească. Mai mult – susţineau aceştia – căsătoria era greşit înţeleasă, deoarece ar fi trebuit să fie o relaţie incapabilă de măsurare în bani. Din moment ce femeia era din ce în ce mai liberă să-şi facă planuri în viaţă, căsătoria devenea din ce în ce mai mult o relaţie bazată pe afecţiune şi mai puţin pe aspecte economice, cum era cazul în trecut. În consecinţă, eliminarea din cadrul acţiunii „de încălcare a promisiunii" a elementelor economice era de natură să modernizeze abordarea acestei acţiuni. Singurul element economic care era acceptat ca rămas în obiectul acţiunii era legat de problema darurilor de logodnă, iar acestea puteau fi privite ca simbol al dragostei şi nu ca element economic intrinsec.

Din punct de vedere juridic, acţiunea era considerată o anomalie a sistemului de common-law, deoarece conţinea atât elemente de contract, datorită existenţei unei promisiuni de căsătorie, cât şi de răspundere civilă delictuală, deoarece nu se cerea dovedirea existenţei unei înţelegeri între cei doi în privinţa căsătoriei, ci doar simpla declaraţie a femeii, care putea fi susţinută de martori[69)]. De asemenea, evaluarea prejudiciului moral, constând în suferinţa emoţională produsă de ruperea logodnei, era criticabilă pe argumentul că „dragostea nu poate fi tratată ca o tranzacţie pe piaţă"[70)], iar relaţiile specifice căsătoriei şi logodnei nu pot fi exprimate în bani.

După anii 1950, ruperea logodnei putea cauza doar suferinţă emoţională, iar aceasta nu putea fi exprimată în bani. Doar cadourile date cu anticipaţie între parteneri, în vederea încheierii căsătoriei, puteau fi obiectul unei acţiuni. Un astfel de cadou este inelul de logodnă[71)], care este în mod tradiţional oferit doar în considerarea căsătoriei, spre deosebire de alte daruri, cum ar fi:

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[65] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2;N.P. Feinsinger – *Legislative Attack on "Heart Balm*", 33 MICH. L. REV. 979, 986-96, 1935; Lea Vander Velde – *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996).

[66] Indiana a fost primul stat care a adoptat aceasta schimbare in 1935, conform M.B.W. Sinclair–*Seduction and the Myth of the Ideal Woman*, 5 LAW&INEQ. J. 33, 65&n.n.237-39 (1987).

[67] H. Spiller Daggett – *Legal essays on family law*, 1935, pag. 39.

[68] J. E. Larson – *Women understand so little, they call my good nature deceit: A feminist rethinking of Seduction*, 93 COLUM. L. REV. 374, 379, 397-99 (1993).

[69] M. Grossberg – *Governing the hearth: Law and the family in nineteenth century America*, 1985, pag. 33. 38; N. P. Feinsinger – *Legislative Attack on "Heart Balm*", 33 MICH. L. REV. 979, 986-96, 1935.

[70] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.4.

[71] M. F. Brinig – *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 206 (1990); Viviana A. Zelizer – *The social meaning of money* 99-101 (1994).

maşini, haine, care pot fi date şi cu ocazia zilei de naştere sau a altor evenimente[72]. Acțiunea pentru restituirea acestor bunuri se bazează pe noțiuni precum: darul condițional, restituire, îmbogățire fără just temei[73], dar combină în continuare elemente de contract cu cele de răspundere delictuală, astfel cum era cazul acțiunii „heartbalm" în trecut.

Acțiunea în restituirea bunurilor date între logodnici a cunoscut la rândul ei trei etape jurisprudențiale în Statele Unite ale Americii[74].

Astfel, într-o primă etapă, logodnicii erau obligați să-şi restituie bunurile atunci când rupeau logodna. Ulterior, având în vedere schimbările din dreptul familiei potrivit cărora relațiile umane sunt prea complexe pentru a le califica în termeni de culpă, restituirea bunurilor nu se mai fundamenta pe culpă. Recent, această concepție a evoluat către teoria darului condițional, iar condiția era încheierea căsătoriei, darul trebuind a fi restituit dacă căsătoria nu mai avea loc.

În prima etapă, fundamentul restituirii cadourilor oferite între logodnici era existența unei culpe: logodnica trebuia să restituie inelul de logodnă dacă rupea logodna, dar nu acelaşi lucru se întâmpla dacă logodna era ruptă de logodnic. Culpa consta în ruperea logodnei, indiferent de motivul care determina aceasta să se întâmple, persoana considerată vinovată fiind cea care anunța ruperea logodnei[75].

A doua etapă a debutat în anul 1965, când statul New York a modificat legislația, în sensul că acțiunea era admisibilă pentru restituirea cadourilor făcute în considerarea încheierii căsătoriei, dacă aceasta nu mai avea loc. Acțiunea nu era bazată pe necesitatea dovedirii unei culpe, ci era justificată doar pe faptul obiectiv al neîncheierii căsătoriei[76].

În a treia etapă, conform teoriei darului condițional, cadoul dat sub o condiție, care de regulă trebuie să fie explicită, trebuie restituit dacă condiția nu se realizează[77]. In cazul inelului de logodnă, condiția căsătoriei este implicită[78]. Condiția a fost interpretată fie ca dorința donorului de a se căsători[79], fie căsătoria însăşi[80]. În cauzele privind restituirea inelului de logodnă instanțele americane au ales a doua interpretare.

Spre deosebire de dreptul american, legislația britanică prezumă că inelul de logodnă este un dar absolut al femeii, spre deosebire de alte daruri de logodnă, care sunt condiționale şi trebuie returnate dacă logodna este ruptă, mai puțin atunci când este ruptă din culpa celui care a făcut darul[81].

12.2. Codul civil italian

Reglementarea în Codul civil italian este succintă (art. 79 – 81) şi debutează prin afirmarea regulii în conformitate cu care încheierea unei promisiuni de căsătorie nu poate obliga partea care nu o respectă la încheierea căsătoriei.

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[72] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.4.

[73] *Heartbalm Statues and Deceit Actions,* 83 MICH. L. REV., 1770, 1786-87 (1985).

[74] R.Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.4.

[75] Cauza Spinnell v. Quigley, 785 P. 2d 1149, 1150-51 (Wash. Ct. App. 1990), Cauza Stanger v. Epler, 115 A. 2d 197 (Pa. 1955)

[76] Cauza Heiman v. Parrish, 942 P. 2d 631, 635-38 (Kan. 1997), Cauza Vigil v. Haber, 888 P. 2d 455, 457 (N.M. 1994); E. M. Tomko, Annotation – *Rights in respect of engagement and courtship presents when marriage does not ensue*, 44 A.L.R. 5th 1 68-78 (1997).

[77] 38 AM. JUR. 2D *Gifts*, par. 81 (1996).

[78] Cauza Fierro v. Hoel, 465 N. W. 2d 669, 671 (Iowa Ct. App. 1990).

[79] Cauza Coconis v. Christakis, 435 N.E. 2d 100, 102 (Ohio County Ct. 1981).

[80] Cauza Lindth v. Surman, 702 A. 2d 560, 561 (Pa. Super. Ct. 1997).

[81] S. Cretney, Statues – *Law Reform (Miscellaneous Provisions) Act 1970*, 33 MOD. L. REV. 534, 536 (1970).

În conformitate cu articolul 80, logodnicul poate cere restituirea darurilor făcute în considerarea promisiunii de căsătorie, în cazul în care căsătoria nu mai are loc. Se observă că, în mod similar cu reglementarea din noul Cod civil român, obligația de restituire nu este limitată la darurile făcute între logodnici, legea neexcluzând *ab initio* restituirea darurilor făcute de terți ambilor logodnici.

Articolul 81 introduce răspunderea pentru ruperea în mod culpabil a logodnei, însă aceasta funcționează numai în cazul în care logodna a fost încheiată prin act autentic sau sub semnătură privată (deci, prin act scris, care presupune dovedirea cu mai mare certitudine a intenției reale a părților de a se angaja în vederea încheierii căsătoriei). Angajarea răspunderii operează când o parte rupe logodna „fără un motiv întemeiat". Se observă că nu se utilizează expresia „în mod abuziv", folosită în legislația română, însă rămâne ideea de justificare sau chiar de culpă. Alineatul al doilea al art. 81 precizează, asemănător cu reglementarea din dreptul român, că obligații similare are promitentul, care „din propria sa culpă, a dat celuilalt un motiv întemeiat să rupă logodna".

Un element important este reprezentat de faptul că art. 81 din Codul civil italian obligă promitentul care a rupt logodna fără un motiv întemeiat să despăgubească pe celălalt pentru pagubele cauzate de „cheltuielile făcute şi obligațiile contractate în vederea căsătoriei", însă nu se prevede extinderea răspunderii la orice alt prejudiciu cauzat. Practic, se elimină prin lege posibilitatea reparării prejudiciului moral sau a compensării beneficiului nerealizat, răspunderea limitându-se strict la elementele menționate.

Legea italiană prevede, de asemenea, că rambursarea cheltuielilor şi a obligațiilor se realizează în limita în care acestea au fost făcute, potrivit stării părților.

Ca element general, se observă caracterul mai restrictiv al condițiilor angajării răspunderii pentru ruperea logodnei, în raport cu noul Cod civil român. Sintetizând, legea italiană permite angajarea răspunderii numai în condițiile în care logodna s-a încheiat prin act autentic sau sub semnătură privată şi conținutul răspunderii este limitat la cheltuielile şi obligațiile asumate în vederea căsătoriei, fără a da posibilitatea reparării altui prejudiciu.

12.3. Codul civil elvețian

Reglementarea logodnei în Elveția se face prin articolele 90-93 din Codul civil. Astfel cum prevăd şi codurile civile român şi italian, Codul civil elvețian precizează, în articolul 90, că legea nu acordă drept de acțiune pentru a constrânge la încheierea căsătoriei pe logodnicul care refuză. În plus față de cele două coduri menționate, sunt reglementate unele reguli privind capacitatea persoanelor care pot încheia o logodnă valabilă, şi anume minorii şi interzişii au acest drept doar prin reprezentant. Dispoziția este criticabilă, pe argumentul că logodna este un act personal şi ar trebui lăsat la aprecierea deplină a persoanei cu capacitate deplină de exercițiu.

Dispozițiile articolului 91 din Codul civil elvețian referitoare la restituirea darurilor în caz de rupere a logodnei sunt similare cu cele din noul Cod civil român. Astfel, logodnicii pot cere restituirea darurilor în caz de rupere a logodnei, mai puțin în cazul în care a intervenit moartea unuia dintre logodnici sau în cazul darurilor obişnuite. Dacă aceste daruri nu mai există în natură, restituirea se face în măsura îmbogățirii fără just temei. Deşi Codul civil elvețian nu precizează în mod expres, astfel cum o face noul Cod civil român, s-ar putea interpreta că este vorba despre darurile făcute în vederea căsătoriei, şi nu orice dar făcut în timpul logodnei.

În ceea ce priveşte incidența bunei-credințe, aceasta este un element de noutate față de codurile civile român şi italian. Articolul 92 din Codul civil elvețian prevede următoarele: „În cazul în care unul dintre logodnici a luat decizii în vederea căsătoriei, de bună-credință fiind, care au ocazionat cheltuieli sau pierderea unui câştig, acesta poate pretinde celuilalt logodnic o participare financiară adecvată, cu condiția ca aceasta să nu fie inechitabilă în raport cu ansamblul circumstanțelor." Deosebirea față de reglementarea română privind acordarea despăgubirilor

constă în principal în: a) noul Cod civil român se referă la partea care poate fi obligată la despăgubiri, şi anume cea care a rupt în mod abuziv logodna, în timp ce Codul civil elveţian menţionează partea care poate cere astfel de despăgubiri, şi anume cea care a angajat, cu bună-credinţă, astfel de cheltuieli. Apreciem că reglementarea română, deşi criticabilă în ceea ce priveşte lipsa unei definiţii sau a circumstanţelor care califică o atitudine drept abuzivă în cazul ruperii logodnei, este totuşi preferabilă celei elveţiene, care circumstanţiază buna-credinţă a persoanei care poate cere şi nu a celei care poate fi obligată la plata despăgubirilor, aşa cum ar fi firesc în cazul angajării răspunderii civile a unei persoane; b) noul Cod civil român extinde sfera posibilităţii de a solicita despăgubiri şi pentru „orice alte prejudicii", faţă de Codul civil elveţian care se rezumă doar la angajarea unor cheltuieli sau pierderea unui câştig în legătură cu încheierea căsătoriei. Considerăm că reglementarea elveţiană, ca şi cea italiană, sub acest aspect, sunt mai concise şi mai puţin susceptibile de interpretare neunitară, aşa cum ar putea fi cazul legislaţiei române.

Concluzii

La prima vedere, în pofida argumentelor legate de tradiţie şi de unele (puţine) legislaţii străine, s-ar putea afirma că reglementarea logodnei în noul Cod civil român nu răspunde unei necesităţi sociale resimţite. Credem însă că o apreciere din perspectivă vetustă ar fi greşită, pentru că logodna poate fi anticamera căsătoriei. Iată deci interesul juridic de a şti cine se poate logodi, în ce condiţii, cum se pune capăt logodnei şi, mai ales, care sunt consecinţele ruperii logodnei.

Dispoziţiile noului Cod civil român cuprinse în articolele 266-270 sunt criticabile pe cel puţin următoarele aspecte: a) nu stabilesc natura juridică a acestei uniuni; b) nu impun forma scrisă drept condiţie la încheierea logodnei; c) fundamentează ideea răspunderii pentru prejudicii pe ideea de culpă; d) lasă la aprecierea instanţei categoriile de prejudicii ce pot antrena răspunderea celui care în mod abuziv rupe logodna.

Ceea ce ar fi de dorit în viitoarea reglementare ar fi separarea efectelor ruperii logodnei de ideea de culpă sau abuz. Fără a prelua un anumit model, se poate observa că atât în sistemul american, cât şi în alte sisteme de drept, evoluţia jurisprudenţei şi a reglementării a fost în sensul eliminării unei aprecieri subiective asupra unor elemente atât de sensibile cum sunt relaţiile interumane şi în sensul probării mai stricte (nu cu orice mijloc de probă) a unei promisiuni de căsătorie, atunci când de aceasta depind efecte precum angajarea răspunderii juridice.

Având în vedere incidenţa tot mai mare a relaţiilor de tipul concubinajului, socotim că ar fi fost utilă şi reglementarea unei convenţii de concubinaj, după modelul unor state, precum: Islanda, Danemarca, Suedia, Marea Britanie, Olanda, etc. O astfel de convenţie putea clarifica drepturile şi obligaţiile concubinilor, raporturile cu minorii rezultaţi din concubinaj, regimul bunurilor dobândite în timpul concubinajului, ş.a.

LEGAL-SERVICE-ORIENTED ARCHITECTURE (LSOA) IN ELAWYER

Xingan Li*

Abstract

Legal services have long been practiced under a monopolistic mode, face-to-face consultation between lawyers and clients being the prototype. Pervasive use of information systems provides the possibility for clients to access legal services in a more cost-effective way. eLawyer is an electronic system assisting lawyers to provide and clients to receive legal services. In this paper, I would like to introduce current development in the respect of eLawyer. In this paper, a broad outlook on legal service is applied, and I will give some basic ideas about how the eLawyer should be structured and operated, which parties are involved, what kind of relationship they have, what services they transact, and what limitations there are in eLawyer services.

Keywords: *eLawyer, information systems, legal services, Legal-Service-Oriented Architecture (LSOA)*

Introduction

Legal services have long been practiced under a monopolistic mode, face-to-face consultation between lawyers and clients being the prototype. Pervasive use of information systems provides the possibility for clients to access legal services in a more cost-effective way. Lawyers have to consider role-transformation and service-transformation. The clients' requirement for change and the lawyers' willingness to transform provide eLawyer with a sturdy foundation.

The term "eLawyer" can be loosely defined as an electronic system more or less assisting lawyers to provide and clients to receive legal services. In this paper, I would like to introduce current development in the respect of eLawyer. As a website, eAvocat's self-introduction states that, "eLawyer is a management application for a law firm using Internet technology and that allows besides an easy management and monitoring of a law firm, easy access from clients to their dossiers and documents." (URL: http://www.amorphys.com/company/news/The_eLawyer_presentation_website_is_online_.html). In this sense, eLawyer has sense in overall eservices industry and deserves research. Friedman (1999, 2001a, 2001b) dealt with providing legal advice to clients through the WWW. However, legal advice is only a part of overall legal services. In this paper, a broad outlook on legal service is applied, and I will give some basic ideas about how the eLawyer should be structured and operated, which parties are involved, what kind of relationship they have, what services they transact, and what limitations there are in eLawyer services.

Parties involved and interaction process

Parties involved

Legal service is purely a knowledge work, whether people nominate it or not. It is a process that the client, who was not trained to have sufficient legal knowledge and skills, acquires legal advices from the lawyer, who was trained to have sufficient legal knowledge and skills, by paying a very big sum of commission. It is so that no state in the world provides sufficient resources in

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training a great number of people to have sufficient legal knowledge to exercise law in the country. Only one in hundreds of thousands of people can be trained and granted a lawyer's qualification at the end of a long-lasting competitive procedure, and after she/he gets a license she/he can do so. Thus her/his knowledge and skills would be very expensive for potential clients to purchase and consume. Monopoly of resources in legal education lead to monopoly of knowledge and skills, and in turn leads to monopoly of market for legal services. One single lawyer cannot monopolize the market of legal services, yet the whole market is in fact monopolized by all the lawyers as a whole. This monopoly is usually supported by the state power. That's why this monopolistic status can be challenged by no one.

Unfortunately, unlike other services where people can create added-value by access to the existing market, transforming lawyer into eLawyer would not create more lawyers than before. eLawyer is operating in the old market and takes on a new outlook. It is not a force to change the monopolistic situation, but to simplify the process of human-human interaction which is a necessity in transaction of legal services. Similar transactions are prostitution, massage, medical operation, haircut, and so on. They are all examples of services that cannot be substituted by non-human-human interaction.

In this service, the two parties have different roles and status:

1. The service provider is lawyer (or in the name of attorney, solicitor, barrister, counselor-at-law, legal advisor, etc.). The transaction process of legal services can be simplified by adopting eLawyer. To search and hire a lawyer online save much of the client's offline attempt. Some kinds of or some parts of legal services can also be provided through eLawyer. Particularly, preparation for some kinds of legal forms can largely be submitted to the lawyer through eLawyer website, but the lawyer's personal involvement is still a must.

2. The service recipient may be plaintiff or pursuer, and defendant in civil and administrative cases; suspect or defendant in criminal cases; parties to the contract or agreement, and so on. All of these kinds of parties can be an individual, a group of individuals, or an organization, or a group of organizations.

Traditionally, relationship between the lawyer and the client is closely tied by human-human interaction. By eLawyer, the human-human interaction relationship between the lawyer and the client is only slightly intervened by the introduction of human-machine-human interaction.

Interaction process

In eLawyer services, a database of law might be grasped by the service provider. But access to the database is not necessarily a core service of eLawyer, because access to database itself could not constitute a part of legal advices. It can be said that law itself provides only general advices (proscriptions and prescriptions) to all citizens. But legal advices are those that targeted at detailed cases of the clients. Thus access to database of law does not constitute a core service of eLawyer, because a database is not a lawyer and no human-human interaction or even human-machine-human interaction is involved there. It can be seen as a human-machine interaction, a half interaction between human beings.

In practice, legal services are usually provided in particular situations, for example, in the court. When a lawsuit is heard in the court, at the moment, all parties must be present in person, or in special cases, at least the lawyer. So eLawyer has to go offline into the court, where the human-human interaction between the lawyer and the client is transformed into influential force over the human-human interaction between the client and the judge and the jury, so that the judge and the jury can have more knowledge about the situation of the client from a more professional point of view.

Beyond the introduction of the term stand-in-person, I reviewed and recognized that the previous thinking was limited to two extremes of legal services. One end is that legal services are

only provided as a kind of knowledge base for the clients through information system, without much effort of lawyers to assist them. A stand-in-person is not a must and never practically in charge of the service, once the legal database is ready for use. The other end is that legal services finally go to the field- mostly, a court. A stand-in-person become fully in charge of the entire service. Information systems are only assistance for building relationship between clients and lawyers.

Now, with the introduction of the term stand-in-person, I could further expand my discussion. That is, between the above extremes of legal services, there stand more forms of legal services that can be provided as composed of a proportion of automated computing and another proportion of stand-in-person intervention. Here, neither the automated computing nor the stand-in-person is completely responsible for the whole service. Rather than these two extreme forms, both automated computer and stand-in-person contribute to the establishment of relationship between clients and lawyers, to the maintenance of such a relationship, and to the fulfillment of the service object. During the process that lawyers collect commission and provide legal services to clients, clients pay commission to lawyers and accept legal services, information systems constitute a part of the human-human interaction.

Here is a case of eLawyer services provided as in a middle-of-the-way form. According to its self-introduction, LegalZoom.com was founded by attorneys who have worked at some of the most prestigious law firms in the US and have used their expertise to simplify the law and make it accessible for everyone. Many common legal matters, such as drafting a will, incorporating a business or filing a small claims action, are services that have a great market need, while most people do not want to spend the time, or the money to meet a lawyer. LegalZoom was designed to help clients quickly and affordably create estate planning documents, start a business, register a trademark and so on. From legal practice, preparation of legal documents and formalities is a service that is possible to be provided by lawyers with information systems to simplify the process, without the service quality being reduced.

As it is well known, traditional legal services have been solely a knowledge work. They could not be provided entirely without lawyers' personal intervention. In this sense, electronic legal services are at most substitute or supplementary to personal legal services. Thus in case there is any problematic situation, it is the only method for clients to seek help from stand-in-person, and for the lawyers to use their knowledge to resolve the problem.

The Self-service conception and eLawyer service

An ideal model of self-service may exclude any intervention of human elements from IT infrastructure. But other degrading models may involve less and less intervention of human efforts; at least, if there are any errors during the process of self-service, human intervention becomes necessary.

In order to give a broad understanding of the conception, we can look at a conspicuous example of Omenahotellit (Anckar and Patokorpi 2004). It is an idea that hotels are for the purposes of rest and sleeping, all other services, including entertainment, meeting and meal, being supplementary and thus being excluded from such hotels. Some supporting services, such as cleaning and security, are outsourced to specific companies. Beyond this, these hotels can be operated and managed by automated systems rather than any personnel. Exhibition of rooms, booking, payment, check-in and check-out are all realized through the Internet and terminals in the rooms. We can see a highly self-served model.

eLawyer, will not be as highly self-served as Omenahotellit. Legal services have a broad coverage and many different kinds of aspects, differing from consultancy that is highly dependent on knowledge of the lawyer to form-filling that is less dependent on knowledge of the lawyer (nonetheless the knowledge and intervention of the lawyer is still a must).

I think the difference comes from the processes and the results of different services. During the process of legal services, final decision-making is usually manipulated by official agencies but not lawyer or client. Thus the fulfillment of legal services does not mean that the client will realize her/his goal of buying the service. The lawyer has to do her/his best to use legal knowledge to assist the client to cater for the requirements of official agencies. Comparatively, in accommodation services there is not such a decision-making organ. Rather, accommodation services are decided solely by service provider and service consumer.

In addition, in the case of accommodation services, the results of some services have some extent of possibility of reversal and compensation. If there are some errors or faults, one party may give another party some kinds of pecuniary compensation and the other party may be satisfied by the money, additional services, or by finding services elsewhere. Legal services are different. If the clients failed in official decision-making because the lawyer did not provide qualified services, even if she/he gets compensation, she/he may not have an opportunity to get the same need met. Sometimes, the official decision may be final. Other times, the official decision may be appealed against and be reversed. But uncertainty of the final result is beyond the control of either the lawyer or the client.

Added value and compensation

Legal consultation is rather expensive all over the world. For example, in the US, hourly rates of attorneys are calculated by experience levels:

Experience	06-07
20+ years	425
11-19 years	375
8-10 years	305
4-7 years	245
1-3 years	205
Paralegals & Law Clerks	120

Source: United States Attorney's Office,
http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_6.html

eLawyer service can reduce the attempt that the client searches, finds and hires a lawyer, and also reduce the attempt that the lawyer finds a client. The process of transaction in legal service can become simplified because of less transportation, communication, and face-to-face consultation. Most importantly, the expenses involved in face-to-face consultation are to be removed if no such consultation is involved, as in the case of LegalZoom.com.

The lawyer can collect compensation according to the complexity of the case, and the quantity and quality of the legal advices. For example, LegalZoom.com's incorporation service is priced according to three different kinds of packages:

The first is economy package, service of which is priced at $139, covering basic incorporation preparation, such as preliminary clearance of your corporation's name, preparation and filing of Articles of Incorporation, customized corporate bylaws, including provisions protecting officers and directors from liability, and prepared resolutions of the first meeting of the Board of Directors.

The second is standard package, service of which is priced at *$239.00, covering b*asic incorporation preparation and some popular options, such as those included in the economy package, and Deluxe Corporate Kit embossed with your company name, official corporate seal,

twenty custom stock certificates with stock transfer ledger, Microsoft Accounting Express 2008, and medical expense plan forms.

The third is express gold package, service of which is priced at *$359.00, being a a*ll-inclusive rush package, such as those included in the standard package, and priority rush service (7-10 business days); over 40 essential business forms on CD-ROM, including employment and independent contractor agreements; Federal Tax ID (EIN) application preparation; S Corporation election preparation; and second day FedEx shipping of final package.

It is said that the standard incorporation package was priced at about 1,480 US dollar by a lawyer. The primary cost of face-to-face consultation was saved because of provision of it as an eService.

Duration of the relationship

In eLawyer services, lawyer-client relationship can be diversified. In lawsuits, it is a kind of encounter relationship, that is to say, a short-term relationship. This kind of relationship expires when the procedure of the lawsuit is over. It is decided by a short-term demand and supply of legal services. For example, a suspect can only need a lawyer before his innocence is cleared or his conviction takes effect. Further interaction is only possible when relationship is established on new demand and new supply. But between the client and the counselor-in-law, it might be a long-term relationship. It is decided by a long-term demand and supply of legal services. For example, enterprises usually employ such long-term counselors-in-law.

eLawyer services are more valuable in encounter relationship. The client search, find and hire a lawyer only when she/he needs one (for example, http://www.legalzoom.com). Online availability of lawyers' profiles specialized in certain areas can be of special interest for the client in need. High-profile lawyers can have more competitive advantage over their low-profile counterparts in obtaining potential clients.

In long-term legal services, eLawyer service can also be valuable in reducing unnecessary face-to-face interactions between the client and the lawyer. This in turn creates a possibility to reduce counseling time and costs by taking advantage of counselor-in-law's familiarity of the enterprise's business and interests.

Roles of lawyer and client in service chain

The service chain involving the lawyer and the client is more complicated than any other service chains. There are special marketing procedures. In service chain, the following table can well illustrate the roles of the lawyer and the client:

Stage	**Lawyer**	**Client**
Marketing	Advertisements, free answers to questions, FAQ, Pricing standard, past experience (case study), partners and customers	Inquiring regarding basic information about the products and services provided
Negotiation	Describing capacity of the firm for relevant services	Describing service needed, providing necessary information about the service
Contract	Acting as a service provider	Acting as a service consumer
Performance and delivery	Preparing legal documents according to information provided by client, appearing in court or other judicial agencies with client, as an independent legal knowledge worker, but representing interest of the client	Submitting legal documents prepared by the lawyer to official organs, appearing in court or other judicial agencies with lawyer

Follow-up and evaluation	In general, the result is subject to official decision. The standard for whether the service provided is qualified is not based on whether the official decision supports the client's request. But if the client's goal is not reached, the client may claim the service unsatisfied by providing enough evidences.	In general, the result is subject to official decision. The standard for whether the service provided is qualified is not based on whether the official decision supports the client's request. But if the client's goal is not reached, the client may claim the service unsatisfied by providing enough evidences.
Invoice and payment	Holding the right to invoice	Having the liability to pay
Post-marketing	After client accepts the service, the contract fulfilled; if the client is unsatisfied, may refund.	Satisfied with services, the contract fulfilled; unsatisfied with services, requesting a refund for service fee but not official charges

Legal-Service-Oriented Architecture (LSOA)?

Now we are turning to the concept of SOA. I will not say much about how a LSOA looks like, rather, I think there is a critical factor influencing the basic orientation of a LSOA. Legal service has much specific elements absent in many other kinds of services. In considering designing or building a LSOA, these specific elements must be emphasized.

1. Legal service providers are mostly individual lawyers working in person. Even if they are legally organized, they deal with single cases with individuals' knowledge, skills, and experience. No substitute has yet been innovated in the world. The development of legal informatics did not liberate lawyers from physical work. Under such circumstances, the LSOA could not be built as an entirely automated system, which would simply not work.

2. Legal framework is the basis of legal services. However, legal framework, including laws and regulations, cases and decisions, is frequently changing with the development of many relevant factors in society. The LSOA shall have sufficient flexibility to adapt to new, fast and frequent changes in legal framework. Certainly, the central concern is for lawyers to learn new knowledge, skills and to have new experience.

3. Perception of facts in each individual case is a process of precise communication between clients and lawyers. Traditional face-to-face communication was and still is the most important means for clients to clarify facts to lawyers. Whenever lawyers have suspect about facts, clients shall provide detailed information. New ways of communication under LSOA must guarantee correct convey of information from clients to lawyers, or else it would lead to failure of the service.

4. Legal service requires particular trust and security. In all services, customers usually need to provide some information for maximizing their interests and benefits. Legal service is not an exception. But there are different concerns about privacy and security. For example, a criminal suspect might tell a lawyer all the details of his/her criminal act. The lawyer does not have the responsibility to provide a court with those details that are unfavorable for the criminal suspect, but to provide those favorable details. On the contrary, the lawyer has the obligation to keep those bad evidences secret. A successful LSOA must guarantee secured trust.

Limited possibilities

Unlike many other kinds of services, legal services are heavily based on human-human interaction, within which the lawyer provides legal advices to the client strictly according to

disputes and law. At least two parties, the lawyer and the client, are involved in the process. At least two kinds of knowledge, knowledge about the fact, and knowledge about law, form the basis of the interaction. Sometimes more parties are involved in the process and more respects of knowledge are necessary. Most importantly, the process of transmitting legal advices is usually undergoing a dynamic process, in which the client continuously supplements new situations that the lawyers must take into account, and in which some other parties continuously challenge the existing knowledge about fact stated by the client and the existing legal advice stated by the lawyer. Any other interaction cannot substitute the whole complex of human-human interaction, but, to a maximum extent, only part of it. From this point of view, we cannot expect that eLawyer completely exercises the functions of a lawyer.

Another factor that makes client-lawyer relationship special is that the lawyer is hired by the client. It means that the client only buys services from the lawyer within the scope of their contractual clauses. That the client buys is neither the personality of the lawyer, nor the whole knowledge and whole ability of the lawyer, nor something else physically perceivable. This relationship poses the lawyer as a special existence: on one hand, she/he stands with the client, independent of other parties; but on the other hand, she/he stands independent of the client, serving the client with her/his legal knowledge and skills. Thus the transaction of the legal service cannot be made through transfer a package and so on. In most cases, eLawyer might help to simplify the arrangement of human-human interaction by introducing a knowledge-based machine intermediary.

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LEGAL PERSONALITY AND POWERS OF THE EUROPEAN UNION

Augustin FUEREA[1]

Abstract

Based on legal personality, EU won through Treaty of Lisbon, in accordance with the system of division of competences between the Union and the Member States as provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union, competences not conferred upon the Union in the Treaties remain with the Member States. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. The representatives of the governments of the Member States may decide to amend the Treaties upon which the Union is founded, including either to increase or to reduce the competences conferred on the Union in the said Treaties.

Keywords: *EU legal personality; areas of Union competence; Treaty of Lisbon; Treaty on European Union; Treaty on the Functioning of the European Union*

1. Preliminary considerations

We appreciate that it became known, in October 2007, after Italy[2] and Poland[3] have obtained what they requested, through compromises specific to the international law, on what it has already entered in the history of the European Union construction, as the Treaty of Lisbon. The Portuguese Prime Minister, Jose Socrates, the country of whom had provided at the time, the EU Council presidency, said: "It is a victory of Europe! With this treaty, we are able to get out of the impasse. Europe is much stronger after this summit"[4]. This statement is completed by that offered by the European Commission President, José Manuel Barroso, namely: "It is an agreement that gives to the European Union the capacity to act in the 21st century"[5]. The place and role of the Treaty of Lisbon, more precisely of changes appeared after its entry into force, internationally, in general and in Europe, in particular, are highlighted, including by Lars Knuchel, on behalf of the Confederation President, Micheline Calmy- Rey, of Switzerland, state which, as we know, is not a member of the European Union. According to Lars Knuchel, "Switzerland welcomes the concluding of the reform agreement which should make the European Union more effective and more democratic. Switzerland expresses its interest in having as partner, bilaterally, a stable European Union, able to work and negotiate"[6]. And, in addition to what we said, we also mention Rene Schwok's assertion, professor at the European Institute and at the Department of Political

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[2] Italy also received a seat in the European Parliament.

[3] To solve the problem of Poland, the Treaty was accompanied by a Declaration detailing Ioannina compromise.

[4] http://www.swissinfo.ch/fre/Dossiers/La_Suisse_et_la_crise_financiere_mondiale/Actualites/LUnion_europeenne_se_dote_dun_nouveau_traite_a_Lisbonne.html?cid=6202710

[5] *Idem*.

[6] *Idem*.

Science, University of Geneva, who stated that "the agreement was expected by observers"[7]. These are some reactions that the Treaty of Lisbon has produced, even since the negotiations.

The treaty has entered into force on December 1st, 2009, and from that moment on, we equally speak of a new modifying treaty, as well as of an institutional treaty. Why? Because on one hand, the Treaty of Lisbon amends the three treaties, namely: the Treaty establishing the European Community (TEC), the Treaty on European Union (TEU) and the Treaty establishing the European Atomic Energy Community[8] (TEAEC / Euratom). On the other hand, the Treaty of Lisbon is the first EU treaty that gives it legal personality, bringing to the forefront of international relations a new subject of international law.

The structure of the Treaty of Lisbon is relatively simple. The first two articles (Article 1 with 61 paragraphs and Article 2 with 295 paragraphs) are reserved for amendments to the Treaty on European Union, and respectively, the Treaty establishing the European Community[9] (the latter became the Treaty on the Functioning of the European Union - TFEU). The following five articles are dedicated to the final provisions. However, the Treaty is accompanied by numerous Protocols (37) and Declarations (65), plus a preamble and a Final Act.

Among those many changes brought to the Treaty of Lisbon, the following are very important:

- The European Community is replaced by the European Union, which acquires legal personality;

- the disappearance of the three EU pillars established through the Treaty of Maastricht, of 1992, by turning them into EU policies;

- establishing the values and objectives of the Union even from the opening lines of the Treaty. Union values are the reference for future membership of the European Union, as well as for possible sanctions for Member States, if they violate, in a serious and persistent manner, the Treaty provisions;

- the possibility of EU adhesion to the European Convention on Human Rights, by unanimous vote of the Member States;

- the list of fundamental principles governing relations between the Union and Member States (allocation of powers, fair cooperation, equality among states). The Treaty states explicitly that the principle of national security remains the responsibility of each Member State;

-"The European Parliament and the national parliaments have a much greater contribution to EU decision-making, and citizens will be entitled to be informed of decisions taken by ministers, at EU level. All citizens have the opportunity to influence the laws proposed by the European Union;

- for the first time, citizens can directly ask the Commission to propose an initiative of interest to them and within the competence of the Union, by collecting one million signatures from different Member States"[10];

- including the clause on the possibility of Member States to withdraw from the Union. Withdrawal is not subject to any conditions, and becomes operational after an agreement between the Union and the State, or two years after the notification of the intention to withdraw, even if an agreement to that effect had not been concluded.

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[7] *Idem*.

[8] Even though, in its name, including the amendment of this Treaty was not specified, it results clearly, however, from Article 4, paragraph (2) of the Treaty of Lisbon.

[9] TEEC

[10] Source: http://europa.eu/lisbon_treaty/faq/index_ro.htm

A deeper study of the European Union legal personality and powers is an important aspect of legal approaches of that period, and a series of conceptual clarification must be made[11]

2. The Legal Personality of the European Union

Until December 1st, 2009, the European Union was defined as a *sui generis* entity, with an emerging legal personality, relying in its existence on the three pillars established by the Treaty of Maastricht, namely: the European Communities, the common foreign and security policy, justice and internal affairs[12]. Among the Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, we find the one through which "The Conference confirms that the European Union has legal personality", but this fact "does not authorize it in any way to legislate or to act beyond the powers conferred by the Member States by the Treaties "[13].

As for the legal personality of the European Union, we notice that the shortest article of the Treaty on European Union, namely Art. 47, establishes for the first time in EU history, the legal personality of this entity: "The Union shall have legal personality". What legal effect/s does this text produce? It is relatively easy to answer. Thus, from December 1st, 2009, we can say that on the international scene, a new subject of law appears, namely the European Union, if we refer to the definition provided in Art. 1 of the 1975 Convention on the Representation of States in their relations with international organizations with universal character, namely: "an association of states formed by a treaty, with its own constitution and common bodies, having a legal personality distinct from the one of Member States which constitute it"[14]. Another argument is also "Article 2 of the Convention on the Law of Treaties of 1969 that defines the international organization as an intergovernmental organization, highlighting the quality of members"[15]. In short, the following aspects result from definitions provided, with application also to the European Union:

- the members of the organization are the states;
- the organization is established following the agreement of the states, expressed by memorandum (for the European Union, the Treaty of Lisbon);
- the organization has its own institutional structure;
- the organization has its own international legal personality distinct from that of its constituent states.

Another consequence of the legal personality conferred to the European Union is that only the Union is authorized to conclude international agreements in its fields of competence. Also, the legal personality allows to the European Union to have a budget, officials and offices, it can sign contracts and receive diplomatic representatives.

Briefly, the acquisition by the Union of a legal personality:

- is the result of a necessary requirement to establish a clear legal status of the Union, internationally, in general and in Europe, in particular;
- "contributes to improving the Union perception and its capacity for action, facilitating the political and contractual activity of the Union, at bilateral and multilateral level, on the international stage, as well as to its presence in other international organizations;

[11] Ion M. Anghel, in the article "Brief considerations on how to establish the powers of the European Union in the regime of the Treaty of Lisbon", published in the Romanian Journal of Community law, no.1/2009, p. 29, states that: "Determining the powers of the European Union and of its institutions should be an organic and unavoidable necessity, and is an essential and inexorable prerequisite for its existence and operation".

[12] The name of this pillar was changed by the Treaty of Amsterdam (1997/1999), by the name of "police and judicial cooperation in criminal matters".

[13] "24. Declaration on the EU legal personality"

[14] Dumitra Popescu, "Public International Law. Distance learning", Titu Maiorescu University, Bucharest, 2003, p. 62.

[15] *Idem*.

- contributes to the visibility of the European Union and provides to Member States citizens an identity in relation to the Union;

- constitutes an indispensable element in establishing a protection system for fundamental rights at EU level;

- helps to correct failures resulting from the pillar structure"[16].

3. The Powers of the European Union

As stated above, under Statement no. 24 annexed to the Treaty, on grounds of legal personality, which the Union has acquired, it (the Union) is not authorized "in any way to legislate or act beyond the powers conferred to it by Member States by the treaties"[17].

In determining the relationship between EU law[18] and national law of Member States, including in terms of priority, it is important to realize the distinction between the powers of the Union, on one hand, and of Member States, on the other hand. In this respect, the Treaty of Lisbon establishes a clear division of powers between the European Union and its Member States. The material nucleus is represented by articles 4 and 5[19] of the Treaty on European Union, on one hand, and Title I – "Categories and areas of competence of the Union", articles 2-6 of the Treaty on the Functioning of the European Union, on the other hand.

According to article 5 of the Treaty on European Union, "The delimitation of Union powers is governed by the conferral principle. The exercising of these powers is governed by the principles of subsidiarity and proportionality"[20]. "Under the conferral principle, the Union shall act only within the powers conferred by Member States in the treaties, in order to achieve the objectives set by those treaties. Any power which is not conferred to the Union in the treaties belongs to the Member States"[21]. Under "the principle of subsidiarity, in areas that are not under its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by Member States, either at central or at regional and local level, and because of the dimensions and effects expected, can be better achieved at Union level"[22]. In addition to these provisions, we also find those listed in Art. 4. (1) TEU, namely: "any power that is not conferred to the Union through Treaties belongs to Member States". Besides these two principles, under which powers are shared between the European Union and Member States, the Treaty on the Functioning of the European Union dedicates five items to categories and areas of competence of the Union, by developing a genuine list of powers.

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[16] Adapted from the European Parliament Report, «Rapport sur la personnalité juridique de l'Union européenne (2001/2021 (INI)) », Final A5-0409/2001, conducted by the Commission on Constitutional Affairs, rapporteur Carlos Carnero González, submitted on November 21st, 2001.

[17] "The Declaration on the EU legal personality", cited above.

[18] The entry into force of the Treaty of Lisbon requires, among other things, including the initiation steps as renaming and redefining incident industries branches (the shift from traditional branches of law as the community law, the European Community law, the institutional European Community law or the Community law of Business, the European Union law, the institutional law of the European Union, namely the European Union Business Law). This development is emphasized, among other things, also by the Court of Justice of the European Union, in Press Release no. 108/09 of December 10th, 2009 on the decision in Case C-345/08 Krzysztof *Peśla c / Justizministerium Mecklenburg-Vorpommern*; in this press release, the "interpretation of **Union law** or (...) the validity of a **Union act**" are mentioned for first time.

[19] Former Art. 5 TEC.

[20] Paragraph (1).

[21] Paragraph (2).

[22] Paragraph (3).

Even from the first article of the Treaty on the Functioning of the European Union, it is stated unequivocally that "this Treaty organizes the functioning of the Union and determines areas, limits and conditions for the exercise of its powers"[23].

According to article 3 of the Treaty on the functioning of the European Union, "the Union power is exclusive in the following areas: (a) customs union, (b) establishing competition rules necessary for the functioning of the internal market, (c) monetary policy for Member States whose currency is the euro, (d) conserving marine biological resources under the common fisheries policy, (e) common commercial policy, but also for "an international agreement when its conclusion is provided for by a legislative act of the Union or it is necessary to enable the Union to exercise its internal competence, or insofar as it might affect common rules or alter their scope". In all these cases, "only the Union can legislate and adopt acts with mandatory legal action, and Member States can do so only if authorized by the Union or for the implementation of Union acts"[24].

Further, the Treaty specifies the areas where the Union shall share power with the Member States, namely: (a) internal market, (b) social policy, for aspects defined in this Treaty, (c) economic, social and territorial cohesion (d) agriculture and fisheries, excluding the conservation of marine biological resources, (e) environment, (f) consumer's protection (g) transport, (h) trans-European networks (i) energy, (j) area of freedom, security and justice (k) common safety objectives in public health matters, for aspects defined in this Treaty"[25]. These provisions are added to the following: "In research, technological development and space areas, the Union shall have competence to carry out activities, and in particular to define and implement programs and not exercising this power can have as result preventing Member States from exercising their own competence. In areas of cooperation for development and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy, and not exercising that power may have the effect of depriving Member States of the opportunity to exercise their own competence"[26]. Also, "The Union and the Member States may legislate and adopt mandatory legal acts in this area. Member States shall exercise their competence if the Union did not exercise it. Member States shall again exercise their competence if the Union decided to stop exercising it"[27].

Protocol no. 25 on the exercise of shared powers, to the unique article, contains a provision according to which "if the Union takes action in a given area, the scope of exercising the competence covers only those elements regulated by that act of the Union and therefore it does not cover the whole area".

Declaration no. 18 on the delimitation of powers completes everything described above, in that, "according to the system of powers division between the Union and the Member States, as provided in the Treaty on European Union and the Treaty on the functioning of the European Union, any power not conferred to the Union by the Treaties belongs to Member States. When treaties assign to the Union a competence shared with Member States in a given area, the Member States exercise jurisdiction if the Union has not exercised or has decided to stop exercising it. The latter situation may arise when the relevant EU institutions decide to repeal a legislative act, in particular to constantly ensure a better respect of the principles of subsidiarity and proportionality. The Council may request to the Committee, at the initiative of one or more of its members (representatives of Member States) and in accordance with article 241 of the Treaty on European Union, to submit proposals for repealing a legislative act".

[23] Paragraph (1).
[24] Art. 2, paragraph (1) TFEU.
[25] Art. 4, paragraph (2) TFEU.
[26] Art. 4, paragraphs (3) and (4) TFEU.
[27] Art. 2, paragraph (2) TFEU.

In addition to these provisions, comes art. 6 TFEU that, among other things, enumerates areas where the Union is competent to carry out actions to support, coordinate or supplement the actions of Member States: "(a) protect and improve human health, (b) industry, (c) culture, (d) tourism, (e) education, training, youth and sport, (f) civil protection; (g) administrative cooperation". "The Acts of the Union, legally binding, adopted on the basis of Treaties relating to these areas, shall not entail the harmonization of laws and administrative provisions of Member States. The scope and conditions for the exercise of Union powers are established by the provisions of Treaties relating to each area"[28].

EU legal personality and powers are closely related to the concept of supranationality. Why? Because, in its turn, "the supranationality of the European Union is closely related to the pooling of sovereignty and is reflected in the establishment of common institutions…"[29].

Without going into details, however, it must be noted that, unlike the provisions of EU treaties, the division of powers before the entry into force of the Treaty of Lisbon, between the Union and Member States has undergone some changes, namely: until December 1st, 2009, powers were systematized as follows: exclusive Community powers (agricultural policy, trade policy, transport policy and fisheries), shared powers (e.g.: environment, energy, social policy, etc.), and purely national powers (justice and internal affairs, foreign policy and security policy, as cooperation pillars of the European Union). Currently, as one can see, powers are differently ranked, namely: exclusive Union powers, shared powers and actions to support, coordinate or complete actions of Member States. New are also a number of areas exclusively allocated, until the Treaty of Lisbon, to Communities, and today we find them within the shared powers.

In addition, it is also important that "Member States coordinate their economic and employment work policies under the conditions of this treaty, for the defining of which the Union has jurisdiction"[30]. Also, "The Union has the competence, in accordance with provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including to progressively defining a common defense policy"[31].

The provisions in article 352[32] of the Treaty on the functioning of the European Union are also interesting; this article, as it has already been enshrined in the specialized national and international literature, includes a "passarelle clause". According to this article, "if an action by the Union should prove necessary within policies defined in the Treaties, in order to achieve one of the purposes mentioned in the treaties, and if the necessary powers in this regard are not provided in those treaties, the Council acting unanimously at the Commission proposal and after the European Parliament's approval adopts the appropriate measures. At the date on which those provisions are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously at the Commission proposal and after the European Parliament's approval"[33]. The Commission, within the procedure for monitoring the subsidiarity principle, calls the national Parliaments' attention to proposals based on this article. Measures based on article 352 TFEU "can not entail the harmonization between laws, regulations and administrative provisions of Member States where Treaties exclude such harmonization"[34]. The benefit of this article's provisions can not be used "to achieve the objectives of foreign policy and security policy" and "any measure adopted

[28] Art. 2, paragraphs (5) and (6) TFEU.

[29] Ion M. Anghel, "Legal personality and Powers of the European Communities / European Union", Lumina Lex Publishing House, Bucharest, 2006, p. 73.

[30] Art. 2, paragraph (3) TFEU.

[31] Art. 2, paragraph (4) TFEU.

[32] Former art. 308 TEEC.

[33] Paragraph (1).

[34] Paragraph (3).

under this article shall respect the limits"[35] set by the Treaty. The limits specified in the text mentioned are in article 40[36] of the Treaty on European Union. Thus, "the implementation of the common foreign and security policy shall not affect the application procedures and the appropriate scope of powers of institutions under the Treaties for the exercise of Union powers under Articles 3-6 of the Treaty on the Functioning of the European Union. Also, the implementation of policies listed in those articles shall not affect the application of procedures and the appropriate scope of powers of institutions under the Treaties, for the exercise of Union powers, on grounds of this Chapter[37]". To these it is added the Declaration on article 352 of the Treaty on the Functioning of the European Union: "The Conference underlines that, in accordance with the constant jurisprudence of the Court of Justice of the European Union, article 352 of the Treaty on the Functioning of the European Union, which is integrated in an institutional system based on the principle of conferred powers, can not form the basis for the extension of Union powers beyond the general framework which is represented by all provisions of the Treaties and, in particular those provisions that define the tasks and activities of the Union".

In a careful analysis of provisions of the Treaty on European Union, as amended by the Treaty of Lisbon, we note that, although clearly defined, the powers of the Union may still be restricted, or on the contrary extended. To support this statement, we bring the following arguments:

- Art. 6[38], section (1), paragraph 2: "Provisions of the Charter[39] do not extend in any way the competences of the Union, as defined in the Treaties"; also, section (2) provides that "The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. The Union's competences, as defined in the Treaties, are not altered by this accession";
- Art. 48, section (2) TEU states that "the Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for revising the treaties. These proposals[40] may concern, among others, either to increase or reduce the competences conferred to the Union, in the Treaties. These proposals shall be submitted to the European Council by the Commission, and national Parliaments shall be notified". Likewise, we also use the content of section (6), the third paragraph: "The decision referred to in the second paragraph[41] can not extend the powers conferred to the Union, through Treaties".

Conclusions

The entry into force of the Treaty of Lisbon, on December 1st, 2009, is undoubtedly a step forward in achieving the European project. It was possible for such an objective to become a reality through a series of compromises made in the sense of international law, but without

[35] Paragraph (4).
[36] Former art. 47 TEU.
[37] Chapter 2, "Special provisions for foreign and security policy".
[38] Former article 6, TEU.
[39] It involves the Charter of Fundamental Rights, EU legal instrument, which has become legally binding upon the entry into force of the Treaty of Lisbon.
[40] Ion M. Anghel, "Legal personality and Powers of the European Communities / European Union", op. cit., p. 101, states that "The specialized literature considers that the allocation of EC / EU powers is an irreversible act. We believe that this view should be expressed in less categorical terms ... ".
[41] "The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the functioning of the European Union. The European Council shall act unanimously after consulting the European Parliament and the Commission, as well as the European Central Bank in case of institutional changes in the monetary area. This decision shall enter into force only after the approval of Member States, in accordance with their respective constitutional rules".

compromising the idea of European Union, as a subject of international law, having still a highly particular character, even if other theorists have already the most different opinions[42]. The legal personality and powers of the European Union are issues likely to trigger increased efforts from all socio-professional categories, but especially those of lawyers, objectively and necessarily involved in renaming and redefining some concepts, as well as in the knowledge, understanding, study and application of the new acquis of the new entity. The origin of such obligations is in the fundamental law of our country, namely the Romanian Constitution, republished, Title VI (the Euro-Atlantic Integration), art. 148 – Integration into the European Union:

"(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act [43].

(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval".

[42] Ion M. Anghel, in the article "The European Union and the position (the quality of subject of international law) of its Member States", published in the Romanian Journal of Community Law no. 6 / 2009, p. 78, states that: "in the typology of institutions of international law, the European Union appears in its general outline, as an international organization ....".

[43] Emphasis added.

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ISSUES RAISED BY THE CASE LAW ON ADMINISTRATIVE SUSPENSION

Marta Claudia CLIZA *

Abstract

This paper has taken into account the legal practice generated by the two texts excerpted from Law no. 554/2004, respectively articles 14 and 15. The need of such an endeavour is justified by a heterogeneous practice, which has created confusion amongst justiciable people. The suspension of administrative acts represents an institution in itself, and in this situation, we deal with the cancellations ruled by the courts when certain cumulative conditions are not complied with. This is precisely why we need both a theoretical and a practical analysis of the institution of administrative suspension by an administrative court, in the context of the two texts of the law mentioned above.

Keywords*: administrative courts, administrative act, suspension, well-grounded case, imminent damage*

Introduction

At present, one observes an increasing interest of European countries in consolidating and developing procedural warranties for protection against damages or hurting that might occur by the execution of the administrative act, even in the stages that are preliminary to the legal administrative procedure. Thus, legal regimes can have stricter or broader regulations pertaining to the reasons that entitle the judge to rule the measure of suspension.

This study is trying to present the institution of suspension by the law courts of the effects of administrative acts, as a measure that is meant to defend the interests of the people who had their rights harmed and who, at the same time, apply for the cancellation of the act that is considered to be legal.

This scientific endeavour reviews the European systems that give the judge the possibility to temporarily interrupt the effects of an administrative act. Also, the paper provides a thorough presentation of the texts excerpted from Law no. 554/2004, respectively articles 14 and 15, which entitle administrative court judges to suspend such an act, whenever they consider this measure necessary.

The paper also presents certain cases when legal courts have ruled the suspension of such documents, by making reference both to the legal provisions and to the actual case submitted to judgement.

We consider that this paper is useful both for theoreticians and practitioners in the field of law, and especially for those who work in the field of administrative courts, as the paper targets to clarify certain aspects pertaining to the suspension of administrative acts within administrative-related actions.

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The suspension of administrative acts in European legal systems

In the category of legal systems that make it possible to rule the measure of suspension under stricter conditions, we mention the system existing in France, where article L 521-1 of the Code on administrative justice[1] stipulates that, when an administrative decision (even one ruling a rejection) makes the object of an application for annulment or for reformation, after having been informed by means of a notification in this respect, the judge of the "referés" (recourses, applications for annulment that are being judged by the administrative court) may rule the suspension of the execution of such decision or of some of its effects, provided that this be justified by emergency and there is a means that might generate, during the course of trial, "serious doubt" as far as the lawfulness of the decision is concerned. The above-mentioned law also stipulates that, when the suspension is ruled, the application for annulment or reformation of the decision is regulated as soon as possible, and the suspension ends at the latest when a decision is ruled pertaining to the application for annulment or reformation of the decision.

The French system is dominated by the non-suspensive effect of the recourse stipulated in the article L 4 of the Administrative Code for Justice, which affects not only administrative recourses, but also the recourse ways before administrative justice.

Recent administrative doctrines consider that both the derogations from the principle of the suspensive effect and the organisation of the judges' powers to rule upon the postponement or suspension of the execution fall under the incidence of the law.[2]

The Belgian legal system (the Law of October 17, 1991), the application for suspension has an accessory system, compared to the application for annulment, and the execution can only be suspended if serious reasons are invoked, reasons that might justify the cancellation of the act or regulation attacked, provided that the immediate execution of the act or regulation represents a risk for causing serious prejudice, which would be difficult to repair.

Amongst the systems that make it possible to rule the measure of suspension under less strict conditions, one can mention the German system which, by means of paragraph 80-1 1 of the law on administrative jurisdiction grants a suspensive effect to the preliminary administrative complaint and to the application for annulment, without the intervention of the judge, but the German legislation also regulates exceptions from the principle of the suspensive effect of the recourse, by means of paragraph 80- ll of the above-mentioned law. The consequence of the suspensive effect is the fact that the legal force of the administrative document is suspended, such act lacks such force in the first stage and, therefore, it cannot be executed, nor can it generate consequences of another type. In theory, the German administrative law considers that the constitutional requirement of an effective protection of the rights leads to the possibility to make interventions in early stages, before the occurrence of an irreversible situation or of a prejudice that cannot be repaired.

One of the most advanced systems for the protection of citizens before administrative authorities is enforced in Portugal, where the court has the power to take any temporary measures, to make any type of pressure that might be necessary for solving the case, without such ruling being conditioned by the parties' requests.

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[1] C. Lepage, Ch. Huglo, S. Le Boulch, Code de justice administrative (*Translation : Code on administrative law*), Litec, Edition du Juris-Classeur Publishing House, Paris, 2002-2003, 79

[2] L. Visan, D.I. Pasare, Cerinte normative si jurisprudentiale, europene si nationale in materia suspendarii executarii actelor administrative (*Translation : European and national normative and case law requirements in the field of suspension of the execution of administrative acts*), in the magazine "Revista de Drept Public", issue no. 3/2006, 111

We continue the discussion at European level and speak about the suspension of the execution of administrative acts. In this context, on September 13, 1989, the Ministers' Committee within the Council of Europe adopted the Recommendation R (89) 8, pertaining to the temporary jurisdictional protection in administrative matters, which recommends the governments of the member states of the Council of Europe to make use, both in theory and in practice, of the principles stipulated in this Recommendation. One can therefore draw the conclusion that, if an administrative act is challenged before a jurisdictional authority and this authority has not made a ruling pertaining to the lawfulness of such act, it is desirable that, as far as it is aked to rule on measures for temporary protection, in order to avoid any irreparable prejudice and by taking into account all circumstances and interests in question, the court be allowed to decide the full or partial suspension of the execution of the administrative act, by means of a quick procedure and for as long as it is considered to be necessary.

Also, another recommendation, respectively Rec (2003) 16 on the execution of administrative and jurisdictional decisions in the field of administrative law, a recommendation that was adopted by the Ministers' Committee within the Council of Europe, suggests states to include in the established legal framework the possibility of private individuals to request before an administrative or jurisdictional authority the suspension of the challenged decision, if the law does not stipulate that the rightful suspension of the execution of the decision occurs at the very moment when the complaint is formulated.

An interest of this type can also be found at Community level, such as it results from the case law of the Court of Justice of European Communities (CJEC), which decided that, if recourse is filed for the interpretation of a community rule, in order to appreciate the compatibility of the national norm with a community rule submitted to interpretation, while waiting for the interpretative decision and with the purpose of ensure full effectiveness of community law, the judge who is to settle the recourse may postpone the execution of the national norm whose lawfulness is questioned; also, the judge will have the obligation to remove any national norms that might prevent them from taking temporary measures. An additional argument presented is the system established by article 177 TCE, whose useful effect would be reduced if the national court postponing the ruling of a decision until the Court responds the preliminary question failed to order the taking of temporary measures before such moment.

Suspension of administrative acts – theoretical aspects

From a theoretical point of view, the suspension is the operation of temporary interruption of the effects of administrative acts. The suspension of administrative acts is a warranty for lawfulness, but this a warranty that only occurs in exceptional cases, in special situations. It supposes the temporary interruption of the production of legal effects, as well as the temporary postponement of the production of legal effects. Moreover, it is considered that the term "suspension" must also include the situations when an administrative act becomes effective subsequently to the moment when it was issued. This is also the case of administrative acts that become effective later than they were published. The fact that an administrative act becomes effective after its publication means the suspension of the execution obligation. This happens as, in keeping with the common law principles, this obligation must occur the moment when the act is created.

The following are reasons for suspension:

a) Challenging of lawfulness;
b) Change of actual conditions after the issue and, implicitly, the change of the aspects pertaining to opportunities;

c) The need to have compliance of the administrative act with the acts that are subsequently issued by superior bodies;
d) The enforcement of a sanction on a natural person who has perpetrated an administrative deviation;
e) Clarification of a doubt formulated by the issuing body on the lawfulness of the document.

However, these reasons cannot transform the suspension in a rule of the legal status of administrative acts, just like it happens in the case of cancellation.

Suspension is different from cancellation, with the difference been made by several aspects:
a) Cancellation appears as a rule, while suspension is an exceptional operation;
b) Cancellation is ruled when there are certainties that the act is illegal, including as far as its opportunity is concerned, while suspension is ruled when there are doubts concerning the lawfulness, including as far as opportunity is concerned;
c) Any cancellation generates the final cessation of the effect of the administrative act (from this point of view, it is a type of nullity), while any suspension generates the temporary cessation of such effects (it is a singular aspect within the status of administrative acts).

As far as the forms of suspension are concerned, if we take into account the legislation in effect, we can appreciate that the suspension of administrative acts may occur:

a) rightfully (on the grounds of an express provision of the law);
b) on the grounds of an order issued by the superior body;
c) on the grounds of the decision of temporary withdrawal ruled by the issuing body;
d) on the grounds of a court order or of an ordinance of the Public Ministry.

In conclusion, suspension can be ordered by a *legal act*, but it can also be produced by the lawmaker.

The most important situation for suspension in keeping with the law is stipulated in article 123, paragraph 5 of the Constitution. According to this piece of legislation, the presentation of the prefect's action before an administrative court against an act of the county or local council or of the Mayor will withdraw ***the rightful suspension*** of the act, if the prefect considers that the act in question is illegal. Another example of suspension in keeping with the law is given by the Government's Ordinance no. 2/2001 *on the legal status of contraventions*. The provisions of article 32 of this law stipulate that any complaint filed by the contravener against the report drawn up for the contravention will withdraw the suspension of the execution of the act of sanction.

Also, the provisions of Law no. 554/2004 *on administrative courts* stipulate a situation of suspension by means of a legal act: Upon request, the court has the right to take the measure of suspending the administrative act making the object of a litigation submitted to judgement "in better justified cases and in order to prevent the occurrence of imminent damages, the application for suspension will be immediately settled by the court, even without the parties attending, and the order ruled will be rightfully enforceable".

Suspension of administrative acts by the courts

At present, following the suggestions made in the administrative doctrine and taking into account the solutions ruled by administrative courts, the provisions of Law no. 554/2004 were reconsidered, as far as the suspension of the execution of administrative acts is concerned, due to

the changes and additions made by Law no. 262/2007. The current regulations stipulate, as a general rule, the legal suspension, upon request, of the execution of administrative acts, simultaneously to the filing of the administrative recourse or of the application for the annulment of the administrative act before an administrative court, the grounds of the matter being the provisions of articles 14 and 15 of the law. Also, it is stipulated that the attacked document be rightfully suspended if the court is informed by the prefect or by the National Agency of Public Officers.

The Romanian law recognizes the principle of the automatic execution of administrative acts, and therefore Law no. 554/2004, by means of the provisions pertaining to the suspension of the execution of administrative documents creates an exception to this principle and correlates European requirements with national ones. The suspension of the execution of administrative acts is a warranty for lawfulness, which only occurs in exceptional cases and in special situations. Suspension involves either the temporary interruption of the production of legal effects, or the temporary postponement of the legal effects.

Article 14 of Law no. 554/2004, with subsequent changes and additions, regulates the procedure for suspension of the execution of administrative acts by legal means, as suspension is optional and only admissible following the filing of the preliminary administrative recourse, in keeping with the provisions of article 7, as the well-grounded case and any imminent damage that should be prevented must be proved.

Recent administrative doctrines claim that, in the case of suspensions that are based on the exercise of an administrative recourse, administrative courts play a decisive role, in the sense that they must appreciate the apparent illegality of the administrative act and then carefully decide the suspension of the act, only when this is obviously necessary. However, legal practise has proven that there are cases when the suspension of the execution of an administrative act must verify if all legal conditions are complied with, by analysing the evidence existing in the file and the statements made by the parties; the legal arguments of the persons involved in the litigation must also be verified.

As for the conditions pertaining to the actual justification of the suspension, if we are to analyse the provisions of article 14, paragraph (1) of the law, we can see that the suspension of the execution of an administrative act can only be ruled if the following conditions are jointly complied with: the existence of a well-grounded case and the need to prevent imminent damage. The provisions of article 14, paragraph (3) regulates the situation when a major public interest is involved, an interest that might seriously affect the functioning of an administrative public service and which would justify the measure of suspension. A third condition is added, a procedural one this time: the plaintiff must prove the initiation of the preliminary administrative procedure. This is conditions is decisive for the admissibility of the application for suspension of the execution of an administrative act, in keeping with the provisions of article 14 and the compliance with this condition is proven by the previous notification of the issuing body. If no such proof is presented, the correct solution of the court is to reject such application as not admissible.

a) **Existence of a well-grounded case.** At present, the provisions of article 2, paragraph (1) and letter T of Law no. 554/2004 define the phrase "well-grounded case" as a legal actual and lawful circumstance that might generate serious doubt as far as the lawfulness of the administrative act is concerned.

The fact that previously there was no definition for well-grounded cases led to numerous interpretations in the legal practise, as far as the content of this notion was concerned. Numerous examples were given and, with the purpose of limiting the range of this notion, the administrative doctrine gave examples of circumstances that might prove that there is a "well-grounded case" (for example, those connected to the actual and lawful situation, including aspects that emphasize the

illegal nature of the act and the abuse of authority, the efforts made, the attitude of the authority, the method of summoning the interested body and the casting of votes).

Legal practise has constantly mentioned the fact that the existence of a well-grounded case may be withheld if the case showed powerful and obvious doubt as far as the lawfulness presumption was concerned, as this presumption represents one of the basic elements of the enforceable nature of administrative acts. Other criteria that can be taken into account when proving a well-grounded case are: the actual nature of the measure enforced by the public authority, the subsequent conduct of the addressee of the act and the effects such act might have on certain associated legal relations.

Well-grounded cases cannot be justified by invoking certain aspects that pertain to the lawfulness of the administrative act, as such aspects concern the basis of the act, which is only analysed by the action for annulment.

The court only has the possibility to perform a limited research on the appearance of common law, as the grounds of the litigation cannot be harmed during the procedure stipulated by law.

The provisions of article 2, paragraph (1), letter s) define the term "imminent damage" as any future and predictable material prejudice or, as the case may be, the serious predictable damaging of the functioning of a public authority or of a public service.

Following an analysis of the notion of "prejudice", one might say, just as in the case of offensive civil responsibility, any violation of a right has a patrimonial value. Future prejudice is the prejudice that has not yet occurred, but is certain to occur, even if one cannot estimate how long such prejudice will last. Therefore, both current and future prejudices are certain and can be evaluated. If the lawmaker has included the idea of future prejudice in the notion of "imminent damage", it is obvious that, even if the prejudice is under development and has partially occurred, one can speak about imminent damage, as even in this situation there are reasons justifying the suspension, if we are to take into account the fact that an administrative act which has produced the entire prejudice it was susceptible to generate cannot be suspended.

Future prejudice must also be predictable, that is certain – as it is mentioned in the terminology used for civil responsibility matters –, even if one cannot estimate how long such prejudice will last. Any prejudice that is not certain to occur does not allow the urgent measure of the suspension of the administrative act that was attacked.

As for the form any prejudice may take, this can be material, actual and trial-related. This means any prejudice that is capable of putting the plaintiff in a disadvantageous situation, such as creating a new legal situation by the execution of the administrative act, by the future generation of certain rights that did not exist when the preliminary complaint was filed, a situation that might persuade the plaintiff to adopt a trial-related position that might also involve any third party who might benefit from the act that was attacked. In order to admit the suspension of execution, any prejudice must basically be unlikely to be repaired by a subsequent indemnity.

As far as imminent damage was concerned, the practise of some courts has also shown that this notion is construed in the sense of the civil law, that there must be a material, real and actual prejudice which must be proved. The definition of the term "imminent damage" leads to the conclusion that the serious and predictable disturbance of the functioning of a public authority or service, as stipulated in the 2nd part of article 2, letter s) of the law can be mentioned as the grounds for an application for suspension. However, it is necessary that the disturbance begun or which is to begin be so serious as to threaten not only an activity of the public authority or of a public service, but their very functioning.[3]

[3] Antonie Iorgovan, Liliana Visan, Alexandru Sorin Ciobanu, Diana Iuliana Pasare, Legea contenciosului administrativ, comentariu si jurisprudenta (*Translation : Law on administrative courts – comments and case law)*, Universul Juridic Publishing House, Bucharest, 2008, 252 and the following

As the suspension of the execution can only be ruled under express and limited conditions stipulated by the law, as this represents an exception from the rule of automatic execution of administrative acts, it results that the delegated judge has the responsibility to actually evaluate, with no discrimination or bias and by comparing the situation to each case, the compliance with the conditions pertaining to the admissibility of the application for suspension, in keeping with the provisions of article 14 of the law, but without a restrictive interpretation of the actual grounds justifying the suspension, as otherwise the purpose of the suspension cannot be reached. [4]

The measure for suspension of the execution of an administrative document ruled in keeping with the provisions of article 14 only lasts until the ruling of the main issue. The measure of suspension is rightfully extended until the case is finally and irrevocably settled, even if the plaintiff has not applied for the suspension of the execution of the administrative act on the grounds of paragraph (1) of article 15 of the law, as regulated in article 15, paragraph (4). Thus, the lawmaker has given an even greater efficiency to the institution of suspension of the execution of the administrative act, as the lawfulness appearance was rejected by the fact that the main issue was admitted.

The term for the recourse was established within 5 days from the date when the ruling is communicated, and it was made clear that the recourse does not suspend the execution. The express will of the lawmaker was to free this category of decisions from the possibility of ruling the suspension of execution by exercising any possible means of attack, as such decisions are special by the fact that they are rightfully enforceable.[5]

The regulation mentioned in article 15 of Law no. 554/2004, as changed by Law no. 262/2007, refers to the application for suspension of the execution of the unilateral administrative act, as formulated after the initiation of the legal stage involving the lawfulness control performed on the administrative act. The plaintiff may file such an application either by an action addressed to the competent court for the total or partial cancellation of the act that was attacked, or by a separate action.

After analysing the provisions of article 15, we can identify the conditions that must be complied with for the admissibility of such an application. These conditions are: the existence of an action for the total or partial cancellation of a unilateral administrative act; the existence of a well-grounded case; the prevention of imminent damage; the filing of an application of this type, until the main issue is settled.[6]

Another aspect taken from legal practice was the idea of reiterating the application for suspension. This idea is grounded on the provisions of article 15; therefore this happens at the same time with the action for annulment or until the settling of the main issue pertaining to the action for annulment, after courts had previously rejected such an application.

In such situations, some trial courts appreciated that, in keeping with the provisions of article 14, paragraph 6 of Law no. 554/2004, there would be a matter to be judged and therefore admitted this exception, which was invoked either automatically by the court, or by the other party involved in the litigation.

Having this solution at hand, the following defences were reiterated during the recourse. Thus, the decision of the trial court to reject the application for suspension on the grounds of

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[4] Iuliana Riciu, Procedura contenciosului administrativ (*Translation : The procedure of settling administrative matters*), hamangiu Publishing House, Bucharest, 2009, 322

[5] Gabriela – Victora Birsan, Bogdan Georgescu, Legea contenciosului administrativ nr. 554/2004 adnotata (*Translation: Comments on the text of Law no. 554/2004 on administrative courts*), Hamangiu Publishing House, Bucharest, 2007, p. 87 and the following

[6] Iuliana Riciu, *op. cit.,* 331

article 166 of the Code for Civil Procedure (the exception of the matter to be judged) is illegal from two points of view.

From a first point of view, the court's arguments based upon the provisions of article 14, paragraph 6 of Law no. 554/2204 cannot be maintained for the following reasons:

It is true that the provisions of article 14, paragraph 6, target to avoid the abusive exercise of trial-related rights, by filing successive applications for suspension for the same reasons, also ignoring the fact that the application for suspension was rejected by the court. However, by introducing this interdiction in the text of articles 14 and 15, the lawmaker obviously took into account the enforcement of the interdiction distinctly, in each and every mentioned situation.

In the case of the application for suspension based upon the provisions of article 14, we speak about a distinct procedural stage – the suspension of the execution of the administrative act during the preliminary procedure and until a ruling is made for the main issue; in the case of the same application, but based upon the provisions of article 15, another procedural stage is stipulated – the suspension of the execution of the administrative act following the filing of the action for the cancellation of the act, either at the same time or by a separate action, until a ruling is made for the main issue.

Therefore, in the case submitted to judgement, the application for suspension has other legal grounds, as it was formulated during a different procedural stage. Thus, one cannot state that there is a successive application for suspension, even if the reasons are in fact the same.

In the presented case, as long as it can be proven that the right stipulated in article 15 was used in good will, on the grounds of new rightful reasons for applying for suspension, the court should analyze such application.

The legal provisions pertaining to “successive applications for suspension for the same reasons” mandatorily stipulate that these applications must include the main actual and rightful reasons, as stated in the provisions of article 112, paragraph 1 and point 4 of the Code for Civil Procedure. Therefore, the filing of an application for suspension with other legal grounds cannot be included in the interdiction imposed by the lawmaker.

From the second point of view, one cannot say that the case involves the authority of solved matter, as there is no case identity. This conclusion becomes even more necessary as one may say that the provisions of the above-mentioned article 14, paragraph 6 and article 15, paragraph 2 grant efficiency to the principle of the authority of solved matter, as regulated by the provisions of article 1201 of the Civil Code. This principle supposes a triple identity: parties’ identity, object identity and case identity. However, if the new case is based by other legal grounds than the first one, like the case submitted to judgement, there is no judged matter. (in this sense, see T.S., dec. no. 568/1955 and dec. 816/1955, C. D 1955, volume 2, page 219, respectively page 220).

Therefore, the reasons presented by the trial court in the sense of admitting the authority of judged matter for the subsequent application for suspension and which are based upon the provisions of article 15 of Law no. 554/2004 infringe the principle of the fundamental right of free access to justice, a right that is guaranteed by article 21, paragraph 1 of the Constitution. Therefore, the reasons presented render these provisions unenforceable.

Furthermore, interpreting these provisions contrary to those that were mentioned previously would mean infringing the provisions of article 6, paragraph 1 of the European Convention of Human Rights regulating the equity of the procedure, as the plaintiff’s application, if based upon the provisions of article 15 could not be "heard" – it could not be legally examined by the notified court. The case law of the European Court of Human Rights has constantly stipulated that the convention guarantees actual and effective rights, not theoretical and illusory ones. Moreover, according to the Court, the fact that trial courts fail to explicitly rule on an express application, but they prefer to implicitly reject the case, making this dependant on the settlement of another

application is an infringement of the provisions of article 6, paragraph 1 of the Convention (the case Gheorghe vs. Romania, Decision of March 15, 2007, application no. 19215/04).

This is the current point of view of the supreme court, such as one may see by analysing the content of the Decision no. 2190/2009 of the High Court of Cassation and Justice (the decision was not published).

Conclusions

The purpose of this paper was to revise the idea of temporary interruption by the courts of the effects of administrative acts. In fact, the paper was intended to be a theoretical and practical analysis of the institution of suspension, based upon the provisions of articles 14 and 15 of Law no. 554/2004.

Also, the paper presented some examples taken from legal practise, in order to facilitate the activity of practitioners in the field of law.

This analysis is important as, in the case of suspension, we deal with derogation from the rule of the automatic execution of administrative acts and this exception is worth being minutely analyzed.

Also, this paper is important due to the fact that it presents the different stands that courts take as far as the issue discussed is concerned.

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THE FUNDAMENTAL PRINCIPLES GOVERNING THE PROFESSION OF LAWYER IN ROMANIA

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Keywords*: profession of Lawyer, Romanian law, principle of legality, principle of freedom and independence, the principle of autonomy and decentralization, the principle of professional secrecy*

1. Introduction

In Art. 1. (2) the Statute of the lawyer profession[1] says the *fundamental principles*[2] governing the *exercice* of the lawyer's profession, the following : legality, freedom, independence, autonomy and decentralization, professional secrecy. Even before adopting the current form of the Statute, the literature[3] was observed, rightly, that legislation has not conducted a systematization of the organizational principles of the legal profession[4] - not be confused with the principles of the lawyer's profession exercice[5] - the absence of such systematization being explained precisely because of the interdependence between the two categories of principles.

In our case, no effort to challenge our doctrine to achieve a broader analysis of the principles related to the organization, namely the profession of lawyer, we will further proceed in discussing the fundamental principles, as they were mentioned in article 1 para. (2) of the Statute.

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[1] Published in the Official Gazette. no. 45 of January 13, 2005, as amended and supplemented (hereinafter the Statute).

[2] Also listed in the Statute, in art. 214 para. (1), the following essential principles of the legal profession: free exercise of the profession, dignity, conscience, independence, integrity, humanity, honor, loyalty, delicacy, moderation, tact and sense of brotherhood.

[3] See I. Les, Romanian judiciary system organization. New rules, All Beck Edition, Bucharest, 2004, p. 230.

[4] According to the author cited, the basic principles of advocacy organization such as: autonomy bar, the existence of democratic structures advocacy organization, collegiate governing bodies (Ibid).

[5] The literature was considered that the profession of attorney is governed by the following principles: the principle of legality, the principle of independence, the principle of freedom; partiality principle, the principle of collaboration with the judiciary, the principle of educational role, the principle of professional ethics (G. Matthew, Defender, subject to the process criminal, in the light of recent legislative changes (I), in ,,Law" magazine no. 5 / 1996, p. 83-85). Were analyzed within the legal profession and exercise principles: the principle of dignity and honor of the legal profession, the principle of the lawyer's monopoly on the specific professional activities, principle conforming which the advocate accomplish either a function of private interest but one of a public interest, principle of brotherhood and mutual respect (L. Danila, Organization and exercice of the profession of lawyer, Ed. 2nd, Ed. CH Beck, Bucharest, p. 70-84). Principles of the lawyer's profession exercise were also considered : officiality, subsidiarity, good faith, confidentiality, accountability, fair competition (A. Raducanu, D. Croitoru, General principles of organizing and exercising the legal profession in terms of post-modern theories, the Bulletin of National Institute for Professional Training of Lawyers no. 1 / 2006, p. 118-120). Finally, we have an example in the literature of an author who merely assert that the legal profession is organized and operates under the principle of autonomy (M. Niculeasa, Liberal Professions. Regulator, doctrine, law, Ed. Universul Juridic, Bucharest, 2006 p. 174).

Principle of legality

The lawyer profession is primarily a *legal profession*, as organized and exercise mainly *based on Law no. 51/1995[6] and Statute*.

Indeed, according to art. 1 para. (2) of the Act in conjunction with art. 3 para. (2) and (4) of the Statute, may lawfully exercise the profession only people who have *the status of lawyer and are entered on the panel's bar[7] they are part of,* being prohibited from carrying any specific activities of the profession by an individual that has not the quality of lawyer entered in a bar and on the table of lawyers or by another juridical person, except the (civil) limited professional attorneys society. Moreover, according to art. 3 para. (3) in conjunction with art. 172 para. (1) of the Statute, a lawyer can be entered in *only one bar* and *can not perform in the same time in two or more forms to practice his profession[8],* the latter prohibition is justified in the light of the need to avoid conflict of interest[9].

Under art. 1 para. (2) of the Act in conjunction with Art. 5 para. (2) and (3) of the Statute, all bar association in Romania, legally constituted, are *legal members of the National Union of Bars of Romania (N.U.B.R.)[10]* - legal person of public interest, established by law and declared a *single successor of the Lawyers Union in Romania[11]*. In the context of a necessary perspective on the

[6] Law no. 51/1995 regarding the organization and profession of lawyer was republished in the Official Gazette no. 113 of March 6, 2001, as subsequently amended and supplemented (hereinafter the Act).

[7] Anticipating the proper regulation of professional organization, art. 5 para. (1) of the Statute provides that in each county and in Bucharest exist and operates under the Law, one single bar, legal entity of public interest, consisting of all lawyers registered with the panel of lawyers, which have their main headquarters in areas of its radius. And according to art. 48 para. (1) first sentence of the Law, the bar consists of all lawyers of the county or from the municipality of Bucharest.

[8] According to art. 23 para. (1) letter c) of the Statute of the profession of lawyer previously been in force (published in the Official Gazette no. 284 of May 31, 2001), the lawyer salaried employee throught profession and the associate could simultaneously activate, with the same quality, in both forms of profession exercice. Note also that, after reforming art. 5[1] of the Act by the Emergency Ordinance no. 159/2008 (published in the Official Gazette No. 792 of November 26, 2008) and declared unconstitutional by the Constitutional Court decision no. 109 (published in the Official Gazette no. 175 of March 18, 2010), was provided, as an exception, that professional limited company - form of lawyers profession exercice - could be formed by the combination of at least two lawyers permanently in the performance of the profession, whether or not they had or if they were belong to a form or another of profession's exercice. [para. (1)], in this situation, the forms of exercising the profession from which, by assumption, the lawyers wich had formed a professional society with limited liability were part of, may not be subject to liquidation, if so the associates were agreed. [para. (5)].

[9] To observe the rules of conflict of interest, see also art. 44 para. (1) of the Act in conjunction with art. 120 of the Statute.

[10] These provisions should be linked with art. 57 para. (4) of Law, conforming with the Bar Association is constituted and operates only within N.U.B.R., under Law and professional Statute.

[11] Correlated with art. 57 para. (5) of the Act, conforming with UNBR is the lawful heirof the Lawyers Union in Romania, the latter being created by art. 71 para. (1) of the Act to organize and unify the body of advocates in 1923 (Decree no. 610/1923 published in the Official Gazette. no. 251 of February 25, 1923), as general body bars lawyers in Romania, with legal personality. Here is how it was interpreted, in a case of the interwar period, the significance of this milestone in regulating the legal profession history (the spelling of the time): „(...) By the enactment of the law to organizing body of lawyers (21 February 1923) bar associations were considered as true public authority, designed by their organization law to help administrate one of public services, the most important, that of justice (...). By Law no. 610 of February 21, 1923, bar associations were removed from the control of justice and put under the control „of the body of lawyers Union in Romania", the general body of the bars in Romania. With this innovation has not changed the bars character of public authorities designed to assist in the administration of justice services, but assumed they did not acquire the meaning of part of the public services in the State administration. That is, they remained on the same characteristic of public establishments, sui generis, that can not make administrative acts, which could be censored by the administrative contentious, their actions remain under

question whether the bars organized under Law no. 51/1995 some formalities are required for the approval and registration by the competent authorities, emphasized that „(...) the bar was, is and will remain a *professional association territorially organized, recognized and established by law*, and not merely an association - a private law legal person - subject to judicial review at the time of its establishment and registration in the register of legal persons.[12]"

Article 1 para. (3) of the Act in conjunction with art. 5 para. (4) of the Statute prohibit the establishment and operation of bars outside the N.U.B.R., instruments of incorporation and registration of such entities are considered *automatically void*. We showed, several years ago[13], that the terminology used in relation to this sanction should not be understood throught the idea of nullity operating under the law (without requiring the adjudication of a court order to verification the produced effects), opinion we considered a dependent criticable distinction between nullity *in law* (or *by operation of law*) and *judicial* nullity (by the recovery mode of the penalty)[14].

In fact, the legislator's intention was to designate[15] as „ null and void" the sanction of *absolute nullity*[16], to be judicially established[17]. Indeed, the committee drafting the Statute noted, at art. 5 para. (4), third sentence, the legal regime applicable to such penalty, setting that the nullity can *always* be found invalid by the N.U.B.R. request, by the bar parties, by the the Public Prosecutor and also by the court may be established *automatically*[18]. Regarding the means to invoke the penalty, being a nullity of *public policy*, under art. 108 para. (1) Civil Procedure Code,

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the control of ordinary courts. (s.n. St. Naubauer)" (Appeal Court of Chisinau, Section I, Decision no. 77 of December 9, 1927 in General Jurisprudence, 1928, p. 1064, apud al. Lascarov Moldovanu, Law for organizing the lawyers body annotated with doctrine, jurisprudence, Parliament debates, explanatory statement, opinion and the Legislative Council reports, Ed. Curierul Judiciar SA, Bucharest, 1937, p. 457-458).

[12] T. Savu, Some considerations concerning the legal status of the organization and operation of the bar, the Lawyer magazine no. 1 / 2006, p. 29.

[13] See St. Naubauer, in T. Savu, St. Naubauer, Reviews the new legal framework for the legal profession, Universul Juridic Publishing, Bucharest, 2004, p. 12-13.

[14] This distinction is reflected, for example, in the oldest French doctrine, where it is considered that sometimes the nullity operates by right (nullite de plein droit), and sometimes by the power of a court (see J. Rene, Traité élémentaire de procedure civile et commerciale ed. 2, Paris, 1929, p. 33, apud M. Popa, General Theory of invalid acts of civil procedure, Ed. All Beck, Bucharest, 2003, p. 151, note 1). In our professional literature of the interwar period, trenchantly stated: „The procedure does not know the legal nullity and should be discussed, whether they are of public order or that are only relative. To give but one required by law void, we need someone to ask." (V.G .Cadere, Treaty of Civil Procedure, National Culture Publishing House, Bucharest, 1928, p. 29). This legal view was maintained in the communist era: „In reality, whenever the parties cannot agree, there is not a valid nullity without a court order. In this sense, all nullities are therefore legal nullities. (...) it is inappropriate to talk about „legal nullities" or „nullities of right". Without distinction as absolute or relative (or as explicit or virtual) is not appropriate to talk, as we think, than about invalidity. In both cases, the legal document (or part of it) will be zero. And invalidity (assuming the parties have not agreed) can not operate until after delivery of a court (or arbitration)". (Tr. Ionascu and E.A. Barasch, in Tr. Ionascu, E.A. Barasch, A. Ionascu S. Brădeanu, M. Eliescu, V. Economu, Y. Eminescu, M.I. Eremia, E. Roman, I. Rucăreanu, V.D. Zlatescu, Civil Law Treaty, vol. I, General part, R.S.R. Academy Publishing House, Bucharest, 1967, p. 343 and p. 345). After 1990, they stressed that„(...) basically, the nullities are involving the entry of a court decision (being therefore judicial and not legal) (...)" (Gh. Beleiu, Civil Romanian Law. Introduction to civil law. Subjects of civil law, ed. Eighth revised and enlarged by M. Nicolae and P. Trusca, Ed Legal Universe, Bucharest, 2003, p. 221).

[15] See G. Beleiu, the mentioned work, ibid.

[16] See St. Naubauer in T. Savu, St. Naubauer, the mentioned work, p. 13.

[17] Otherwise, „As long, therefore, did not intervene the judicial abolition, the act remains valid, ie able to produce any effects arising from his private nature and mission". (E. Herovanu Theoretical and practical Treaty of civil procedure, judicial organization and proficiency, vol. 1, Graphic Arts Institute of Romanian life, Iasi, 1926, p. 157).

[18] According to art. 1247 para. (3) of the new Civil Code (published in the Official Gazette no. 511 of July 24, 2009), „The court is required to automatically invoke the absolute invalidity (s.n. – St. Naubauer)".

this may be raised by the party or by a judge in any state of the case, indicating that, under art. 162 of the above mentioned Code, before the appeal court the public policy exceptions may be raised only when there is no need for an examination of facts outside the case[19].

In connection with the requirement of the lawyer's profession exercice only throught N.U.B.R., in the literature has been raised ,, the question whether the text is wrong, as it is not allowing the creation of alternative bars, breaching of the two other constitutional principles namely the right to association and the one of equal opportunities"[20]. However, as shown on another occasion[21], conditioning the establishment and functioning legality of the bars to the membership of N.U.B.R.[22] represents legislation a settlement springing from *the need to avoid the appearance and proliferation the paralell lawyers structures*[23], the lawyer profession practice outside the framework established by Law no. 51/1995 being even a *crime*[24].

2. Principles of freedom and independence

Given the close link between these two principles, we will analyze them together. Law uses the term *free* profession, which means the profession *pursued by a person on their own, without*

[19] According to art. 1249 para. (1) of the new Civil Code, ,,If the law does not provide otherwise, the absolute nullity may be invoked at any time, either by action or by way of exception. (s.n. – St. Naubauer)".

[20] A. Răducanu D. Croitoru, the mentioned work, p 116-117.

[21] See St. Naubauer in T. Savu, St. Naubauer the mentioned work, p. 12.

[22] Rejecting the unconstitutionality exception of art. 48 para. (1) first sentence and art. 57 para. (1)and (4) of Law no. 51/1995, the Constitutional Court held, by Decision no. 321/2004 (published in the Official Gazette no. 1144 of December 3, 2004) that ,,(...) organization of lawyers in bars and of the bars in the National Union of Bars of Romania does not contravene any of the constitutional provisions relied in support of the exception. Organization of legally exercise of the the lawyer profession, for that matter of any other activity of interest to society is natural and necessary, for jurisdictional purposes, means and how it can pursue this profession, and the limits beyond that would violate rights of other persons or profession cathegories. The statutory provisions contested do not violate in any way the right to work and right of association, as the author claims without referral basis, a law university graduate not being obliged to practice law nor being unable to associate or to choose work under the law conditions. As in the case of specific regulations of other professions, such as the notary ones, medical or experts, the mentioned law, as a whole and, in particular, the law provisions which are the exceptions subject, are designed to protect the free exercise of the legal profession against illegitimate competition from persons or structures outside the legal framework and, secondly, to ensure the right of defense of those who resort to legal services throught the organization and exercice guarantees of this profession, within the limits set by law (s.n. - St. Naubauer)" (see, in the same sense, for example, the Decisions of the Constitutional Court no. no. 234/2004 published in the Official Gazette no. 532 of June 14, 2004 and no. 233/2004 published in the Official Gazette no. 603 of July 5, 2004).

[23] Dangerous precedents are well known particularly by the creation of so-called Romanian Constitutional Bar (founded in 2002 by the Association of Charity ,,Bonis Potra" from Deva) namely the establishment of 42 ,,bars" and of ,,Lawyers Union in Romania"/,,National Union of Bars of Romania" (decided in 2004 by members of Băleşti Gorj Branch of Association ,,Potra Figaro" of Alba Iulia). According to art. 62 para. (2) of the Statute, ,,No ownership, or use usurping the name of ,,the bar" by any natural or legal person whatever the nature of work performed by it, under penalty provided by law for the use without right of the designation of a legal person of public interest, established by law".

[24] According to art. 25 para. (1) of the Act, carrying on specific activities of the legal profession by natural or legal person that is not a lawyer entered in a bar - N.U.B.R. component - and on the table of lawyers of that bar is considered a crime and is punishable under criminal law. And noting that by the Government Emergency Ordinance no. 159/2008, was introduced an additional paragraph - paragraph. (6) - at the art. 57 of the Law, according to which the use without right of the names ,,Bar", "National Union of the Bars of Romania", ,,N.U.B.R.", or ,,Lawyers Union of Romania" or the names of specific forms of exercise of the legal profession by any natural or legal person, whatever the work of it and use the profession specific signs or wearing the lawyer's robe in other conditions than those under Law no. 51/1995 were reported as crime, punishable by imprisonment from six months to three years.

being permanently employed in an institution or organization[25]. But it is instead to emphasize that an essential feature of the lawyer profession is that it is a *liberal*[26] profession, in a sense that it *depends on an order, by a professional body, his remuneration in nature not having a commercial character*[27]. Moreover, the Constitutional Court itself considered *fundamental* principle that „the lawyer profession is a *liberal* and independent profession (s.n. - Stefan Naubauer)"[28]. The Statute declares on the art. 6 para. (1) that the freedom and *independence* of the legal profession are principles upon which Advocate promotes and protects the rights, freedoms and legitimate interests to customers, these principles defining and ensuring professional status of lawyer for his business. Independence of the legal profession, which involves *the organization and its operation without any interference from the state*[29], but not to be confused with independence of the lawyer[30], the latter arising from the first, being considered[31] as a consequence of the autonomy[32] of the advocacy institution.

3. The principle of autonomy and decentralization

According to art. 4 para. (1) of the Statute, the legal profession is organized and operates under the principle of autonomy and decentralization, as provided by Law[33] and Statute[34].

Organizing the advocacy is covered in a self management structure within the N.U.B.R.[35], distinct both from the device state and other legal professions or positions[36] (judges, public notaries, legal advisors, bailiffs, insolvency practitioners).

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[25] See Explanatory Dictionary of Romanian language, Romanian Academy, „Iorgu Iordan" Linguistics Institute, Ed. Encyclopedic Universe, Bucharest, 1998, p. 855.

[26] See Fl.A. Baias, Principles of legal profession in the light of the provisions of Law no. 51/1995, the Law magazine no. 10-11/1995, p. 36.

[27] See Le Petit Larousse, Paris, 1994, p. 599.

[28] See Decision no. 45/1995 regarding the constitutionality of some provisions from the Law for organization and the profession of lawyer practice(published in the Official Gazette no. 90 of May 12, 1995).

[29] See Fl.A. Baias mentioned work, p. 29 and 32. Not be forgotten that, during the communist era, the legal profession has been „under the direction and control" of the Ministry of Justice [see: Law no. 3 / 1948 on the abolition of the Bar Assosiacions and establishment of the Colleges of Lawyers of Romania (published in the Gazette no. 15 of January 17, 1948, as amended by Law no. 16/1948, published in the Gazette no. 33 of 10 February 1948), Decree no. 39 / 1950 regarding the profession of lawyer (published in Official Gazette no. 11 of February 14, 1950), Decree no. 281/1954 on advocacy organization and exercice in Romanian People's Republic (published in Official Gazette no. 34 of July 21, 1954, as amended by Decree no. 681/1969, published in Official Gazette no. 106 of 7 October 1969 approved by Law no. 60/1969 in its turn published in Official Gazette no. 148 of December 19, 1969)].

[30] Fl.A. Baias, the above mentioned work, p. 32. In doctrine, the independence of lawyers - professional and material - has been discussed as a manifestation of the principle of freedom and independence of the legal profession (L. Danila, mentioned work, p 55-64).

[31] See I. Les, mentioned work, p. 237.

[32] See immediately infra, section 4.

[33] According to art. 47 para. (1) of the Act, „the lawyer profession is organized and operates on the basis of autonomy, within the powers provided in this Law", and according to art. 48 para. (2) of the Act, „Bar Association has legal personality, heritage and its own budget. (s.n. – St. Naubauer)".

[34] Under art. 62 para. (1) of the Statute, „The independence of the profession, bar association authonomy and free exercise of the legal profession may not be restricted or limited by the acts of public administration authorities, the Public Ministry or other authorities, than in the cases and conditions expressly provided under the present law. (s.n. – St. Naubauer)". According to art. 63 para. (1) of the Statute, „the Bar is a legal person of public interest, consisting of all lawyers registered with the Table of lawyers, with their own heritage and independent organization (s.n. – St. Naubauer)", and according to art. 64 para. (1) of the Statute „Each bar has its own budget. Advocates contribution to achieving the budget is determined by the Bar Council (s.n. – St. Naubauer)".

[35] See I. Les mentioned work, p. 230, L. Danila, mentioned work, p. 70.

[36] See Fl.A. Baias mentioned work p.,30.

From the perspective of internal organization of the legal profession on the principle of autonomy, we have seen on another occasion[37] that the fundamental reform brought by the Law no. 255/2004[38] was to enhance organizational autonomy and decision of the bar and creating an institutional structure at national level (N.U.B.R.), in which interests are protected and covered more efficiently. The existence of a union of bars should be considered also in terms of decentralization of their work, to ensure uniform settlement of the problems of the profession, aspect that could not be achieved in the absence of such a structure at national level[39].

4. The principle of professional secrecy

According to art. 215 para. (2) of the Statute, professional secrecy aimed at *all information and data of any kind, in any form and on any medium*, provided to the lawyer by the client in order to provide legal assistance - *lato sensu* - and for which the client requested confidentiality, and also *any documents prepared by lawyers*, which contain or are based on information or data supplied by the client in order to provide legal assistance and whose privacy has been requested by the client.

In literature, professional secrecy was considered both a right and a primary, fundamental duty of the lawyer and also an essential condition of the profession exercice[40].

In art. 8 para. (1) Statute declares professional secrecy as *public policy*, the lawyer can not be compelled to disclose it under any circumstance and by any person[41]. However, according to art. 8 point. f) of Law no. 656/2002 on preventing and sanctioning money laundering, and to establish measures to prevent and combat terrorist financing[42], lawyers are *subject to reporting* when preparing or assisting in drawing operations for their clients regarding : purchase or sale of immovable property, shares or elements of goodwill, management of financial instruments or other property of guests, formation or management of bank accounts, savings or financial instruments, organizing the contributions required to provide underwriting , operation or management of a company, establishment, administration or management of companies, undertakings for collective investment in transferable securities or other similar structures or conduct, by law, of other fiduciary activities, as well in the case where they represent their customers in a financial nature operation or targeting real estates.

A lawyer may not be released from professional secrecy by any authority or person or *even by customer*[43]. In the presence of this mandatory provisions, the doctrine was argued that ,,The right to professional secrecy (...) remain as long as the lawyer does not receive absolution from his client to talk about what information is held as a lawyer" and that ,,the extent that the client believes that the information (...) may be useful in his defense, he can absolve the lawyer from the obligation of professional secrecy"[44].

To these allegations, we note that they are *exempt*[45] - for the exclusive requirements related strictly to the *lawyer defense*- when it is *prosecuted, disciplinary* or when there is a dispute

[37] T. Savu in T. Savu, St. Naubauer, mentioned work, p. 148.

[38] Law 255/2004 amending and supplementing Law 51/1995 regarding the organization and profession of lawyer exercice was published in the Official Gazette no. 559 of June 23, 2004.

[39] St. Naubauer, in T. Savu, St. Naubauer mentioned work, p. 11.

[40] A. Cobuz Băgnaru, The fundamental obligations of the lawyer: professional secrecy and avoidance of conflict of interest, the magazine Lawyer no. 1 / 2007, p. 14.

[41] Article 8. (para. (3) first sentence of the Statute.

[42] Published in the Official Gazette no. 904 of December 12, 2002, with subsequent amendments.

[43] Article 8. para.(3) the second sentence of the Statute.

[44] L. Danila, mentioned work, p. 66 and p. 67.

[45] Article 8 para. (3) the third sentence of the Statute.

regarding the agreed *fees*. It is true that the Law - art. 44 para. (2) - refers to the possibility that the lawyer to receive prior express and written absolution from all his customers concerned stakeholders, to be heard as witnesses and provide links to an authority or person, on the case which was entrusted[46].

But, according to para. (3) and (4) of art. 44 of Law, on the one hand, the witness quality prevails over the legal capacity about the facts and circumstances that he knew *before* becoming a guardian or representative of any party and, furthermore, if he has been heard as a witness, the lawyer can not engage in *any professional occupation* in the case[47].

Article 9 para. (1) of the Statute declares that the obligation to professional secrecy is *absolute and unlimited in time.* The effects of this obligation extends to all activities both lawyers and the members, and salaried employees within the profession that operates within the same type of exercising the profession, including the relationships with other lawyers[48]. Moreover, the obligation of professional secrecy is also for the people with whom the lawyer works together in practice[49] as well for its employees, the lawyer being obliged to let them know this requirement. This obligation incumbent upon all organs of the legal profession and their employees regarding the information known within the exercice of their functions and duties[50].

In the context of secrecy rules, art. 10 para. (1) of the Statute declares *confidential* any communication or professional correspondence between lawyers, between lawyer and client, between lawyer and professional bodies, in whatever form that it was made. Regarding relations of the Romanian lawyer with *foreign lawyers*, the Statute[51] operates the following distinction:

- towards lawyers registered to a bar in a *European Union member state*, Romanian lawyer is bound by special provisions of Code of Conduct for lawyers in the European Union[52]. Thus, under art. 5.3. („Correspondence sent between lawyers") of the Code of Conduct, the lawyer who addresses a fellow lawyer from another member state a communication

[46] According to art. 79 para. (1) Crim. pr. Code „Person required to maintain professional secrecy can not be heard as a witness on the facts and circumstances of which he became aware in their professional capacity without the consent of the person or unit to which is bound to secrecy". Under art. 191 section 1 Civil pr. Code., some people, which included lawyers, „that the law compels them to secrecy about the facts entrusted in their practice", are exempt from being witnesses. To rules of civil procedure, the doctrine has found that people held by professional secrecy may testify if they were released from this obligation by those interested in secrecy, moreover, it has been considered that these people can testify even without the agreement of the one interested in secrecy, disclosure giving witness to sanctions, but not constituting grounds for cancellation of testimony (M. Tabarca, G. Buta, Commented Code of Civil Procedure and annotated with legislation, jurisprudence and doctrine, Ed. Legal Universe, Bucharest, 2007, p. 574).

[47] According to art. 79 para. (2) Crim. pr. Code, „Witness quality takes precedence over the defender quality, on facts and circumstances which he knew before he became guardian or representative of any party. (s.n. - Şt. Naubauer)".

[48] Article 9. (1) second sentence of the Statute. Regarding relations with other lawyers, remember that, according to art. 173 of the Statute, between the forms of exercising the profession can be established professional relationships and collaboration, the business collaboration agreement will be registered at the bar.

[49] Article 9 para. (2) of the Statute. Regarding the persons with whom the lawyer is working in the occupation, remember that, according to art. 6 of the Act, any lawyer, regardless of the form of practice, may conclude agreements of cooperation with experts or other specialists, indicating that the civil societies of lawyers may conclude such an agreement only with the consent of all members.

[50] Article 9 para. (3) of the Statute.

[51] Article 10 para. (2) and (3) of the Statute.

[52] Code of Conduct for lawyers in the European Union was adopted in plenary session on 28 October 1998 and subsequently amended in plenary sessions of the Bars Council of European Union (CCBE) of 28 November 1998, December 6, 2002 and May 19, 2006. Implementing the Advocates Congress Judgment in 19 to 20 June 1999, by Decision no. 1486 of October 27, 2007, of the N.U.B.R. Permanent Commission, the European Union Lawyers Code of Conduct applies in Romania as the Romanian lawyer Code of Conduct, with effect from January 1, 2007.

that seeks to confer confidential or *without prejudice* must clearly state this even before sending the first communication, and in case where the communication recipient is unable giving a confidential character, he should notify the sender immediately.

- towards lawyers registered to a bar outside the European Union, the Romanian lawyer must ensure, prior to exchanging confidential information, that in the country where practicing his foreign fellow exist rules to ensure the confidentiality of correspondence and, otherwise, to sign a confidentiality agreement and ask if his client agrees, in writing, the risk of non-confidential information exchange.

Note that under art. 10 para. (4) of the Statute, correspondence and information exchanged between lawyers or between advocate and client, regardless of media type, in any case *can not be introduced as evidence in court* and can not be deprived of confidentiality. However, in a *per a contrario* interpretation of the provisions of art. . 91^1 para. (6) in conjunction with para. (1) Crim. pr. Code, *recording conversations between the lawyer and the represented or assisted party in the process can be used as evidence,* if the resulting data or information therein conclusive and helpful regarding the preparation or perpetration by a lawyer of a crime for which the criminal investigation is automatically, and interception and recording are required to establish facts or because to identify or locate the participants can not be done by other means or the research would be delayed. Also, according to art. 91^1 para. (6) in conjunction with para. (2) Crim. pr. Code *intercepts and telephone recording conversations or communications made by phone or through any electronic means of communication between lawyer and client may be authorized* in case of offenses against national security under the Penal Code and other special laws, also for narcotics traffic offenses, arms trafficking, human trafficking, terrorism, money laundering, money counterfeiting or other values, for offenses under Law no. 78/2000 on preventing, discovering and sanctioning corruption[53] in case of other serious crimes or of the crimes commited by means of electronic communication.

Under art. 215 para. (3) of the Statute, in order to ensure professional secrecy, the lawyer keeps his work only at his headquarters[54] or in areas approved by the Bar Council in this regard. The professional office and other spaces in which the lawyer is working needs to be able to preserve secrecy[55]. Also for reasons related to ensure secrecy, the Law itself, in art. 33, declares *inviolable* the acts and work of professional nature held by the lawyer or in his cabinet, the frisking of the avocate, home or his cabinet or the lifting of documents and goods can not be done but by the prosecutor, under a warrant issued under the law conditions[56]. According to art. 215 para. (4) of the Statute, to ensure professional secrecy, the lawyer *has a duty to object* to searches of home, primary, secondary headquarters and of his office work, also to body search, or acts or work of professional nature in places mentionated above, or on him. Although the Statute does not impose, this obligation incumbent to lawyer, obviously, if *the search is not made by the prosecutor based on order,* explanation found in para. (5) of art. 215, which states that the lawyer is obliged to oppose *the lifting of documents and goods* consisting of acts and work of professional nature *in case there are not complied with terms of art. 33 of the Act*. In that case, the lawyer bears the obligation to immediatelly warn about what happened the Dean Bar[57].

[53] Published in the Official Gazette no. 219 of May 18, 2000, as amended and supplemented.

[54] Professional office may be also located at the *lawyer residence.*

[55] Article 215 para. (1) of the Statute.

[56] To observe the legal regime applicable to the lifting of objects and documents, and in the conduct searches, see art. 96-110 Crim. pr. Code.

[57] E.C.H.R. case law, the presence of the Dean Bar during the search made at the place of business of law firms was considered a „special warranty procedure" (see E.C.H.R., Section V, Decision of 24 July 2008 regarding

Finally, remember that the lawyer is obliged to preserve professional secrecy regarding any aspect of the case entrusted[58], being liable for committing a *serious disciplinary offense*[59], but he may use information about a former client, if they became *public*[60].

Conclusions

From the foregoing, therefore result that the lawyer profession in Romania is a *legal* profession, *free* and *independent*, being organized and operating under the principle of *autonomy* and *decentralization.* Though declared as public policy, the principle of *professional secrecy* currently meets a number of limitations, especially in terms of preventing and sanctioning money laundering[61].

no. 18603/03 complaint, Marc Andre and SCP Andre, Andre et Associés versus France, unofficial translation from French by Monica Savu, published in extract of Pandectele Romane no. 8 / 2008, p. 233-243).

[58] Article 8 para. (2) of the Statute.

[59] Article 8 para. (5) of the Statute.

[60] Article 8 para. (4) of the Statute.

[61] See also the Council Directive 91/308/EEC to prevent use of the financial system for money laundering purpose (OJ L 166, p. 77), as amended by Directive 2001/97/EC of the European Parliament and Council of December 4, 2001 (OJ L 344, p. 76).

STABILITY - CHANGE BALANCE IN SUSTAINABLE ORGANIZATIONS

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Abstract

The sustainable organization represents an added value generating entity, integrated in the economic, social and ecologic environment, which constantly creates competitive advantages relative to competitors. The paper proposes an analysis of sustainability at an organization level, both from the perspective of cultivating and developing good practices promoted in the organization, and from the perspective of designing and implementing organization change programs. Modalities by which the management can create and maintain a balance between stability and change are also proposed, as a support of organization sustainability.

Key words: *sustainable organization, stability, organizational change, competitive advantage.*

1. Introduction

Sustainable development represents the fundamental goal of the contemporary society, which governs all strategies, policies as well as fundamental and adopted programs at a global, regional and national level. The support for sustainable development is achieving human progress while harmonizing the "economic – social – ecologic" trio.

Economically, sustainability implies creating and consolidating a stable and predictable business environment, favorable for the development of the organization sector, especially for small and midsized organizations. Our scientific approach starts with the premise that the existence of a strong sector of sustainable organizations represents a fundamental premise for building a new modern and competitive economy. In our opinion, the sustainable organization is the main micro economic pawn of the new economy, based on knowledge.

The sustainable organization was formed during the last decades in developed countries. This new type of organization in characterized by high functionality and creativity, sets the accent relatively equally on economic, social and ecologic aspects, it holds the capacity to permanently perfect itself, it constantly creates new products and services, it generates information and competitive knowledge, which ensures a sustainable development on a long term, from which both employees and entrepreneurs can benefit [1].

Promoting sustainable organizations represented one of the main concerns on the agenda at the International Labor's Organization Conference in Geneva in 2007. The tripartite delegations, formed by governments, unions and employers representatives, came up with a series of conclusions, one of them being the one according to which the sustainable organization, who is mostly of small or medium in size, represents the „engine" of future development, of which the economic and social performance level of each country depends on [2].

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Also, the sustainable organization represented one of the major themes approached during the 8th European Regional Reunion of the International Labor Organization, which took place in Lisbon from the 9th to the 13th of February 2009. The participant delegations to this reunion proposed a series of measures which target a stable and sustainable economic growth. From these, we remind [3]: using incentive packages, in order to reduce the consequences of the recession; making new strict international regulations regarding the financial market and also the commercial markets in order to prevent the apparition of systemic risks which have not been foreseen and removed by previous engagements; adopting some measures concerning access to financing, in view of stimulating entrepreneurship and the capacity of small and midsized firms to keep their employees and to create new jobs; promoting favorable environment for sustainable organizations, as a main support for economic recovery and growth; reestablishing a normal flow of human and investment capital in mid and long term, in order to avoid a serious deterioration of the production base from certain countries; ensuring a functional financial system to facilitate growth and to create a more dynamic private sector; the development by some organizations of the initiatives of corporate social responsibility, in order to complete the sustainable strategies and the results in cause.

Consequently, economic sustainable development is conditioned decisively by the existence of sustainable organizations, which need to benefit a favorable context to the foundation and functioning from the commercial, financial, management, technological, administrative, educational, legal, scientific, ecologic, cultural and political points of view. This favorable context is created by making some strategies and policies that promote entrepreneurship operational and by establishing sustainable organizations. In this sense, it is essential that social partners are aware of the role played by sustainable organizations in consolidating a dynamic and competitive microeconomic sector, which constitutes one of the main vectors of social and economic development based on knowledge.

Beyond contextual factors, we appreciate that it is important for managers and entrepreneurs to practice a modern, proactive management, to identify and value business opportunities, to manifest receptivity to what is new, creativity and flexibility and, thus to subscribe their organizations on the path of sustainability.

2. The sustainable organization

The sustainable organization is the organization which, based on an economic, ecologic and social balanced approach, values knowledge and the other resources it owns and attracts, at a higher level while generating efficiency and multi dimensional performances validated by the market and society, for long periods of time [4].

In our conception, the sustainable organization represents an added value generating entity in the economic, social and ecologic environments that, through a proactive, flexible and innovative management constantly creates competitive advantage compared to the competition.

In order to become sustainable, an organization must be run by managers and entrepreneurs who have a strategic vision and also it must own human resources with multiple competences, a flexible management system, material and financial resources, performance technologies, as well as an organization culture oriented towards change, creativity and innovation. Each of the components above has a well defined position in the organization's internal environment configuration and a special part in its functioning mechanism.

Sustainable organizations must perform periodic evaluations of their competitive potential, backed up by thorough analysis of the business environment, with special referral to the competition in the same activity branch. In this respect, we consider that a major mutation in the

managers' and entrepreneurs' mentality is necessary, so that they understand the importance of these analysis and evaluations, who's complexity varies depending on the scale and particular activities carried out by the organization.

The competitive potential of a sustainable organization is defined, mainly, by the resource complex and organization culture. Human resources have an inexhaustible creative and development potential, with the capacity to produce and adequately combine all other of the company's resource categories. In this context, we appreciate that the human resources analysis must be structured using two coordinates – quantity and quality. The quantity coordinate of the analysis refers to the adequate sizing of the personnel, and the quality one concerns a series of aspects like: evaluation of the structure, competence and attitude shown by the human resources towards fulfilling their tasks; systematic enrichment of theoretical and practical knowledge from their own activity domain or related areas; requalifying human resources according to the demands required by the changes in the intra and extra organization environment; gaining and deepening some economic, management, information etc. knowledge; type of training programs developed; the increase of human resource quality in order to promote; amplifying personal mobility from the perspective of structure modifications and the necessity to change the job.

Technical and technological resources have a special importance in the sustainable organization, especially in the context of amplifying moral wear of the products and technologies. The landmarks of the analysis for this resource category concern the time staging of production processes and services, making charts concerning scheduling, launching and operative following of these processes, using advanced fabrication technologies, total quality management implementation production activities and services, managing energy resources, as well as elaborating efficient machine and production equipment maintenance. Currently, an important place in technical and technological resources is held by innovative technologies, which mainly concern: artificial intelligence; manufacturing advanced semi conductors and super conductors; making digital images; biotechnology; manufacturing flexible computers, etc.

Knowledge has a decisive impact over the sustainable organization's performance. Explicit knowledge can be found in studies, patents, projects, licenses, standards, software, while implicit knowledge can be found in the minds of the organization members (technical know-how, technological know-how, IT know-how, management know-how etc.).

The human resources in sustainable organization are trained in a continuous learning process, they accumulate knowledge and, thus, they gain new competences necessary for the conversion into practice of new strategic orientation. E.g., making organization changes, like total quality management implementation, management operationalization through objectives or introducing new manufacturing technologies involves learning processes and, implicitly, knowledge accumulation. In the current times, knowledge represents an essential source for obtaining the competitive advantage, insuring the strategic integration of the sustainable organization in a more and more complex and dynamic business environment.

Next to resources, organization culture significantly influences the competitive potential of the sustainable organization. The cultural model, as an organization philosophy concerning business conduct, constitutes one of the key factors of operational competitiveness and excellence [5, 6, 7].

Organizational culture has an essential role both in the substantiation and strategy elaboration stages, as a determinant, and as well in the implementing stage, as an instrument [8]. In the strategy substantiation stage an organization culture analysis is necessary, in order to identify its strong and weak points. In the implementing stage, the strong points of the cultural model must be maintained and, eventually, amplified, and the weak points must be diminished or eliminated, if possible.

Sustainable organizations must promote cultural models centered on creativity, innovation, initiative spirit, responsibility, professional competence and individual performance. An adequate cultural model constitutes an important vector of an organization's sustainability. Consequently, sustainable organizations must adopt cultural models, who promote value homogeneity, create perspectives which offer positive motivation and encourage the involvement of the employees in the decision processes. In this respect, it is important that managers and entrepreneurs initiate coordinated activities in motivating the human resources and to adopt policies who use exceptional results of their own employees as inspiration. The development of a cultural sustainable model implies that managers and entrepreneurs design reasonable standards in achieving objectives, treating human resources with respect, to give them freedom in creation and in experimenting innovative projects, so that they can excel.

3. Stability, change and organization sustainability

The sustainable organization is, by excellence, a flexible organization. An essential condition of the organization flexibility is the product and process flexibility. A product's flexibility is determined by the number of ways it can be used, while process flexibility is given by the number of possible configurations in order to adapt to environment conditions, cost and time necessary for the configuration change [9].

Organization flexibility constitutes a function with multiple variables which come from the functional approach of the firm, information flexibility, research and development flexibility, organizing flexibility, human resources flexibility, and geographical flexibility.

Financial flexibility can be a restriction in realizing manufacturing flexibility which, in turn can stimulate and complete the commercial flexibility. Managers and entrepreneurs have the mission to create and maintain a balance between the seven types of functional flexibility.

By approaching flexibility from another perspective, there are four types of flexibility: conservative, operational, structural and strategic [10]. Conservative flexibility resides in static performance optimizing of the organization's procedures while results are constant in time, operational flexibility, most common, constitutes an ensemble of abilities, almost entirely routine, through which we mainly pursue an increase in the activity volume, structural flexibility considers fundamental changes in organizing and decision making, thus adapting to the evolutions of the environment, while strategic flexibility generates modifications in the area of incorporated objectives and activities, manifesting itself especially when changes appear in the business environment. Strategic flexibility presents a double dimension: quality and innovation.

A sustainable organization initiates and developes strategic change periodically. Organization change corresponds to a new orientation, fundamental and radical, concerning the ways the firm will carry out its activity, having essential implications over the behavior of all of its members. Starting a change process involves realizing the need for change, the manifestation of the wish to change, accumulating knowledge, as well as forming the necessary abilities in order to implement the change [11].

The forces which determine an organization change may be internal or external. The change in strategic orientation of the competitors, government regulations, the emergence of new firms on the market, competitors' technological innovations, as well as the quality increase of their products and services represent a force which makes a firm resort to organization changes. A new vision of the entrepreneur or management team, introducing new manufacturing technologies, assimilating new products, the intent to enter a new market are internal forces which can determine the start of an organization change process.

The sustainable organization understands the essence of change. Rosabeth Moss Kanter, management professor at Harvard Business School, introduced in specialty literature the concept of organization specialized in change [12]. The sustainable organization is the one that anticipates, initiates and implements change. This type of organization approaches the change process in a proactive manner, in the sense that it makes the necessary steps to adapt to the evolutions recorded in the business environment. Being proactive implies a continuous process of organization learning.

In the sustainable organization new models of thinking are developed and cultivated, human resources are permanently engaged in learning processes in order to gain competences and each experience is considered as a learning opportunity. In our opinion, the investment in education and continuous training if the human resources are essential in knowledge based society and economy. Managers and entrepreneurs must imprint their employees a pro-change and pro-learning attitude by creating an organization climate which must be stimulant, dynamic and auspicious for achieving operational excellence.

The sustainable organization is permanently oriented towards the future and the managers' and entrepreneurs' strategic vision is reflected in the behavior of the human resources, which must manifest the same level of involvement both in the current organization problems as well as in the change projects.

As any other system, the sustainable organization tends towards balance. A sustainable organization is the one where management creates and maintains a balanced combination between stability and change. In other words, the organization balance involves an adequate proportionality between stability and change. The organizations must adapt to changes which appear in the environment, while maintaining the main lines of the business strategies that they promote. Consequently, managers and entrepreneurs have an essential role in creating and maintaining the organization balance, for an optimum "stability – change".

In the sustainable organization, stability and change, new and tradition are not in an antagonistic report, but a complementary one. It is important that modern methods and practices are promoted in the organization, while maintaining the good practices used in the past.

The sustainable organization manifests receptivity to new, but in the same time grows the spirit of tradition. In consequence, organization sustainability involves the coexistence "new – tradition" and the optimum "stability – change".

4. Organization sustainability. Management actions

Sustainability constitutes the fundamental objective of the modern organization in knowledge based economy. Reaching this objective involves a series of entrepreneur – manager actions which can be structured, in our opinion, on the following major coordinates:

- systematic practice of strategic management;
- creation of flexible organization structures;
- designing and implementing of adequate IT systems;
- perfecting strategic alliances with other organizations.

In order to become sustainable, an organization must apply a strategic management integrated system. The opportunity to apply strategic management is sustained, on one hand, by the growth of the current business environment and on the other hand, by the multiple advantages that this "forecast" management offers – design and action unit at every hierarchical level, creating a general mood governed by interest and receptivity to new, capacity to detect emerging opportunities etc.

Organizations can choose a procedural strategic management model structured in three stages: strategic planning, strategy implementing and strategy evaluation. An essential stage in the strategic management process, strategic planning includes diagnostic analysis, organization change and strategy design. The sequence of these stages of strategic planning must be regarded through a corresponding and interdependent vision, in the sense that the strategy is gradually shaping while doing the diagnostic analysis and strategic organization change. In the design stage of the strategy, based on information gathered during the first two stages of strategic planning, the trajectory that the organization will follow in the next time period is defined.

Every sustainable organization must have a flexible organization structure, well defined from a functional and a dimensional point of view, which will ensure the fulfillment of the strategic objectives established according to the mission, while the economic and social efficiency remains high. It is necessary that managers and entrepreneurs do actions like: expanding the use of formalized documents and procedures; introducing equipment and IT products; increasing the degree of involvement and responsibility by the executants, as a consequence of the proliferation of IT and the development of cultural models oriented towards results and performance; the development of information flow and imprinting a strong information dimension to the organization culture.

Consequently, organizations must manifest their concern towards formalizing the organizing systems, in the sense of designing and demarcation of the structural components according to the specificity and the magnitude of the organizing processes involved, as well as the strategic objectives in view. Formalizing organizing systems must be on the mangers' and entrepreneurs' priority list, but the key to success from an organizing point of view is, in our opinion, to create and maintain a balance between formal and informal dimensions, an optimum "formal – informal". This fact is important because, as suggested before, the sustainable organization is, usually, small or midsized. From the sustainable organization, the majority is represented by micro organizations which only develop one activity or a small number of activities, the organizing simplified on the structural level, as well as the pronounced informal dimension of the intra organization environment contributes significantly to the increase the information and decision flow circulation speed, with benefic effects in the economic and social performance area.

The organizations' competitive nature is highly influenced by the existence of adequate information systems. Entrepreneurs and managers must take into consideration designing and implementing of information systems to respond to the internal and external needs of the organizations they run. Externally, an information system must provide information referring to preferences manifested by the demander, to strategic actions made by competitor firms, to mutations recorded in the legislative environment, to the technological and management know-how, to the apparition of new products and services on the market, to their quality etc. internally, an efficient information system determines the efficiency growth in substantiating and adopting management decisions, diminishing distortions, filtering, redundancies and overloading the information channels, as well as the improvement of the communications inside the organization.

The initiation and development of strategic alliances represent management actions through which an organization may become sustainable. Firms chose strategic alliances when they do not own potential to ensure a lasting competitive position on a certain market. Making a strategic alliance represents a decision of maximum importance for the management of an organization. By making strategic alliances, firms can enter a business environment marked by the intensifying of the competition. Also, strategic alliances create the possibility of running some expensive projects, which would not be materialized in other conditions. The most common strategic alliance models are the franchise, the concession, the licensing in common of products and technologies and also joint-ventures. The franchise, concession and common licensing of products and technologies

show multiple advantages for the partner organizations, from which we remind: facilitating the entrance on a certain market; reducing the risks associated with the deployed activities; the access to additional financial, management, technologic and human resources. Joint-ventures result from perfecting some strategic alliances between organizations which activate in different countries.

Conclusions

Promoting sustainable organizations was one of the main themes approached during the International Labor Organization Conference in Geneva in 2007, as well as the 8th European Regional Reunion of the International Labor Organization in Lisbon in 2009. By appreciating that the sustainable organization represents the main microeconomic pawn of the new economy, based on knowledge, the participant delegations proposed a measure pack which aims a stable and sustainable economic growth.

The sustainable organization represents an entity which generates integrated added value to the economic, social and ecologic environments which, by a proactive, flexible and innovative management, constantly creates competitive advantages for itself compared to the competition. In order to become sustainable, an organization must be led by mangers and entrepreneurs with strategic vision and, in the same time, to possess human resources with multiple competence, a flexible management system, material and financial resources, advanced technologies, as well as an organization culture oriented towards change, creativity and innovation.

The competitive potential of a sustainable organization is defined, mainly, by the complex of resources and organization culture. Among resources, knowledge tends to become primordial in the context of the new emerging economy, with a significant impact on the performance of the sustainable organization. Explicit knowledge can be found in studies, patents, licenses, standards, software, while implicit knowledge implicit knowledge can be found in the minds of the organization members (technical know-how, technological know-how, IT know-how, management know-how etc.).

The sustainable organization understands the essence of change by manifesting flexibility in the developed processes and actions. This new type of organization anticipates, initiates and implements change, which it approaches in a proactive manner, in the respect of permanent accommodation to the evolutions recorded in the business environment. Being proactive implies the development and cultivation of new thinking models, as well as training human resources in organization learning processes, in view of accumulating knowledge and, implicitly, gaining competence.

The organization sustainability implies an adequate proportionality between stability and change. Managers and entrepreneurs hold an essential part in creating and maintaining an organization balance, of an optimum “stability – change”. In the sustainable organization modern methods and practices are constantly promoted, while maintaining the good practices used in the past. The sustainable organization is oriented towards the future, manifests receptivity to new and, in the same time, cultivates the spirit of tradition.

Sustainability constitutes the fundamental goal of the modern organization in knowledge based economy. In our conception, systematic practice of the strategic management, creating flexible organization structures, designing and implementing adequate IT systems, as well as developing strategic alliances represent possible entrepreneur – manager actions through which an organization can integrate in the economic, social and ecologic environment, by becoming sustainable.

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THE IMPACT OF MONETARY POLICY TOWARD INDONESIAN STOCK MARKET UNDER INFLATION TARGETING REGIME

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Abstract

A high volatility in stock market movement can be influenced by current news both domestic and international economic shocks, including the ongoing global financial crisis that affect Indonesian economy in particular. Based on empirical studies and theories, that monetary policy can be an effective tool in order to stabilize the stock market volatility. Monetary policy can have a significant effect on the movement in stock market. Does it really happen on Indonesian macro economy? This paper investigates the relations between monetary policy by its instruments and stock market movement. Our empirical evidence is based on before and after the adoption of Inflation Targeting Framework, including the period of Asian Crisis (1997) and the Global Financial Crisis (2008). This paper uses a Vector Error Correction Model (VECM) in order to examine the dynamic movement and changes on Indonesian Stock Market as an impact of the changes in monetary policy in terms of Inflation Targeting regime. Utilizing an Impulse Response and Variance Decomposition approach, this paper analyzes the effectiveness of monetary policy toward the stock market performance in order to achieve the stability of stock market and to develop market expectations. These objectives are beneficial to strengthen the credibility of the Central Bank as the monetary authority in terms of the implementation of Inflation Targeting Framework. Furthermore, this paper attempt to assess and evaluate the monetary policy and induce the central bank to create an optimal policy in the future.

Keywords: *inflation targeting framework, monetary policy, stock market, vector error correction, variance decomposition*

1. Introduction

Stock market has become one of the main subjects in terms of macroeconomic stability. Since the monetary policy has, an objective to achieve the price stability in terms macro economy, therefore the stance of the Central Bank whereas the monetary authority is needed to influence the stock market particularly. Movements in the stock market can have a significant impact on the macro-economy.[1] Reversely, the change in macroeconomic variables can have a significant impact as well on the movements in the stock market. These relationships will have a significant result in order to provide comprehensive information to the policy makers to respond and create optimal policy in terms of macroeconomic stabilization.

Nevertheless, it is still difficult to identify the monetary policy response to the stock market. However, based on the theory that the monetary policy can influence the stock market by its instruments, such as the interest rates, therefore, we would like to emphasize on the stock market

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[1] Study of Thorbecke (1997); Rigobon and Sack (2003); Ehrmann and Fratzscher (2004); Maysami, Howe, and Hamzah (2004)

response to the change on macroeconomic variables. These variables will represent the stance of monetary policy in terms of inflation targeting framework. The adoption of inflation targeting framework based on the objectives of the Central Bank to achieve the price and macro-economy stabilities, through setting the range of inflation target.

According to the Bank Indonesia Yearly Report[2], stated that during the Asian Crisis on 1997 to 2000, the foreign investors tend to implement only hit and run trade strategies. It means that the investors attempt to boost their gain only on a very short time. Meanwhile, the similar situation had happened on money market. This condition pushed the investors more un-sensitive regarding the change of interest rates. In terms of high country risk, the difference between domestic and international interest rates might not be the only main reasons for investors to change their portfolios. In fact, there were several arguments that investors had change their portfolio from Indonesian capital market to other countries.[3] First, there was a profit motive, regarding the high interest rate on other capital market particular on United States of America. Second, it was called flight to quality motive. The motive occurred in order to maintain their portfolio because of the downward performance on emerging market particularly. These two particular factors were indirectly became barrier to the portfolio investment and capital inflow to Indonesian financial market.

Increasingly, the central bank started to implement some policies in order to improve the performance of capital market, namely the regulation on stock pricing. However, this particular policy was un-sufficient to boost up the capital market performance. Moreover, the downturn performance of capital market remains until 2002. At the end of 2001, the Composite Index was 5.83% decreased from 416.3 to 392.0 levels. It was mainly affected by the depreciation on rupiah; the increase on Bank Indonesia rate to 17%; and the downgrade of investment rating in Indonesia, from "stable" to "negative" based on Moody's on March 2001.[4] Furthermore, these circumstances even worst when the government raised the tax policy particular on bond return to 0.003%. This policy was contra-productive in terms of improving the capital market performance as one of the financing institution.

In addition, we can analyze the stock market fluctuation in detail from the following figures.[5] There are the movements of Jakarta Composite Index (from 1990 to 2009) as well as the LQ45 index (from 1994 to 2009), given as follows:

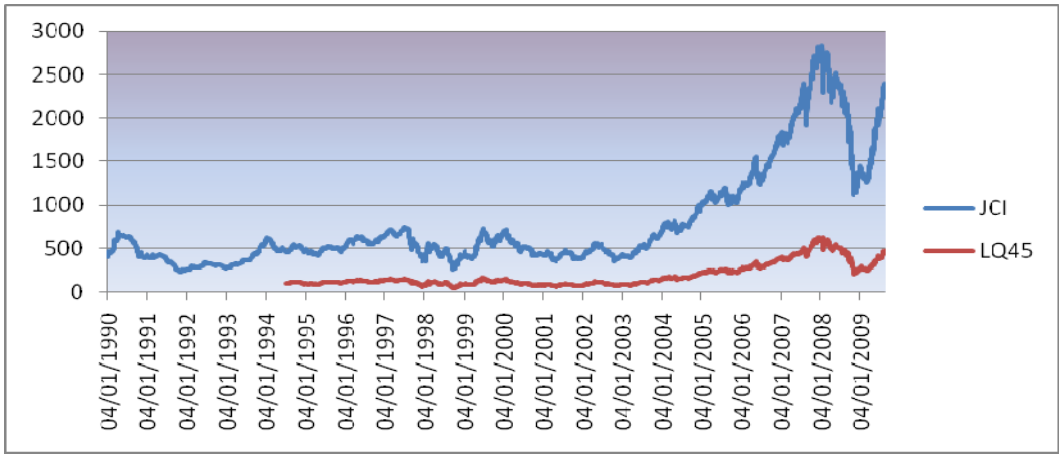
[2] Indonesian Economic Report 1997, p. 64; 1998, p.70; 1999, p.72; 2000, p.75; Macroeconomic and Monetary Condition

[3] Based on the survey of Bank Indonesia and Indonesian Capital Market and Financial Institution Supervisory Agency, 1999

[4] Based on the Financial Market Report, Economic Report on Indonesia, Bank Indonesia, 2001

[5] The main source of JCI and LQ45 taken from Bloomberg Databases, retrieved date: March 01, 2010

Figure 1
The Jakarta Composite Index (JCI) and LQ45 Index Movements



Source: Bloomberg, 2010

According to figure 1 above, we can see that the similar movement are happened on LQ45 Index as on Jakarta Composite Index (JCI). The LQ45 index is the index of forty-five stocks that most liquid and have the highest market capitalization. It means that investors also attempt to invest and re-arrange their financial portfolio on Jakarta Composite Index as well as LQ45 Index.

During 2003, there was an increase on price index, volume of trading in the stock market, bond market, and mutual funds. This was affected by the decline in the interest rate. Several factors had boosting the positive performance of Indonesian capital market.[6] There were: (1) relatively low bank interest rate, which enable the investor to gain higher profit on capital market instead of bank deposits; (2) improved foreign investors' perception on Indonesian capital market as well as the country risk and a significant difference on interest rate that cause high capital inflows to gain short-term profits; (3) relatively stable on macroeconomic indicators. This was reflected by increased Jakarta Composite Index (JCI) in response to increased stock trading both by domestic and foreign investors. The JCI closed at level 691.9 and increased up by 266.9. This increased JCI gained a profit of 62.8% compared the position at end 2002. Positive performance also occurred upon LQ45 index, which increased 59.9 to 151.9 in 2003 compared to previous year. The improved JCI and LQ45 performance was related to several international stock exchanges positive performance and relatively low bank interest rate.

The stock market performance was remained bullish on 2004.[7] The continuing trends as on 2003 pushed the composite index above the 1,000 level before year-end. The bullish domestic stock market resulted from continuously improving fundamentals, both in macro and micro contexts, as well as market optimism over the new government. The upward trend continued during 2005. However, the JCI index started to fluctuate, even still a positive gain. Internal factors were driving negative sentiment on the stock market included the upward trend in domestic interest rates in consequence to the tight bias monetary policy stance adopted to reduce inflation

[6] Based on Monetary Policy Transmission Evaluation of Bank Indonesia, Economic Report on Indonesia, 2003, p.67.

[7] Based on Stock Market Evaluation, Economic Report on Indonesia, 2004, p. 68.

and depreciation on rupiah. The other factors that bearing down on the JCI were the surge in world oil prices to almost $70 per barrel.[8] The market had negative projections on the performance the stock markets. Moreover, it also induced by the raised on the domestic interest rates regarding the tight monetary policy stance. Eventually, the fluctuation on stock market continued until year-mid on 2008, when the global financial crisis had happened. The Composite Index closed at 1,355 at the end of 2008, a drop of 50.64% compared to the previous year. At the beginning of 2008, the index was relatively impressive. It was 2,830 level which was the highest level ever recorded since the beginning of Indonesia Stock Exchange.

Furthermore, Bank Indonesia attempted to minimize the negative impact of any economic shocks that can dropped financial markets performance as well as the macro stability. Therefore, the policies of Bank Indonesia, which is represent by the Indonesian Capital Market and Financial Institution Supervisory Agency and the Indonesian Stock Exchange Board are plays an important role in limiting a deeper financial markets decline, particular on Composite Index.

According to the consequence of monetary policy stance toward the financial markets performance through the financial systems mechanisms, then we provide a brief summary of several macroeconomic performances in terms of particular indicators, as follows:

Table 1.
Selected Macreconomic Indicators[9]

Percent

Description	2003	2004	2005	2006	2007	2008
GDP Growth	4.7	5.0	5.7	5.5	6.3	6.1
CPI Inflation	5.1	6.4	17.1	6.6	6.6	11.0
Core Inflation	6.9	6.7	9.8	6.0	6.3	8.3
Average Exchange Rate (Rp/$)	8,572.0	8,940.0	9,713.0	9,167.0	9,140.0	9,241.0
SBI (1 month)/BI Rate since July 2005	8.3	7.4	12.8	9.8	8.0	8.6
Current Account/GDP	3.4	0.6	0.1	2.9	2.5	0.1

Sources: BPS-Statistic Indonesia; Bank Indonesia

In 2005, CPI inflation rose gradually to 17.1%, following the October hikes in fuel prices. The shocks in this index was primarily driven by fuel prices and other administered prices, in particular transportation tariffs. Higher inflation expectations and rupiah depreciation also raised core inflation while downward pressure from the output gap remained relatively insignificant. Against the backdrop, CPI inflation was above the determined target of 6%+/-1% for 2005. The core inflation rate was high in 2005, peaking at 9.7%, primarily attributable to high inflationary expectations and depreciating exchange rates. Higher inflationary expectations from the public were visible as Q1-2005 closely associated with the government's plan to adjust domestic fuel prices in line with global oil prices and weaker exchange rates.

The rise in the Bank Indonesia (BI) rate, that is, an anchor for the interest rate determination in Indonesia, and deposit rate was followed by a limited increase in lending rate, whereas the

[8] Based on International Economic Evaluation, Economic Report on Indonesia, 2004, p.70

[9] The basic references on setting Inflation Target under Inflation Targeting Framework, taken from Indonesian Bureau of Statistic, 2009

volume of credit allocation remained relatively high. The lending rate began to increase during October 2005 to 15.18% from 13.41% at the end of 2004. This verified that the role of banks in financing the economy remains imperative. In brief, the rise in the BI Rate has not negatively affected bank intermediation. In order to reduce inflation and restore monetary stability, Bank Indonesia tightened further its monetary policy, primarily through the implementation of a new Inflation Targeting Framework (ITF) supplemented by exchange rate stabilization packages.[10]

Eventually therefore, this study will emphasize on two basic research questions, which is based on the background that discussed earlier. The first is to examine whether the monetary policy can have a significant effect in order to achieve its objectives in terms of the inflation-targeting framework. The purpose of this particular problem is to measure the credibility of Bank Indonesia regarding the basic requirements of the inflation-targeting implementation, namely credibility, transparency, and accountability. The second is to investigate whether the monetary policy can have a significant effect on financial markets, particular on stock market. The result will be beneficial to the market players in terms of their decision-making regarding the market perception and expectation. In conclusion, the study will provide a valuable knowledge and experience based on the empirical studies and current research in terms of monetary policy and financial systems.

2. Review of related literature and studies

2.1.The Definitions and Concepts of Inflation Targeting

There are many definitions and concepts within the inflation targeting, which need to be verified before proceeding to the next section. These definitions and concepts arise from the way of conducting inflation targeting policies. Green (1996) define inflation targeting is a framework for conducting monetary policy in which decisions are guided by expectations of future inflation relative to the announced target. In inflation –targeting setup, the authorities announce a target or, more typically, a target range for future inflation. The change in the policy reaction is represent of the change in the projected inflation over one to two-year time horizon in terms of decreasing from the announced band of inflation target. Therefore, later the expected future inflation called an intermediate target as the monetary authorities used it into the monetary policy indicators. Meanwhile, Romer (2006) define that inflation targeting does not mean a single-minded focus on controlling inflation. Instead, there are three basic indicators that inflation targeting working on. First, which is becomes the main part that there is an explicit target for inflation. The target is typically quite low and usually specified as a range or in interval of a few percentage points. Second, central banks in inflation-targeting countries (inflation targeters) appear to have more weight than other central banks on conducting the inflation. Lastly, there is greater emphasis on making the central bank's policies transparent and central bankers accountable for the policies.

There are two main concepts that are use as a basic reference for this study, which are implicit vs. explicit inflation targeting and strict vs. flexible inflation targeting. The first concept is implicit vs. explicit inflation targeting. Hammour (2005) define an implicit inflation targeting implies that the monetary authority does not have to pre-announce and report publicly its inflation target. As an example on this type is the current monetary policy in the United States. The Central bank of United States (The Fed) controlling and maintain the inflation rate and other macroeconomic indicators, and then reacts at the first sign of inflation or excess demand by changing its instrument such as the interest rate upward. In other condition, explicit inflation targeting requires pre-announcement of inflation targets and reporting periodically to the public

[10] Monetary Policy Evaluation, Economic Report on Indonesia, 2005

the developments in the monetary policy and the success or the failure to achieve the targets. Therefore, explicit inflation targeting implies full accountability and transparency of monetary policy. According to this differentiation, the inflation-targeting concept used in this study is meant to be the explicit type.

The second concept that we describe is what Svensson refers to, in many papers (1997a, 1997b, and 1998) and in Rudebusch and Svensson (1998), as strict versus flexible inflation targeting. Ball (1997) describes those two types as narrow versus broad definitions respectively. First, strict inflation targeting is a single-target policy where the central bank's objective function contains only inflation. In other point of view, the flexible inflation targeting is a multi-target regime where the monetary authority includes more than inflation in its objective function, such as the real output and interest rate. The first type implies that the central bank has to set its instruments in such a way that the target is met every period. This type of policy would lead to more variability and fluctuations in the output and interest rate. Therefore, the adjustment under flexible inflation targeting is slower or gradual as compared to the strict type.

Furthermore, Romer (2006) stated that there are two main views of inflation targeting. The first is that it is merely "conservative window-dressing". In this view, the important changes in monetary policy are that the central bank has decided to aim for lower inflation than in earlier decades and to put greater emphasis on the behavior of inflation. The other features of inflation targeting, such as the formal targets, inflation reports, and so on, are of little importance. The other view is that inflation targeting matters. This view focuses on credibility, transparency, and accountability. Discussions of credibility argue that the emphasis on hitting the inflation target can affect expected inflation. This can be important in two situations. The first is when inflation targeting is adopted. Typically, this is done when inflation is well above the newly adopted target. Thus, inflation targeting may reduce expected inflation, and hence lower the output costs of the disinflation needed to get inflation down to the target. This idea is appealing and plausible. The second situation is where the disturbances move inflation away from the target. By anchoring expectations at the target level, inflation targeting can reduce the disturbance's impact on expected inflation. Indeed, there is some evidence that shocks to the price level have little influence on expected inflation under inflation targeting. Since disturbances are both positive and negative, this is not likely to have a large effect on average output. Nevertheless, it can make the economy more stable.

In many literatures, we found that inflation targeting has both several advantages and disadvantages during a certain period of research. Based on these findings, it will provide a reference as a basic argument in order to examine the effectiveness of inflation-targeting framework. Accordingly, this study will describe both advantages and disadvantages of inflation targeting taken from particular research.

The first is the advantages of inflation targeting which as a medium-term strategy for monetary policy (Mishkin, 2001). In contrast to an exchange rate peg, inflation targeting enables monetary policy to focus on domestic considerations and to respond to shocks to the domestic economy. In contrast to monetary targeting, another possible monetary policy strategy, inflation targeting has the advantage that a stable relationship between money and inflation is not critical to its success: the strategy does not depend on such a relationship, but instead uses all available information to determine the best settings for the instruments of monetary policy. Inflation targeting also has the key advantage that it is easily understood by the public and thus highly transparent.

Nevertheless, Mishkin (1999) and Bernanke (1999) discussed about the critics of inflation targeting, which have noted seven major disadvantages. First, that inflation targeting is too rigid. Second, that it allows too much discretion. Third, that it has the potential to increase output

instability. Forth, that it will lower economic growth. Fifth, that inflation targeting can only produce weak central bank accountability because inflation is hard to control and because there are long lags from the monetary policy instruments to the inflation outcome, is an especially serious one for emerging market countries. Sixth, that inflation targeting cannot prevent fiscal dominance. Lastly, that the exchange rate flexibility required by inflation targeting might cause financial instability, are also very relevant in the emerging market country context.

There are many studies discussed inflation targeting. Study of Green (1996) and Smith (2005) focused on the theory of inflation targeting and core inflation as well, and the policy implication to the economy. Green's findings are inflation targeting can be classified either as a rule or as discretionary. The literature identifies an inherent bias that on average causes inflation to exceed the socially preferred level. This bias is sometimes offered as an explanation for higher than desirable inflation rates. However, in setting the low-inflation target, an apparent inconsistency is introduced: average and expected inflation will exceed the announced inflation target. Meanwhile, Smith (2005) found that both the level of accommodation of the central bank and the inflation expectations of agents affect, which measure is core inflation. From the conditional results, there are no changes in the public's beliefs about the regimes. Hence, all regimes would be ranked equivalently. Moreover, the gain from inflation targeting lies in the fact that it makes central banks less accommodative but not in making, the public believe that the central bank is less accommodative.

Therefore, in order to deliver the outcomes of inflation targeting, such as control the inflation rate, raise output growth, lower unemployment, and increase external competitiveness, there must exists a strong institutional commitment to make price stability as the primary goal of the central bank.

2.2.The Role of the Central Bank on Inflation Targeting Framework

The Central Bank has a main role to conduct the Inflation Targeting Framework. Mishkin (2001) stated that inflation targeting is a recent monetary policy strategy that encompasses five main elements: (1) the public announcement of medium-term numerical targets for inflation; (2) an institutional commitment to price stability as the primary goal of monetary policy, to which other goals are subordinated; (3) an information inclusive strategy in which many variables, and not just monetary aggregates or the exchange rate, are used for deciding the setting of policy instruments; (4) increased transparency of the monetary policy strategy through communication with the public and the markets about the plans, objectives, and decisions of the monetary authorities; and (5) increased accountability and credibility of the central bank for attaining its inflation objectives. Nevertheless, the crucial point about inflation targeting is much more than a public announcement of numerical targets for inflation for the year ahead. There are at least three major challenges that the monetary authorities, here the central bank and government, faces: (1) building credibility; (2) reducing the level of inflation; and (3) dealing with the fiscal, financial, and external dominance (Fraga, 2003).

The adoption of inflation targeting represents an effort to enhance the credibility of the monetary authority as committed to price stability. The fact is that building credibility takes time. The central bank's policies not only have to be consistent with the inflation-targeting framework, but they also have to take into account that private agents do not fully trust that the central bank will act accordingly. Moreover, private agents have concerns about the commitment of the central bank to the target itself and to its reaction to shocks.

Another key feature of inflation targeting regimes is that the transparency of policy associated with inflation targeting has tended to make the central bank highly accountable to the public. Sustained success in the conduct of monetary policy as measured against a pre-announced

and well-defined inflation target can be instrumental in building support for an independent central bank, even in the absence of a rigidly defined and legalistic standard of performance evaluation and punishment (Mishkin, 2001).

As illustrated in Mishkin and Posen (1997), and in Bernanke (1999), inflation-targeting central banks have frequent communications with the government, and their officials take every opportunity to make public speeches on their monetary policy strategy. Inflation-targeting central banks have taken public outreach a step further that is an Inflation Report-type document to clearly present their views about the past and future performance of inflation and monetary policy. Therefore, each central bank and government in such a country that adopts inflation targeting should maintain and cooperate in effective and efficient policies.

Recent empirical studies provide evidence that independent central banks foster lower and less volatile inflation rates but do not appear to produce lower or more volatile output. Based on this evidence, some authors have concluded that central bank independence is a "free lunch" that delivers price stability without apparent real output costs. This approach is questionable given that many countries did not establish independent central banks. Some explanation rests on the existence of a credibility versus flexibility trade-off associated with the setting up of an independent central bank. Study of Lohman (1992) and Cukierman (1994) were developed models where the central bank independence originates a trade-off between the credibility gains associated with central bank independence and the flexibility costs arising from a suboptimal stabilization policy.

In terms of case study research, there are Kannan (1999); Chowdury & Siregar (2004); Fraga, Goldfajn, & Minella (2003); and Johnson (2003) that focused on the implementation of inflation targeting on many countries. Kannan (1999) describe the inflation targeting implementation in India. This study found that in India, stipulated annual variation in broad money is considered as an intermediate target under the monetary targeting framework and its act as a domestic anchor for monetary policy with feedback. In the April 1998, monetary policy a move towards indicators approach was announced, where the RBI takes into account the developments in a host of macroeconomic indicators such as money, credit, prices, etc, in the conduct of its monetary policy.

Study of Chowdury & Siregar (2004) focuses on Indonesia's monetary dilemma, which is the constraint of inflation targeting. The result stated that the essence of inflation targeting is embedded in the so-called social welfare function that includes both inflation and economic growth. When the relationship is found to be positive in the short run or at the moderate rate of inflation, the society has to weigh the cost of low inflation vis-à-vis cost of lost output. In the context of Indonesian transition, one has to evaluate the risk of a prolonged recession for democratic consolidation and social conflict. It is affected by the danger of higher inflation and its likely negative effect on output.

In addition, study of Fraga, Goldfajn, & Minella (2003) found that inflation targeting in emerging market economies has been relatively successful but has proven to be challenging. The volatility of output, inflation, the interest rate, and the exchange rate has been higher than in developed countries. The process of building credibility, the necessity of reducing inflation levels, the dominance issues, and the larger shocks have all played an important role. Meanwhile, Johnson (2003) stated it is a challenging task to analyze the conditional effect of inflation targets on the level of expected inflation. Using the 12-month period after inflation target were announced and 12-month period post-target period for forecasting, in four of five countries, there is evidence that inflation targets coincide with a reduction in expected inflation not explained by information known when forecasts were made. In New Zealand and Sweden, the reduction in expected inflation is immediate. In Australia and Canada, the effect is smaller and slower to develop. In the United Kingdom, inflation targets appear to have little impact.

2.3.Monetary Policy Implication from Inflation Targeting

The single objective of Indonesian monetary policy is to maintain the stability in the rupiah. It means that Bank Indonesia should control the inflation rate, whereas the representation of the value of rupiah in terms of goods and services in consumption activities. The other implication is to maintain the stability in the foreign exchange in terms of rupiah. Therefore, in order to influencing economic activity, Bank Indonesia sets a policy rate known as the Bank Indonesia (BI) Rate, as the primary monetary instrument. However, the transmission of BI Rate decisions to achievement of the inflation target operates through highly complex channels and is subject to time lag. It is called as the monetary policy transmission mechanism. In terms of the framework, it will discuss specifically on third chapter (research framework). This mechanism reflects the actions taken by Bank Indonesia through adjustments in monetary instruments and operational target with effect on a range of economic and financial variables before ultimately influencing inflation as the final objective. This mechanism operates through interaction between the central bank, the banking system and financial sector and the real sector. Changes in the BI Rate influence inflation through various channels, among others the interest rate channel, credit channel, exchange rate channel, asset price channel and expectations channel. Each of these channels will discuss further on third chapter (the research framework).

The monetary policy transmission mechanism works with a time lag. The time lag may vary, depending on the specific channel. The exchange rate channel normally operates faster, given that changes in interest rates have rapid effect on the exchange rate. Conditions in the financial and banking sector are also heavily influenced by the speed of monetary policy transmission. If banks see that the economy faces considerable risk, the bank response to downward movement in the BI Rate will usually be very slow. Furthermore, if banks are undergoing consolidation to improve their capital position, reductions in lending rates and more vigorous credit demand will not necessarily engender an increased lending response. On the demand side, the public may not necessarily respond to lower bank lending rates with increased credit demand if the economic outlook is bleak. In conclusion, the condition of the financial sector, the banking system and the real sector plays a crucial role in the effectiveness or otherwise of the monetary policy transmission process.

2.4.The Role of Financial Markets in the Economy

- **The Theory of Efficient Capital Markets**

John Muth developed an alternative theory of expectation, called rational expectations, which can be stated as follows: Expectations will be identical to optimal forecasts (the best guess of the future) using all available information (Mishkin & Eakins, 2000). Rational expectations theory makes sense because it is costly for people not to have the best forecast of the future. The theory has two important implications: (a) If there is a change in the way a variable moves, there will be a change in the way a variable are formed, too, and (b) the forecast errors of expectations are unpredictable.

While monetary economists were developing the theory of rational expectations, financial economists were developing a parallel theory of expectation formation in financial markets. Efficient market theory is the application of rational expectations to the pricing of securities in financial markets. Current security prices will fully reflect all available information because in an efficient market, all unexploited profit opportunities are eliminated. However, the evidence on efficient markets theory such as market overreaction, excessive volatility on stock prices, and mean reversion condition suggests that the theory may not always be entirely correct. The evidence seems to suggest that efficient markets theory may be a reasonable starting point for

evaluating behavior in financial markets but may not be generalizable to all behavior in financial markets. Capital Market plays an important role in the economy of a country because it serves two functions all at once. First, Capital Market serves as an alternative for a company's capital resources. The capital gained from the public offering can be used for the company's business development, expansion, and so on. Second, Capital Market serves as an alternative for public investment. People could invest their money according to their preferred returns and risk characteristics of each instrument (Indonesian Stock Exchange Report, 2009). Furthermore, this study will optimize the efficient market theory and its rationale in order to analyze the Indonesian Stock Market performance as an impact of the changes on monetary policy.

Some empirical studies focus on the relations between monetary policy and financial markets particular on stock market. Lee (1992) investigates causal relations and dynamic interactions among assets returns, real activity, and inflation in the postwar United States. Major findings are (1) stock returns appear Granger-causally prior and help explain real activity; (2) stock returns explain little variation in inflation, although interest rates explain a substantial fraction of the variation in inflation; and (3) inflation explains little variation in real activity. All variables were estimated using VAR approach. Based on these findings, many researchers were develop and construct new research and studies in terms of financial markets. Particular on monetary policy effect toward the financial market, there are Thorbecke (1997), Rigobon and Sack (2003), and Gupta (2006). Thorbecke (1997) examining on how stock return data respond to monetary policy shocks. The evidence states that monetary policy exerts large effects on ex-ante and ex-post stock returns. Furthermore, positive monetary shocks increase stock returns indicates that expansionary monetary policy exerts real effects by increasing future cash flows are capitalized. Similarly, Rigobon and Sack (2003) investigates the relations between monetary policy and financial market. In addition, they believe that movements in the stock market can have a significant impact on the macro-economy and are therefore likely to be an important factor in the determination of monetary policy. The results suggest that stock market movements have a significant impact on short-terms interest rates, driving them in the same direction as the change in stock prices. Their findings are consistent with some rough calculation, hypotheses, and empirical studies. Meanwhile, Gupta (2006) found that once the threshold level of financial sector has been achieved, a tight monetary policy is likely to be growth enhancing at moderate levels of financial sector development and growth under the inflation-targeting framework.

Granger (1986) and Johansen and Juselius (1990) proposed to determine the existence of long-term equilibrium among selected variables through co integration analysis, a preferred approach to examining the economic variables-stock market relationship. A set of time-series variables are co integrated if they are have same order and a linear combination is stationary. This linear combination shows that they have a long-term relationship between the variables. The main advantage of co integration analysis is that through an error correction model (ECM), the dynamic co-movement among variables and the adjustment process toward long-term equilibrium can be examined (Maysami, 2004).

Mukherjee and Naka (1995) applied VECM to analyze the relationship between Japanese Stock Market and exchange rate, inflation, money supply, real economic activity, long-term government bond rate, and call money rate. They concluded that a co integrating relation existed and that stock prices contributed to this relation. Maysami and Koh (2000) applied similar relationship in Singapore. Meanwhile, Maysami and Sims (2002, 2001a, 2001b) employed the Error-Correction Modelling technique to examine the relationship between macroeconomic variables and stock returns in Hong Kong and Singapore (Maysami and Sim, 2002b), Malaysia and Thailand (Maysami and Sim, 2001a), and Japan and Korea (Maysami and Sim, 2001b). Similarly, Omran (2003) utilized VECM on examining the impact of real interest rates as a key

factor in the performance of the Egyptian stock market. Vuyyuri (2005) used similar methodology to investigate the co integrating relationship and causality between the financial and the real sectors of the Indian economy using monthly observation from 1992 to 2002. Therefore, this study will extend the literatures through utilizing Johansen's (1988) VECM to examine the long-run equilibrium relationship between monetary variables and stock market indices particularly.

Furthermore, we would like to emphasize on the research framework including the theoretical and conceptual framework. Based on the framework, then the study will develop a research hypotheses which as the basic tools in order to examine the research objectives.

3. Research hypotheses

The research model and hypotheses that are use in this paper are based on the study of Rigobon and Sack (2003). The first objective is to examine the effect of monetary policy in order to achieve the monetary goals. Hence, the proxies are the Bank Indonesia (BI) Rate and Money Market Rate, where as the representation of monetary policy. Meanwhile, the monetary goals represent by Inflation Rate, Output Growth, and Exchange Rate. We hypothesize that there is a significant effect of monetary instruments toward the monetary goals. The main reason is that the credibility and the effectiveness of these particular monetary instruments are mainly determined through the achievement of monetary objectives, namely price stability and economic growth. Therefore, we expect that the monetary instruments can be effectively achieving its objectives.

Accordingly, the second objective is to analyze the impact of monetary policy toward Indonesian Stock Market. The proxies for monetary policy are similar to the first research question. There are Bank Indonesia (BI) Rate and Money Market Rate. On stock market side, the paper utilizes the Jakarta Composite Index (JCI). We hypothesize that there is a significant effect of monetary instruments toward the financial market performance particular on stock market. The main reason is that the effectiveness of these particular monetary instruments toward the macroeconomic stabilization, which are price stability and economic growth, also determined through the financial systems channels. Based on the monetary policy transmission mechanisms, then the study expect that the monetary instruments can be effectively enhancing the financial stability through the stock market performance.

In order to simplify the models, we do not explicitly write down the four lags that are used in these particular models. According to empirical studies, Rigobon and Sack (2003) utilize five lags in terms of daily databases, Torbecke (1997) and Christiano (1994) used six lags in terms of monthly databases. Based on the Bank Indonesia decision process making, the inflation targeting board are revising new policy in quarterly. Nevertheless, in order to maintain the flexibility, the board will construct new policies depends on the significant changes on markets. Therefore, at the first hypothesis, this study will optimize four lags in terms of examining and evaluating the time lags of any policy adjustment. However, the results will provide the time lags suggestion for every research model in this study. The following are the research models as we stated on above.

$$JCI_t = \alpha BI_t + \beta ER_t + \gamma INFL_t + \delta MM_t + \theta Q_t + \varepsilon_{1t} \quad (1)$$

$$BI_t = \vartheta JCI_t + \mu ER_t + \pi INFL_t + \varphi MM_t + \rho Q_t + \varepsilon_{1t} \quad (2)$$

Where, $INFL_t$ is the Inflation Rate on time t; Q_t is the Output Growth at time t; ER_t is the Exchange Rate at time t; BI_{1t} is the Bank Indonesia Rate at time t; MM_t is the Money Market Rate at time t; JCI_t is the Jakarta Composite Index at time t; and ε_{1t} is the error term.

4. Research methodology

This paper utilize database in quarterly, which is from Q1:1990 to Q3:2009. The data mainly as a secondary data and collected from International Financial Statistic (IFS)-IMF, CEIC Database and Bank Indonesia as well. The variables that are used in this paper are Gross Domestic Product (GDP) Growth, Bank Indonesia (BI) Rate, Exchange Rate, Inflation Rate, Money Market Rate, and Jakarta Composite Index (JCI). Nevertheless, in order to get additional data to sharpen the analysis, this paper also optimizes the Central Bank Annual Reports, The IMF Reports, World Economic Outlook Database by IMF, and other sources of data.

- **Vector Autoregression (VAR) Approach**

Stock & Watson (2001) define a univariate autoregression is a single equation, single variable linear model in which the current value of a variable is explained by its own lagged values. This is just a multiple time-series generalization of the Autoregressive (AR) model. The VAR model can be estimate by using the Ordinary Least Square method (Maddala, 2000). The uses of Vector Autoregressive Model are forecasting, causality analysis, impulse response analysis, forecast error variance decomposition and policy analysis (Lutkepohl, 2003).

- **Impulse Response Analysis**

Impulse responses trace out the response of current and future values of each of the variables to a one-unit increase in the current value of one of the VAR errors, assuming that this error returns to zero in subsequent periods and that all others errors are equal to zero. The implied thought experiment of changing one error while holding others constant makes most sense when the errors are uncorrelated across equations, so impulse responses are typically calculated for recursive and structural VARs (Stock & Watson, 2001).

- **Variance Decomposition**

In practice, forecast error variance decompositions are also popular tools for interpreting VAR models. Stock & Watson (2001) define forecast error decomposition is the percentage of the variance of the error made in forecasting a variable due to a specific shock at a given horizon. Thus, the forecast error decomposition is like a partial R^2 for the forecast error, by forecast horizon. According to Enders (2004), the forecast error variance decomposition tells us the proportion of the movements in a sequence due to its "own" shocks versus shocks to the other variable. The impulse analysis and variance decompositions can be useful tools to examine the relationships among economic variables. Therefore, we would like to apply this approach to sharpen our analysis. Recently, study of Lutkepohl also confirmed that VAR model is useful to do the forecasting, causality analysis, impulse response analysis, and policy analysis.

5. Results and analysis

According to the Unit Root test using the Augmented Dickey-Fuller (ADF) test, the result are some variables are stationary at first difference or I(1). Therefore, we adopt the Vector Error

Correction (VEC) Model instead of VAR model. The following are brief summary of unit root test by using ADF test, given as follows:

Table 2
Unit Root Test Summary

	LEVEL	FIRST DIFFERENCE
Ln BI	-1.326869 (5) *[0.6130]*	-6.048195 (4) *[0.0000]*
Ln ER	-1.247110 (3) *[0.6499]*	-5.658898 (2) *[0.0000]*
Ln INFL	-6.028556 (3) *[0.0000]*	-3.387394 (3) *[0.0148]*
LN JCI	-0.399059 (0) *[0.9034]*	-8.469266 (0) *[0.0000]*
Ln MM	-1.703046 (0) *[-0.4258]*	-7.394779 (0) *[0.0000]*
Ln Q	-9.217619 (0) *[0.0000]*	-4.754084 (10) *[0.0004]*

The number without the parenthesis is the test statistic to be compared with McKinnon one sided p-values following by the optimal lag(s) of the data at first difference level chosen by SIC criterion which is written on the same line. The value in the parenthesis on the second line is the probability. The result in the table 1 shows that most of the variables are stationary at the first difference as the null hypotheses have been rejected except inflation and output growth that already stationary at level. The non-stationary requires the co integration to be the method.

In order to run the co integration method, we should take the appropriate lags in our model based on the Schwarz criterion, which is the lowest is the better result for lags. It will automatically result from Eviews program when we tests the ADF unit root test. Furthermore, in vector error correction model, we can examine the long run relationship between variables. If there is a long run relations, it will be shows the co integrating relations.

According to table 1 (Appendix), we can see that from the co integration summary result, there is one model that most appropriate in terms of constructing the VEC model, which is assumption four (the stars). The linier with intercept and trend will be our basic model. Then, we run again the Johansen Co integration by choosing the forth assumption and the result are given through Table 2 in Appendix. As in the theory, in order to know if a VEC is appropriate, a cointegration test has to be conducted. VEC model is appropriate in our estimation if there is at least one co integrating equation in the model. From the result on Table 2, Trace and Maximum Eigenvalues confirm the presence of the cointegration by having the rank equal to one and the SIC value is lowest at the type linier with intercept and trend. The result also confirms not rejecting the null hypothesis of the presence of the cointegration as the Trace and Maximum Eigenvalue are lower than the 0.05 critical values. There are three cointegrating equation in the model. It means that the VEC is significantly appropriate in terms of our estimation model.

Furthermore, the result of Pairwise Granger Causality Test, we can determine that some variables are have a causally relations to other variables. The following are the results under the 95% confidence level. There are the exchange rate significantly affecting the BI rate; the causally relations between inflation and BI rate; causally relation between money market rate and BI rate; the BI rate significantly affecting JCI; causally relations between money market rate and exchange rate as well as the output growth and money market rate; also the JCI significantly affecting the exchange rate. Under the 90% confidence level, the output growth has a causally relations to BI rate as well as the money market rate and inflation; inflation significantly affecting JCI; also the exchange rate affecting money market rate. The exchange rate is significantly affecting JCI under 99% confidence levels.

The result confirms that monetary policy in terms BI rate as well as the money market rate are significantly affecting the JCI through the financial system transmission mechanisms. In terms of inflation targeting regime, the central bank plays a role of controlling the inflation target, since it has a significant impact as well to the stock market.

According to the Impulse Responses results (Figure 2) and Table 4 (Appendix), we can examine that most of the macroeconomic variables that are used in this paper are have the common direction or responses to the change on each variables. The BI rate, the exchange rate, JCI and money market rate have a similar direction (positive) to response in terms of the change in economy (the economic shocks) at most condition. Meanwhile, the output growth and inflation have a negative direction to response because of the economic change/shocks.

Figure 2
Impulse Responses

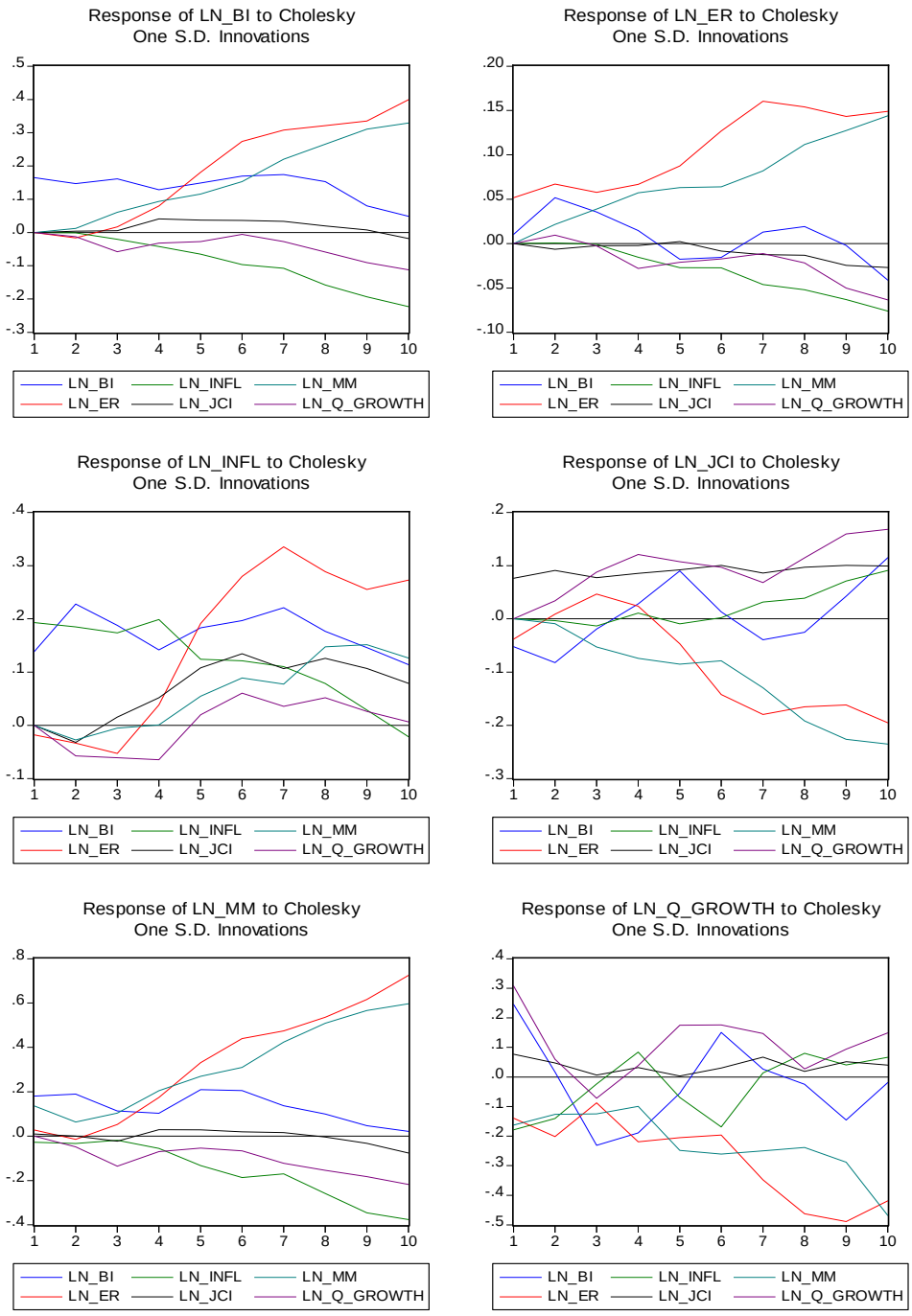
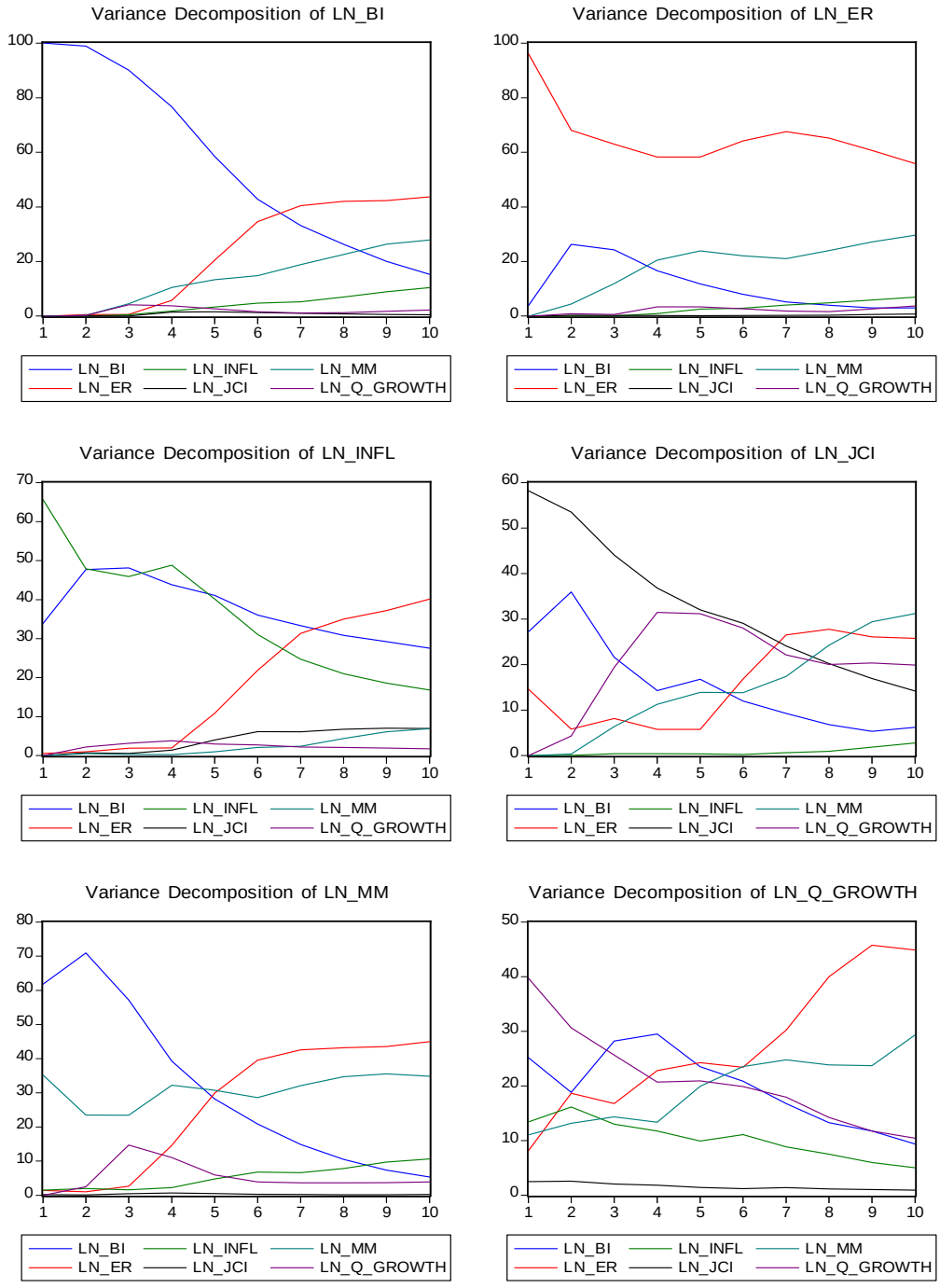


Figure 3
Variance Decomposition



Increasingly, from the variance decomposition results (Figure 3) and Table 5 (Appendix), we can investigates that BI rate has most significant influence to the stock market in particular. BI rate has 60% to almost 100% impact on affecting the stock market as well as the other macroeconomic indicators. The exchange rate has 50% to 80 % influence to the stock market performance. The remains are the inflation rate, which has 40% to 70% impact to the stock market. Based on these results, we can determine that the monetary policy has significant effect on the stock market particularly, as well as the macroeconomic stability. In conclusion, the monetary policy is significantly effective to achieve its goals that are the price stability as well as the financial system stability through the stability performance of stock market.

Conclusions and recommendations

Based on the research findings, we conclude that under the inflation-targeting regime, Bank Indonesia significantly has high influence to the macroeconomic stability. Through the monetary policy transmission mechanisms, Bank Indonesia effectively utilizes all the monetary instruments in order to achieve their objectives that are price stability and economic growth. The stance of monetary policy also has a significant impact to the financial system stability. This paper found that the Indonesian stock market are significantly affecting by the monetary policy stance through its instruments such as the Bank Indonesia rate as the single instrument in terms of inflation-targeting framework as well as the money market rate.

Therefore, this paper would like to recommend to Bank Indonesia as the monetary authority to improve the efficiency and effectiveness of the monetary policy particular on the financial system. The expected result from the policy is to control and boost up the foreign investment through stock market as well as the price stability and economic growth achievement.

APPENDIX

Table 1
Co-integration Summary

Series: LN_BI LN_ER LN_INFL LN_JCI LN_MM LN_Q_GROWTH
Lags interval: 1 to 4

Selected (0.05 level*) Number of Cointegrating Relations by Model

Data Trend:	None	None	Linear	Linear	Quadratic
Test Type	No Intercept No Trend	Intercept No Trend	Intercept No Trend	Intercept Trend	Intercept Trend
Trace	3	2	2	3	3
Max-Eig	3	2	2	3	3

*Critical values based on MacKinnon-Haug-Michelis (1999)

Information Criteria by Rank and Model

Data Trend:	None	None	Linear	Linear	Quadratic
Rank or No. of CEs	No Intercept No Trend	Intercept No Trend	Intercept No Trend	Intercept Trend	Intercept Trend
Log Likelihood by Rank (rows) and Model (columns)					
0	242.3670	242.3670	251.0767	251.0767	252.5785
1	275.5736	278.6556	287.3106	292.1720	292.9193
2	300.8015	304.2956	311.4135	316.8723	317.6191
3	314.3332	318.1024	323.1296	336.3877	337.1010
4	320.2289	325.7383	329.2583	347.6872	348.3918
5	321.0073	329.5027	329.7961	353.6467	353.7617
6	321.0090	329.8138	329.8138	354.1598	354.1598
Akaike Information Criteria by Rank (rows) and Model (columns)					
0	-4.098624	-4.098624	-4.211529	-4.211529	-4.024102
1	-4.982232	-5.068983	-5.221276	-5.382167	-5.204969
2	-5.533397	-5.595649	-5.725561	-5.869677	-5.734131
3	-5.597218	-5.629265	-5.713734	-6.141155*	-6.045875
4	-5.342870	-5.405761	-5.469094	-6.070299	-6.016326
5	-4.875303	-5.020945	-4.991504	-5.776945	-5.740069
6	-4.375375	-4.492240	-4.492240	-5.256657	-5.256657
Schwarz Criteria by Rank (rows) and Model (columns)					
0	1.514979	1.514979	1.635974	1.635974	2.057301

1	1.099171	1.051403	1.094028	0.972120*	1.344234
2	1.015806	1.031521	1.057543	0.991393	1.282873
3	1.419786	1.504689	1.537170	1.226698	1.438929
4	2.141934	2.234977	2.249610	1.804338	1.936278
5	3.077302	3.126576	3.195000	2.604476	2.680335
6	4.045029	4.162065	4.162065	3.631548	3.631548

Table 2
Co-integration Test

Trend assumption: Linear deterministic trend (restricted)
Series: LN_BI LN_ER LN_INFL LN_JCI LN_MM LN_Q_GROWTH
Lags interval (in first differences): 1 to 4

Unrestricted Cointegration Rank Test (Trace)

Hypothesized No. of CE(s)	Eigenvalue	Trace Statistic	0.05 Critical Value	Prob.**
None *	0.819551	206.1661	117.7082	0.0000
At most 1 *	0.642699	123.9755	88.80380	0.0000
At most 2 *	0.556539	74.57501	63.87610	0.0049

Trace test indicates 3 cointegrating eqn(s) at the 0.05 level
* denotes rejection of the hypothesis at the 0.05 level
**MacKinnon-Haug-Michelis (1999) p-values

Unrestricted Cointegration Rank Test (Maximum Eigenvalue)

Hypothesized No. of CE(s)	Eigenvalue	Max-Eigen Statistic	0.05 Critical Value	Prob.**
None *	0.819551	82.19062	44.49720	0.0000
At most 1 *	0.642699	49.40050	38.33101	0.0019
At most 2 *	0.556539	39.03096	32.11832	0.0061

Max-eigenvalue test indicates 3 cointegrating eqn(s) at the 0.05 level
* denotes rejection of the hypothesis at the 0.05 level
**MacKinnon-Haug-Michelis (1999) p-values

Unrestricted Cointegrating Coefficients (normalized by b'*S11*b=I):

LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH	@TREND(2)
10.35325	-9.049707	3.149989	-9.093080	-8.622210	4.829329	0.440746
-22.66537	5.961232	10.05386	3.726592	12.55172	-0.194099	-0.307688
45.52114	-20.84330	-3.821325	-9.786950	-33.35832	-9.164140	0.932197
13.70967	6.218039	-2.876248	2.305123	-12.74163	-2.540873	-0.249530
-4.158835	-3.010891	-4.367122	-2.363666	-0.087369	-2.359213	0.139923
21.56337	-1.997966	-1.211270	0.187089	-17.28400	3.087290	-0.047369

Unrestricted Adjustment Coefficients (alpha):

D(LN_BI)	-0.034588	0.004683	-0.031182	0.003658	0.045395	0.002209
D(LN_ER)	0.013699	-0.013940	0.005190	-0.012637	0.008347	1.88E-05
D(LN_INFL)	-0.053215	-0.075391	-0.046212	0.049580	0.033444	-0.002540
D(LN_JCI)	0.052760	0.017789	0.011061	0.026492	-0.013210	0.002262
D(LN_MM)	-0.092324	-0.016737	-0.011116	-0.011810	0.046285	0.014693
D(LN_Q_GROWTH)	-0.178801	0.145686	0.092336	0.046959	0.092830	-0.010421

1 Cointegrating Equation(s):	Log likelihood	292.1720

Normalized cointegrating coefficients (standard error in parentheses)

LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH	@TREND(2)
1.000000	-0.874093	0.304251	-0.878283	-0.832802	0.466455	0.042571
	(0.14779)	(0.10058)	(0.10143)	(0.06077)	(0.09594)	(0.00710)

Adjustment coefficients (standard error in parentheses)

D(LN_BI)	-0.358098
	(0.23858)
D(LN_ER)	0.141827
	(0.07434)
D(LN_INFL)	-0.550943
	(0.35070)
D(LN_JCI)	0.546236
	(0.14355)
D(LN_MM)	-0.955851
	(0.33371)

D(LN_Q_GROWTH)	-1.851169
	(0.71723)

2 Cointegrating Equation(s): Log likelihood 316.8723

Normalized cointegrating coefficients (standard error in parentheses)

LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH	@TREND(2)
1.000000	0.000000	-0.765444	0.142830	-0.433694	-0.188513	0.001096
		(0.11016)	(0.05293)	(0.06751)	(0.10631)	(0.00156)
0.000000	1.000000	-1.223777	1.168197	0.456597	-0.749312	-0.047450
		(0.19819)	(0.09523)	(0.12146)	(0.19127)	(0.00281)

Adjustment coefficients (standard error in parentheses)

D(LN_BI)	-0.464237	0.340926
	(0.57367)	(0.24949)
D(LN_ER)	0.457791	-0.207072
	(0.16288)	(0.07083)
D(LN_INFL)	1.157822	0.032152
	(0.74297)	(0.32311)
D(LN_JCI)	0.143041	-0.371417
	(0.33233)	(0.14453)
D(LN_MM)	-0.576502	0.735730
	(0.79822)	(0.34714)
D(LN_Q_GROWTH)	-5.153206	2.486565
	(1.54298)	(0.67103)

3 Cointegrating Equation(s): Log likelihood 336.3877

Normalized cointegrating coefficients (standard error in parentheses)

LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH	@TREND(2)
1.000000	0.000000	0.000000	1.261547	-1.002617	-2.437087	-0.013710
			(0.19710)	(0.24524)	(0.38641)	(0.00553)
0.000000	1.000000	0.000000	2.956778	-0.452985	-4.344287	-0.071121
			(0.35327)	(0.43957)	(0.69258)	(0.00992)
0.000000	0.000000	1.000000	1.461525	-0.743258	-2.937605	-0.019343
			(0.28159)	(0.35038)	(0.55207)	(0.00791)

Adjustment coefficients (standard error in parentheses)

D(LN_BI)	-1.883659	0.990854	0.057284
	(1.14385)	(0.51781)	(0.24703)
D(LN_ER)	0.694057	-0.315254	-0.116837
	(0.33431)	(0.15134)	(0.07220)
D(LN_INFL)	-0.945793	0.995360	-0.749006
	(1.46041)	(0.66111)	(0.31539)
D(LN_JCI)	0.646547	-0.601963	0.302774
	(0.68121)	(0.30837)	(0.14712)
D(LN_MM)	-1.082534	0.967433	-0.416610
	(1.65784)	(0.75048)	(0.35803)
D(LN_Q_GRO WTH)	-0.949979	0.561984	0.548646
	(3.04674)	(1.37921)	(0.65798)

4 Cointegrating Equation(s):	Log likelihood	347.6872

Normalized cointegrating coefficients (standard error in parentheses)

LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GRO WTH	@TREND(2)
1.000000	0.000000	0.000000	0.000000	-0.929843	-0.299282	0.000346
				(0.07690)	(0.10646)	(0.00146)
0.000000	1.000000	0.000000	0.000000	-0.282421	0.666241	-0.038177
				(0.18641)	(0.25805)	(0.00354)
0.000000	0.000000	1.000000	0.000000	-0.658949	-0.460918	-0.003059
				(0.15275)	(0.21145)	(0.00290)
0.000000	0.000000	0.000000	1.000000	-0.057686	-1.694590	-0.011142
				(0.18329)	(0.25372)	(0.00348)

Adjustment coefficients (standard error in parentheses)

D(LN_BI)	-1.833505	1.013602	0.046762	0.645568
	(1.18236)	(0.53530)	(0.25488)	(0.30970)
D(LN_ER)	0.520804	-0.393833	-0.080489	-0.256442
	(0.31409)	(0.14220)	(0.06771)	(0.08227)
D(LN_INFL)	-0.266070	1.303649	-0.891609	0.769493
	(1.39991)	(0.63380)	(0.30177)	(0.36669)
D(LN_JCI)	1.009740	-0.437237	0.226578	-0.460644
	(0.63603)	(0.28796)	(0.13711)	(0.16660)

D(LN_MM)	-1.244442	0.894000	-0.382643	0.858708
	(1.70938)	(0.77391)	(0.36848)	(0.44775)
D(LN_Q_GRO WTH)	-0.306186	0.853978	0.413580	1.373326
	(3.10511)	(1.40581)	(0.66936)	(0.81334)

5 Cointegrating Equation(s):	Log likelihood	353.6467

Normalized cointegrating coefficients (standard error in parentheses)

LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GRO WTH	@TREND(2)
1.000000	0.000000	0.000000	0.000000	0.000000	0.606467	0.001925
					(0.39345)	(0.00545)
0.000000	1.000000	0.000000	0.000000	0.000000	0.941344	-0.037697
					(0.24672)	(0.00342)
0.000000	0.000000	1.000000	0.000000	0.000000	0.180956	-0.001940
					(0.27872)	(0.00386)
0.000000	0.000000	0.000000	1.000000	0.000000	-1.638399	-0.011044
					(0.24023)	(0.00333)
0.000000	0.000000	0.000000	0.000000	1.000000	0.974088	0.001698
					(0.46098)	(0.00638)

Adjustment coefficients (standard error in parentheses)

D(LN_BI)	-2.022295	0.876922	-0.151483	0.538269	1.346590
	(1.06531)	(0.48454)	(0.24472)	(0.28211)	(0.76818)
D(LN_ER)	0.486089	-0.418966	-0.116942	-0.276172	-0.305937
	(0.30011)	(0.13650)	(0.06894)	(0.07947)	(0.21640)
D(LN_INFL)	-0.405158	1.202953	-1.037663	0.690443	0.419439
	(1.35061)	(0.61431)	(0.31026)	(0.35767)	(0.97391)
D(LN_JCI)	1.064679	-0.397462	0.284269	-0.429419	-0.936991
	(0.61965)	(0.28184)	(0.14235)	(0.16409)	(0.44682)
D(LN_MM)	-1.436935	0.754639	-0.584776	0.749305	1.103214
	(1.63012)	(0.74144)	(0.37447)	(0.43169)	(1.17545)
D(LN_Q_GRO WTH)	-0.692251	0.574476	0.008178	1.153906	-0.316336
	(2.92648)	(1.33108)	(0.67227)	(0.77499)	(2.11024)

Table 3
Vector Error Correction Estimates

Standard errors in ( ) & t-statistics in [ ]

Cointegrating Eq:	CointEq1
LN_BI(-1)	1.000000
LN_ER(-1)	-0.058036 (0.03421) [-1.69654]
LN_INFL(-1)	-0.609794 (0.11748) [-5.19058]
LN_JCI(-1)	0.400955 (0.04936) [8.12346]
LN_MM(-1)	-0.550995 (0.07049) [-7.81609]
LN_Q_GROWTH(-1)	-0.759274 (0.11077) [-6.85466]
C	-0.899675

Error Correction:	D(LN_BI)	D(LN_ER)	D(LN_INFL)	D(LN_JCI)	D(LN_MM)	D(LN_Q_GROWTH)
CointEq1	0.203848 (0.23643) [0.86219]	-0.071771 (0.07548) [-0.95085]	0.445518 (0.34197) [1.30278]	-0.490872 (0.14323) [-3.42707]	0.846696 (0.32896) [2.57387]	1.669149 (0.70039) [2.38316]
D(LN_BI(-1))	-0.217087 (0.44053) [-0.49279]	-0.045523 (0.14064) [-0.32369]	1.062270 (0.63718) [1.66713]	-0.058680 (0.26688) [-0.21987]	0.558853 (0.61293) [0.91177]	-0.213556 (1.30501) [-0.16364]

D(LN_BI(-2))	0.169527	-0.446875	0.509030	0.275451	0.943802	0.889719
	(0.58926)	(0.18812)	(0.85231)	(0.35699)	(0.81987)	(1.74561)
	[0.28769]	[-2.37543]	[0.59723]	[0.77160]	[1.15116]	[0.50969]
D(LN_BI(-3))	-0.629868	-0.184949	-0.141119	0.551764	-0.676257	-0.117267
	(0.70025)	(0.22356)	(1.01285)	(0.42423)	(0.97430)	(2.07441)
	[-0.89948]	[-0.82730]	[-0.13933]	[1.30064]	[-0.69409]	[-0.05653]
D(LN_BI(-4))	-0.428723	-0.111132	-0.318009	0.901665	-0.289989	0.217971
	(0.66943)	(0.21372)	(0.96827)	(0.40555)	(0.93142)	(1.98310)
	[-0.64043]	[-0.51999]	[-0.32843]	[2.22330]	[-0.31134]	[0.10991]
D(LN_ER(-1))	-0.377615	0.193274	-0.782097	1.229093	-0.815656	-2.751251
	(0.77335)	(0.24689)	(1.11858)	(0.46851)	(1.07600)	(2.29094)
	[-0.48829]	[0.78282]	[-0.69919]	[2.62342]	[-0.75804]	[-1.20093]
D(LN_ER(-2))	0.046336	0.109086	-0.166916	0.909954	-0.196198	-1.505673
	(0.77678)	(0.24799)	(1.12354)	(0.47059)	(1.08078)	(2.30111)
	[0.05965]	[0.43988]	[-0.14856]	[1.93365]	[-0.18153]	[-0.65432]
D(LN_ER(-3))	0.908273	0.020862	1.127799	0.616039	1.184458	-5.287009
	(0.63452)	(0.20257)	(0.91778)	(0.38441)	(0.88285)	(1.87970)
	[1.43142]	[0.10298]	[1.22883]	[1.60257]	[1.34163]	[-2.81269]
D(LN_ER(-4))	0.716682	0.036895	0.544772	0.376378	1.114965	-1.988526
	(0.85369)	(0.27254)	(1.23478)	(0.51718)	(1.18779)	(2.52894)
	[0.83951]	[0.13537]	[0.44119]	[0.72775]	[0.93869]	[-0.78631]
D(LN_INFL(-1))	0.089072	0.017535	-0.005523	-0.206134	0.235876	0.369709
	(0.17601)	(0.05619)	(0.25458)	(0.10663)	(0.24489)	(0.52141)
	[0.50606]	[0.31205]	[-0.02169]	[-1.93317]	[0.96318]	[0.70906]
D(LN_INFL(-2))	-0.096401	0.010390	0.028715	-0.193093	0.031686	0.435568
	(0.16459)	(0.05255)	(0.23806)	(0.09971)	(0.22900)	(0.48758)
	[-0.58570]	[0.19773]	[0.12062]	[-1.93651]	[0.13837]	[0.89333]
D(LN_INFL(-3))	0.021071	-0.089107	0.372959	-0.082716	0.233447	0.982513
	(0.16684)	(0.05326)	(0.24131)	(0.10107)	(0.23213)	(0.49423)
	[0.12630]	[-1.67296]	[1.54554]	[-0.81838]	[1.00568]	[1.98797]

D(LN_INFL(-4))	0.019095	-0.077601	0.108241	-0.293269	0.112970	0.383801
	(0.13474)	(0.04302)	(0.19489)	(0.08163)	(0.18747)	(0.39916)
	[0.14171]	[-1.80395]	[0.55539]	[-3.59268]	[0.60259]	[0.96153]
D(LN_JCI(-1))	0.003921	-0.109297	-0.357742	0.270189	-0.218059	-0.162965
	(0.27341)	(0.08729)	(0.39546)	(0.16564)	(0.38041)	(0.80994)
	[0.01434]	[-1.25216]	[-0.90462]	[1.63122]	[-0.57322]	[-0.20121]
D(LN_JCI(-2))	0.016509	0.130165	0.306474	0.025535	-0.475988	-0.889240
	(0.28488)	(0.09095)	(0.41205)	(0.17259)	(0.39637)	(0.84392)
	[0.05795]	[1.43118]	[0.74377]	[0.14796]	[-1.20086]	[-1.05370]
D(LN_JCI(-3))	0.331261	0.043106	0.185364	0.236534	0.154038	0.036980
	(0.29202)	(0.09323)	(0.42238)	(0.17691)	(0.40630)	(0.86507)
	[1.13438]	[0.46237]	[0.43886]	[1.33702]	[0.37912]	[0.04275]
D(LN_JCI(-4))	0.091177	0.023480	0.510628	0.201375	-0.229698	-1.330182
	(0.30528)	(0.09746)	(0.44156)	(0.18494)	(0.42475)	(0.90435)
	[0.29867]	[0.24092]	[1.15641]	[1.08883]	[-0.54078]	[-1.47086]
D(LN_MM(-1))	0.154560	0.156012	-0.178061	-0.206450	-0.252737	0.224512
	(0.21429)	(0.06841)	(0.30995)	(0.12982)	(0.29815)	(0.63480)
	[0.72127]	[2.28048]	[-0.57449]	[-1.59029]	[-0.84768]	[0.35367]
D(LN_MM(-2))	0.350604	0.203732	-0.048246	-0.450216	-0.225502	-0.450342
	(0.27117)	(0.08657)	(0.39222)	(0.16428)	(0.37729)	(0.80330)
	[1.29294]	[2.35334]	[-0.12301]	[-2.74056]	[-0.59769]	[-0.56062]
D(LN_MM(-3))	0.411640	0.215642	-0.491806	-0.339943	0.152559	-0.634931
	(0.30370)	(0.09696)	(0.43927)	(0.18399)	(0.42255)	(0.89966)
	[1.35543]	[2.22411]	[-1.11960]	[-1.84766]	[0.36104]	[-0.70574]
D(LN_MM(-4))	0.115518	0.156656	-0.045306	-0.257249	-0.044214	-0.857652
	(0.27487)	(0.08775)	(0.39757)	(0.16652)	(0.38244)	(0.81425)
	[0.42027]	[1.78521]	[-0.11396]	[-1.54486]	[-0.11561]	[-1.05330]
D(LN_Q_GROWTH (-1))	0.114801	-0.023565	0.151721	-0.262948	0.483506	0.463191
	(0.15865)	(0.05065)	(0.22947)	(0.09611)	(0.22074)	(0.46998)
	[0.72361]	[-0.46526]	[0.66117]	[-2.73581]	[2.19039]	[0.98555]

D(LN_Q_GROWTH (-2))	-0.021928	-0.022376	0.163168	-0.150686	0.135826	0.051249
	(0.11168)	(0.03565)	(0.16153)	(0.06766)	(0.15538)	(0.33083)
	[-0.19635]	[-0.62759]	[1.01013]	[-2.22723]	[0.87414]	[0.15491]
D(LN_Q_GROWTH (-3))	0.058310	-0.013297	0.103199	-0.091926	0.219655	-0.039201
	(0.08697)	(0.02777)	(0.12580)	(0.05269)	(0.12101)	(0.25765)
	[0.67043]	[-0.47888]	[0.82035]	[-1.74464]	[1.81515]	[-0.15215]
D(LN_Q_GROWTH (-4))	0.022898	0.002262	0.131100	-0.012603	0.034756	0.013126
	(0.06542)	(0.02089)	(0.09462)	(0.03963)	(0.09102)	(0.19380)
	[0.35002]	[0.10832]	[1.38550]	[-0.31801]	[0.38185]	[0.06773]
C	-0.039791	-0.003547	-0.049745	0.004253	0.048435	0.166002
	(0.04280)	(0.01366)	(0.06191)	(0.02593)	(0.05955)	(0.12679)
	[-0.92969]	[-0.25958]	[-0.80355]	[0.16404]	[0.81333]	[1.30927]
R-squared	0.436263	0.761059	0.610966	0.760291	0.594376	0.703522
Adj. R-squared	-0.204348	0.489534	0.168882	0.487895	0.133439	0.366615
Sum sq. resids	0.597986	0.060948	1.251045	0.219470	1.157625	5.247696
S.E. equation	0.164867	0.052634	0.238465	0.099880	0.229389	0.488397
F-statistic	0.681011	2.802911	1.382013	2.791124	1.289496	2.088179
Log likelihood	37.14028	91.94522	19.42427	61.19668	21.28689	-14.98716
Akaike AIC	-0.464178	-2.747717	0.273989	-1.466528	0.196380	1.707799
Schwarz SC	0.549389	-1.734150	1.287556	-0.452961	1.209947	2.721366
Mean dependent	-0.001585	0.010661	-0.025929	0.029948	0.020428	-0.006505
S.D. dependent	0.150231	0.073669	0.261574	0.139572	0.246418	0.613676

Determinant resid covariance (dof adj.)	2.75E-11
Determinant resid covariance	2.55E-13
Log likelihood	287.3106
Akaike information criterion	-5.221276
Schwarz criterion	1.094028

Table 4
Impulse Responses

Response of LN_BI:

Period	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.160163	0.000000	0.000000	0.000000	0.000000	0.000000
2	0.123804	-0.016768	0.020267	0.037941	0.022762	0.019864
3	0.123967	0.018916	-0.013024	0.053093	0.062017	-0.002489
4	0.173807	0.058788	-0.055310	0.085627	0.111886	0.017661
5	0.157874	0.123222	-0.107998	0.083227	0.136434	-0.000461
6	0.190274	0.240699	-0.170636	0.056240	0.180352	-0.028965
7	0.199104	0.312398	-0.220140	0.023307	0.231603	-0.053257
8	0.220436	0.386458	-0.288653	-0.026367	0.256176	-0.096816
9	0.186744	0.414139	-0.326946	-0.043502	0.299888	-0.124654
10	0.123304	0.426557	-0.348443	-0.056702	0.328307	-0.163535

Response of LN_ER:

Period	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.019968	0.042338	0.000000	0.000000	0.000000	0.000000
2	0.064733	0.056764	-0.020267	-0.018167	0.018694	0.001263
3	0.046693	0.045655	-0.030700	-0.005392	0.036424	-0.007162
4	0.006543	0.056394	-0.047260	0.002768	0.046695	-0.022022
5	0.002458	0.079381	-0.063371	-0.002078	0.051211	-0.019844
6	0.012104	0.105050	-0.072313	-0.019536	0.047091	-0.022032
7	0.029744	0.138637	-0.095734	-0.031114	0.063731	-0.033621
8	0.022944	0.142269	-0.104315	-0.036924	0.085274	-0.042926
9	0.005700	0.138636	-0.109832	-0.046556	0.087030	-0.062171
10	-0.024987	0.134141	-0.115820	-0.041742	0.093178	-0.063660

Response of LN_INFL:

Period	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.127061	-0.069481	0.144372	0.000000	0.000000	0.000000
2	0.167320	-0.077746	0.091747	-0.000219	-0.030467	-0.012021
3	0.093281	-0.118230	0.081069	0.080795	-0.012836	0.048318

4	0.146653	-0.078772	0.071352	0.122831	0.001112	0.053046
5	0.186895	0.008518	-0.052775	0.164248	0.085802	0.088147
6	0.133853	0.127259	-0.099598	0.132291	0.114310	0.059437
7	0.236380	0.298459	-0.144178	0.015543	0.088525	-0.018553
8	0.213304	0.317802	-0.177028	-0.040336	0.142662	-0.022684
9	0.220682	0.318442	-0.205903	-0.108085	0.138269	-0.083415
10	0.174427	0.244138	-0.193878	-0.090381	0.150786	-0.105948

Response of LN_JCI:

Period	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	-0.042905	-0.054819	0.002166	0.065172	0.000000	0.000000
2	-0.045060	-0.019375	0.004421	0.053210	-0.012505	0.009509
3	0.048759	0.019091	0.000115	0.002633	-0.054515	0.022840
4	0.064905	-0.004182	0.046393	-0.005143	-0.077056	0.041434
5	0.122103	-0.032890	0.054320	-0.016034	-0.105251	0.037571
6	0.082589	-0.125740	0.108977	0.010299	-0.101354	0.059660
7	0.007729	-0.208414	0.168610	0.028578	-0.157086	0.052693
8	0.015286	-0.246870	0.200378	0.057003	-0.204499	0.092296
9	0.045871	-0.283844	0.248743	0.072750	-0.244156	0.144364
10	0.127514	-0.287951	0.273483	0.072979	-0.269999	0.155745

Response of LN_MM:

Period	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.178481	0.027657	-0.045545	0.017857	0.137374	0.000000
2	0.158627	-0.001995	-0.029521	0.043802	0.070984	-0.012834
3	0.062317	0.057843	-0.025813	0.063724	0.101253	-0.060189
4	0.148087	0.142287	-0.117637	0.087493	0.216258	-0.004891
5	0.258130	0.261090	-0.252824	0.076226	0.284278	-0.033655
6	0.226810	0.389745	-0.323992	0.068896	0.330830	-0.086843
7	0.128272	0.480536	-0.365707	0.029488	0.416767	-0.151647
8	0.212581	0.629481	-0.501686	-0.061752	0.465544	-0.190790
9	0.209515	0.703583	-0.585560	-0.101712	0.515091	-0.227272
10	0.122427	0.742035	-0.604901	-0.123719	0.559468	-0.306113

Response of LN_Q_GROWTH:

Period	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.269433	-0.090345	-0.045216	-0.015000	-0.130273	0.286350
2	0.029384	-0.121644	0.089419	0.068289	-0.098346	0.049432
3	-0.220397	-0.024190	0.174669	0.047969	-0.090307	-0.080380
4	-0.207018	-0.153659	0.135761	-0.050585	-0.088495	-0.030960
5	0.091220	-0.120786	0.069306	-0.088434	-0.221259	0.108420
6	0.146313	-0.184542	0.121115	0.042328	-0.205293	0.118089
7	-0.000431	-0.310345	0.300650	0.104861	-0.188320	0.108897
8	-0.003893	-0.361005	0.281343	0.059687	-0.219787	0.093899
9	-0.034961	-0.342972	0.278592	0.094196	-0.254940	0.185338
10	0.134413	-0.301514	0.328174	0.064006	-0.385533	0.173311

Cholesky Ordering: LN_BI LN_ER LN_INFL LN_JCI LN_MM LN_Q_GROWTH

Table 5
Variance Decomposition

Variance Decomposition of LN_BI:

Period	S.E.	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.160163	100.0000	0.000000	0.000000	0.000000	0.000000	0.000000
2	0.209819	93.08524	0.638696	0.933036	3.269874	1.176876	0.896274
3	0.258051	84.61828	0.959612	0.871563	6.394957	6.553740	0.601846
4	0.351393	70.09944	3.316418	2.947535	9.386713	13.67270	0.577191
5	0.448096	55.52116	9.601448	7.621460	9.222182	17.67869	0.355053
6	0.600479	40.95820	21.41429	12.31915	6.012643	18.86534	0.430384
7	0.776718	31.05094	28.97558	15.39579	3.683681	20.16665	0.727367
8	0.979923	24.56862	33.75758	18.34964	2.386730	19.50431	1.433122
9	1.175113	19.61003	35.89479	20.50097	1.796736	20.07564	2.121821
10	1.355434	15.56698	36.88321	22.01764	1.525476	20.95620	3.050498

Variance Decomposition of LN_ER:

Period	S.E.	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.046811	18.19597	81.80403	0.000000	0.000000	0.000000	0.000000

2	0.103419	42.90589	46.88533	3.840476	3.085861	3.267526	0.014909
3	0.131566	39.10677	41.01186	7.817698	2.074679	9.683438	0.305553
4	0.159497	26.77768	40.40708	14.09917	1.441780	15.16002	2.114280
5	0.196935	17.58000	42.75206	19.60280	0.956850	16.70607	2.402218
6	0.241411	11.95046	47.38607	22.01780	1.291642	14.92253	2.431495
7	0.306120	8.376253	49.98065	23.47348	1.836358	13.61479	2.718465
8	0.368558	6.166097	49.38097	24.20466	2.270571	14.74580	3.231909
9	0.425156	4.651653	47.74166	24.86284	2.905388	15.27142	4.567040
10	0.476726	3.974416	45.88894	25.67717	3.077489	15.96641	5.415576

Variance Decomposition of LN_INFL:

Period	S.E.	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.204488	38.60885	11.54519	49.84596	0.000000	0.000000	0.000000
2	0.292140	51.71938	12.73881	34.28482	5.61E-05	1.087617	0.169316
3	0.351603	42.74359	20.10138	28.98512	5.280445	0.884133	2.005333
4	0.417529	42.64820	17.81404	23.47484	12.39907	0.627684	3.036164
5	0.504210	42.98454	12.24412	17.19292	19.11392	3.326218	5.138283
6	0.576506	38.27038	14.23840	16.13581	19.88626	6.475836	4.993312
7	0.711704	36.14265	26.92882	14.69159	13.09625	5.796333	3.344363
8	0.840745	32.33623	33.58533	14.96144	9.614794	7.032874	2.469330
9	0.968046	29.58768	36.15400	15.80935	8.498953	7.344934	2.605080
10	1.052074	27.79889	35.99435	16.78083	7.933577	8.272657	3.219696

Variance Decomposition of LN_JCI:

Period	S.E.	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.095384	20.23299	33.03065	0.051561	46.68481	0.000000	0.000000
2	0.120837	26.51229	23.15190	0.165959	48.47977	1.070898	0.619195
3	0.144374	29.97811	17.96686	0.116321	33.99412	15.00801	2.936582
4	0.186835	29.96889	10.77851	6.235276	20.37440	25.97135	6.671572
5	0.258060	38.09646	7.274178	7.699051	11.06573	30.24791	5.616670
6	0.339176	27.98260	17.95427	14.78014	6.497971	26.43962	6.345394
7	0.463935	14.98410	29.77723	21.10830	3.852543	25.59628	4.681545
8	0.608402	8.776040	33.77959	23.12118	3.117995	26.18163	5.023567
9	0.774883	5.760562	34.24198	24.55801	2.803568	26.06810	6.567785
10	0.936426	5.798750	32.90243	25.34514	2.527074	26.16321	7.263390

Variance Decomposition of LN_MM:

Period	S.E.	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.232132	59.11700	1.419522	3.849643	0.591756	35.02208	0.000000
2	0.295035	65.50365	0.883323	3.384324	2.570529	27.46894	0.189230
3	0.335971	53.95391	3.645345	3.200138	5.579805	30.26548	3.355324
4	0.472585	37.08797	10.90749	7.813576	6.247631	36.23681	1.706524
5	0.714012	29.31704	18.14948	15.96086	3.876652	31.72620	0.969761
6	0.969466	21.37595	26.00692	19.82640	2.607859	28.85442	1.328452
7	1.232289	14.31371	31.30283	21.07838	1.671340	29.29713	2.336616
8	1.571180	10.63552	35.30700	23.16171	1.182580	26.80129	2.911897
9	1.917741	8.332469	37.15933	24.87003	1.075080	25.20406	3.359022
10	2.243046	6.388744	38.10651	25.45205	1.090085	24.64478	4.317832

Variance Decomposition of LN_Q_GROWTH:

Period	S.E.	LN_BI	LN_ER	LN_INFL	LN_JCI	LN_MM	LN_Q_GROWTH
1	0.426606	39.88847	4.484913	1.123386	0.123627	9.325053	45.05455
2	0.471623	33.02531	10.32220	4.513950	2.197742	11.97817	37.96263
3	0.564814	38.25291	7.380436	12.71084	2.253629	10.90800	28.49419
4	0.644408	39.70717	11.35565	14.20321	2.347503	10.26568	22.12078
5	0.715197	33.86269	12.07120	12.46981	3.434720	17.90496	20.25662
6	0.799700	30.43176	14.98011	12.26744	3.027341	20.91098	18.38237
7	0.940502	22.00202	21.71911	19.08814	3.431850	19.12789	14.63099
8	1.074581	16.85535	27.92355	21.47673	2.937393	18.83575	11.97123
9	1.208059	13.42018	30.15403	22.31113	2.932128	19.35684	11.82569
10	1.363397	11.50828	28.56497	23.31054	2.522442	23.19340	10.90037

Cholesky Ordering: LN_BI LN_ER LN_INFL LN_JCI LN_MM LN_Q_GROWTH

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BANK RISK MANAGEMENT – THE MAIN PROBLEM OF THE MONETARY ECONOMY

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Abstract

After the 70's when there had started a series of economic crises, of raw materials and financial and banking crises, the world economy has experienced strong inflationary processes, fluctuations in exchange rates and increasing competitive processes as a consequence of the removal of control on international capital transfers, the development of information technology systems, etc. All these situations, as well as the absence of clear and transparent regulations for prudential banking, have led to the diversification and deepening of financial and banking systems, having an impact on the bankruptcy process of a large number of banks and financial institutions. Such phenomena have been strongly felt even at present – during the years 2008 and 2009 – and they require the existence of approaches to the superior level of techniques and procedures referring to the regulation and management of banking resources in relation to the previous ones. The modest approach to bank risks management also falls in this context.

Keywords: *operational risk, credit risk, liquidity risk, standards and limitations, RAROC model, VAR model.*

Introduction

Risk may have an impact on financial and banking institutions, both an induced impact caused by the effects on the client, staff, shareholders, partners, and even on the central bank authority, and an impact taking the form of some losses directly incurred. Risk represents the possibility of producing an event with adverse consequences for the banking institution.

The exposure to risk is the present value of all losses and additional expenses/costs that are stood by the bank. In order to reduce the effects of the risks, within this paper, there are analyzed some aspects of their effective management, so that the boards of the banks have methods and techniques for analyzing and minimizing them.

Risk Management

The banking sector clearly evolves towards a higher level of techniques and approaches to risk management, in comparison to those used in the past. However, there is plenty of room for improvement. The techniques used by smaller banking institutions are less complex and efficient, in some cases, being necessary the need for improvement in order to make them able to reach the level of top banks. In their turn, these banks must be in a constant search for solutions and ways of managing the issues arising in the field of bank risks.

Today there is an increased concern in financial innovation within the banking activity, especially in terms of extra-balance instruments, which could affect the entire banking system.

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In a bank, the new banking environment and the increased market solvency have required an integrated approach to management techniques, assets and liabilities and bank risk management (see Figure 1).

Fig. 1. Exposure to the risk of a bank.

A. Operational Risk

Operational risk is essential for the effective management and control of all risk categories. It is important for the definition of this kind of risk to take into account the entire variety of operational risks and to capture significant cases resulting in major operational losses.

As a result, there have been identified operational risk events that have the potential to cause serious losses, including the following:

The event which generates risk	Includes
Internal Fraud	Wrong International Reports, staff theft, illegal transactions in the employee's own account
External Fraud	Theft, forgery and damage caused by hackers
Human resources risk	Claims of the staff, violation of employees' health and safety rules, claims related to discrimination attitudes.
Risk of products and services	Breaches of trust in the bank, the inappropriate use of confidential information, illegal transactions in the bank account, money laundering, the sale of unauthorized products
Risk of assets/property and personnel	Terrorism, vandalism, earthquakes, fires, floods
Technological risk	Hardware and software errors, telecommunications problems, lack of supplies
Management risk	Errors in data entry, errors in the management of the collateral, incomplete legal documentation, unauthorized access to customer accounts, the negative performance of the counterparty

For practical use and theoretical clarity it is important to distinguish the operational risk from other types of risks.

It is important to understand risk as being the cause of negative deviation from an expected or desired end, or if we see risk as being the negative effect. Sometimes it is used a combination of cause and effect to identify and demarcate the risk.

Therefore, it is considered that the identification and demarcation of operational risk as opposed to credit risk and market risk, is essential.

The Risk identification matrix is reproduced in Fig. 2. 2.

	Direct Manifestation					
	Losses due to the value of the counterparty	Losses Caused by the change of market value	Other losses	Optional loss		Indicated manifestation
				Increase of expenses	Decrease of revenues	
Uncertain/wrong Information about the counterparty	A / B / a	B	B	B	B	B
Uncertain/wrong Information about the market	A					
Other causes	A					
Inappropriate or wrong processes, persons, systems, external events.	I / a	II		III	IV	V

Figure 2. Risk Identification Matrix (RIM)

The above Cause / effect matrix, known as "Risk identification matrix" - RIM is used for the identification and demarcation of operational risks. The causes are used to demarcate operational risk from other risk categories.

B. Credit risk

The evaluation of customer credit ratings continues to be a process with certain inaccuracies which are insufficiently regulated, based on quantitative methods, which were the result of erroneous assessments, as noted in the current global financial crisis triggered in 2008. In the future this approach should be standardized, both in terms of banks as institutions that make up the rating analyses and in terms of the borrowers as the subjects of credit rating score. In addition to this, the rating procedures should be adapted to be compatible with the rating systems in any area of the capital market. Credit losses, currently very little related to the rating must be followed closely.

As on the bond market, the rating and the "expected" losses should be correlated more closely. However, in this field there is not a database comprehensive enough to make a detailed analysis of the history of a participant, and also on the international bond market.

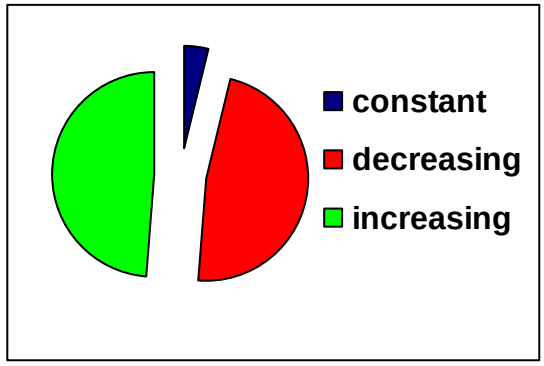
In-depth research is needed in order to assess the benefits obtained from the risks associated with a careful construction of the credit/loan portfolio. In this moment, banks appear to be insufficiently involved in the management of credit concentrations, both in terms of economic areas and in geographical terms.

The role of credit risk management is to maximize the rate of profit received by the Bank while maintaining credit risk exposure within acceptable parameters. The Banks need to manage the overall portfolio credit risk, as well as the individual risk for each credit or transaction. Banks should establish the link between the credit risk and other risk categories. An effective credit risk management is an essential part of banking and risk management framework and it is essential for long-term success of any banking institution.

For most banks, loans are the largest and the most obvious source of credit risk; however, among any bank's activities there are also other sources that generate credit risk, including here off-balance operations, which are also regulated and standardized. Banks are facing more and more the credit risk within various financial instruments, other than loans, including policies, inter-banking transactions and the settlement of transactions. All these processes require a unique regulation and a unique standardization and the settlement of appropriate limits.

The Bank receives funds from depositors and provides loans involving a certain credit risk. As the exposure to credit risk remains the main source of problems for the banks all over the world, these institutions, together with banking supervisory bodies should learn from the mistakes of the past. Banks must be aware of the need to identify, measure, monitor and control the credit risk, as well as of the need for having adequate capital in order to take action against these risks and offset the risks that occur.

From a survey conducted by the Central Bank of Romania (NBR) we can draw the conclusion that the credit risk is perceived by most participant banks to be increasing on the basis of the expansion of the activity of lending, particularly on the retail segment. The relaxation of credit conditions (including the guarantees) on this segment and the lack of a Unique Office of Banking Risks are factors with negative influence upon this risk; in addition to this, given the high degree of currency substitution of assets, the foreign exchange rate contributes to the emphasis of credit risk (see Fig. 3).



Source: Data from the survey of NBR.

Fig. 3. The trend of credit risk from the point of view of the participants in the survey organized by the NBR.

The analyses have shown that the development of banking activities of credit management must take into account the following: efficiency and effectiveness of credit administration operations, including the monitoring activity of documentation, of contractual requirements, of legal agreements, security, etc.; the accuracy and appropriateness of information provided by management information systems; the adequacy of the controls on all the proceedings of "back office"; the observance of the recommended management policies and procedures, as well as of the laws and regulations in force.

For the various components of credit administration to function at optimal parameters, the senior management must understand and demonstrate that it recognizes the importance of this element of monitoring and controlling the credit risk (see Fig. 4).

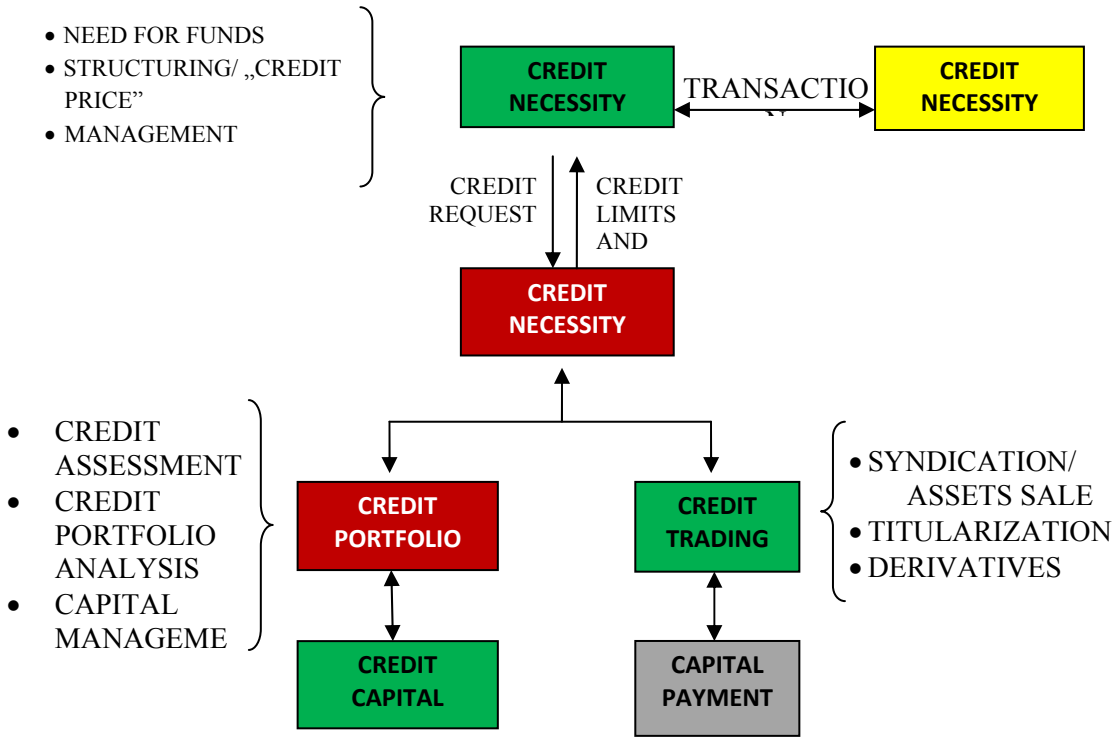


Fig. 4. Schema of credit operation

C. Liquidity risk

It appears to be due to the bank's failure to solve its outstanding obligations. The liquidity risk includes the inability to manage unplanned decreases or changes in financing sources. This risk manifests itself also as a result of the bank's failure to recognize and adapt to the change of the market conditions affecting the ability to liquidate assets quickly and with minimum losses. In order to know the trend of this risk in the view of financial operators on the Romanian market, the NBR has conducted a survey whose outcome is shown in the table below.

The trend of the liquidity risk in the view of financial operators on the Romanian market.

		Number of respondents	Total percentage of answers	Total percentage of valid responses	Cumulative Percentage
Valid answers	Decreasing	6	13.33	16.67	16.67
	Constant	23	51.11	63.89	80.56
	Increasing	7	15.56	19.44	100.00
	Total	36	80.00	100.00	x
No response		9	20.00	x	x
Total		45	100.00	x	x

Source: NBR

The NBR survey reveals the fact that in the context of the prevalence of resources attracted on the short-term, the majority share of medium and long-term investments (resulting from the increased demand for real estate investment loans/mortgages and for purchases of durable goods), makes the risk of Liquidity to remain a concern of the Romanian banking system operators. In the view of the participants in the survey, the trend of liquidity risk reflects an increase of only 19%, at the same time with a decrease of 17% (see Fig. 5).

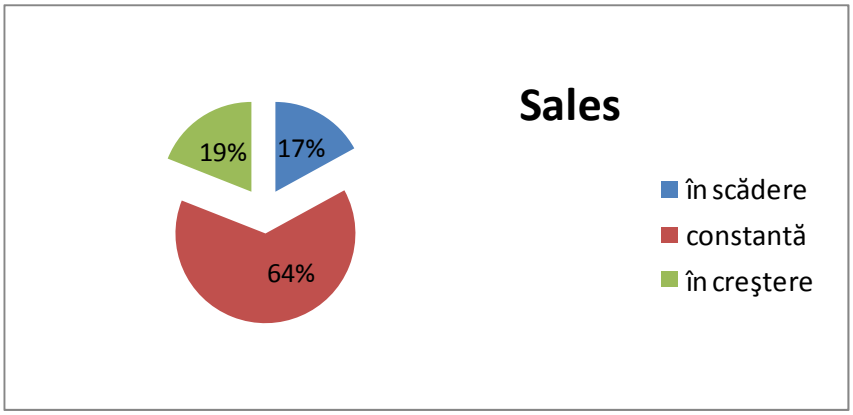


Fig. 5. The trend of the liquidity risk, in view of the NBR survey participants.

Long-term trends in the evolution of liquidity needs

Long-term liquidity needs are correlated to the so-called secular trends that characterize communities of bank customers and the markets where the bank operates. In the figure below (Fig. 6), thicker lines delimit the expected growth of deposits and loan applications for the period of calculation. This happens because the growth of assets is triggered by the growth of credits and the increased liabilities have as a cause the deposits' increase.

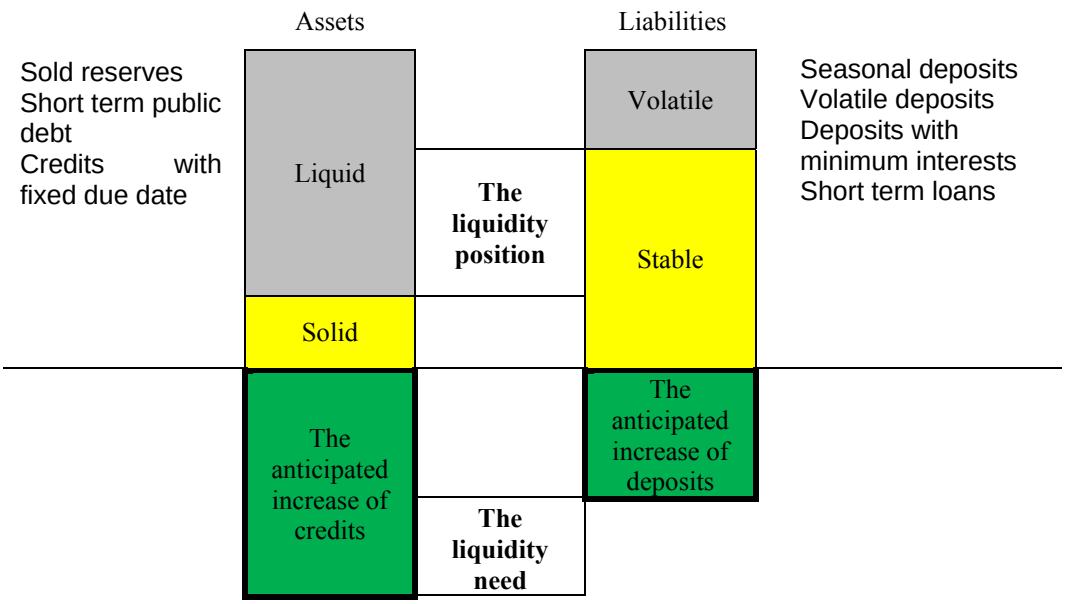


Fig. 6. Planning long-term liquidity

The result is that of a liquidity need that has to be covered and this involves efforts and an increased responsibility from the banks in order to provide it. This need for liquidity triggered during the year 2009, a year of economic and financial crisis, the NBR to ask for 12 banks to increase the capitalization with the proposed funds (a part in September 2009 and another one in the first quarter of 2010), so that they are within the limits of the solvency ratio of minimum 12%.

Conclusions

In order to create an appropriate management of risk, we need procedures, techniques and methods that can be used both to limit and to manage different types of risks. It can be concluded that the administration of a bank must be based on a set of procedures and techniques for implementing a risk management system, namely:

1. Standards and reports

Setting standards for risk categories, should represent an obligatory instrument of the management of risks and control. The standardization of financial reports is required together with the public reports and the need for the management of information related to the quality of assets. Such internal reports need similar standardization procedures and shorter intervals for drawing up, and daily or weekly reports should replace the quarterly periodicity of GAP.

2. Limitations

The minimum standards for participation are used in the field of risk taking only for those assets that exceed a certain quality standard. Instead, the limits should be used for those financial investments that are eligible and require limits in order to cover the exposure.

3. Recommendations regarding investments and strategies

Strategies are indicated from the point of view of the focus and involvement in certain parts of the market, of the extension of the optimal assets-liabilities ratio, or the exposure and the need to get out of risks of a certain kind. In fact, the recommendations (guidelines) must provide advice on the best active management.

4. Incentives

The practice demonstrated that granting incentives and compensations to the managers for the risks assumed by them, reduces the need for costly controls. An appropriate management of risks should provide the bank the ability to identify and assess bank risks, to control them, eliminate, avoid or to finance them. Other priorities that should be taken into account by the management of banks refer to the anticipation of losses, the establishment of reserves, the inquiry of bank risk management within the global management system of the bank.

D. Aggregation of risks

RAROC and VAR models are considered to be methods that include the overall management of risks. However, frequently, the decisions regarding the acceptance of the risk and the price of such a position are not based on a risk analysis. If aggregated risk has to be controlled, these components of the risk-taking process must be better integrated in the banking activity.

Finally, in order to run such a complex management system of risks, certain knowledge connected to the risks and approaches used for their management is also required.

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GESTIUNEA RISCURILOR BANCARE – PROBLEMĂ ESENȚIALĂ A ECONOMIEI MONETARE

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Abstract

După anii '70 când s-au declanşat în serie crize economice, de materii prime şi bineînțeles crize financiar-bancare, economia mondială a cunoscut procese inflaționiste puternice, fluctuații ale cursurilor valutare şi accentuarea proceselor concurențiale urmare suprimării controlului asupra transferurilor internaționale de capital, dezvoltarea sistemelor de tehnologie a informațiilor, etc. Toate acestea, ca şi lipsa unor reglementări clare şi transparente de prudențialitate bancară a condus la diversificarea şi adâncirea sistemelor financiar-bancare, cu impact asupra falimentării unui număr mare de bănci şi instituții financiare. Asemenea fenomene s-au resimțit pregnant şi în prezent – anul 2008 şi 2009 -, ceea ce necesită abordări la nivel superior al tehnicilor şi procedurilor referitoare la reglementarea şi gestionarea resurselor bancare față de cele anterioare. În acest context se înscrie şi modesta abordare a gestiunii riscurilor bancare.

Cuvinte cheie: *risc opereațional, risc de creditare, risc de lichiditate, standarde şi limitări, model RAROC, model VAR.*

Introduction

Riscul poate avea un impact asupra instituțiilor financiar-bancare, atât un impact indus, cauzat de efectele asupra clientului, personalului, acționarilor, partenerilor, şi chiar asupra autorității centrale bancare, cât şi un impact sub forma unor pierderi direct suportate. **Riscul** reprezintă posibilitatea de producere a unui eveniment cu consecințe adverse pentru instituția bancară.

Expunerea la risc reprezintă valoarea actuală a tuturor pierderilor şi cheltuielilor suplimentare pe care le suportă banca. Pentru a putea reduce efectele riscurilor, în lucrare, sunt abordate aspecte ale gestionării eficiente a acestora astfel încât conducerea băncilor să dispună de metode şi tehnici de analiza şi minimizarea acestora.

Gestiunea riscurilor

Domeniul bancar evoluează în mod evident către un nivel superior al tehnicilor şi abordărilor referitoare la gestiunea riscurilor, față de cele utilizate în trecut. Cu toate acestea, există suficient spațiu pentru îmbunătățiri. Tehnicile folosite de instituțiile bancare de dimensiuni mai mici sunt mai puțin complexe şi eficiente, în unele cazuri, făcându-se simțită nevoia de îmbunătățiri pentru a ajunge la nivelul celor de vârf. La rândul lor, şi aceste bănci trebuie să fie într-o permanentă căutare de soluții şi modalități de gestionare a problemelor care apar în domeniul riscurilor bancare.

Astăzi a crescut preocuparea ca inovația financiară în activitatea bancară, în deosebi în ceea ce privește instrumentele extrabilanțiere, care ar putea avea efect asupra întregului sistem bancar.

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În cadrul unei bănci, noul mediu bancar şi solvabilitatea crescută a pieţei au necesitat o abordare integrată a tehnicilor de gestiune, a activelor şi pasivelor şi de gestiune a riscurilor bancare (vezi fig.1).

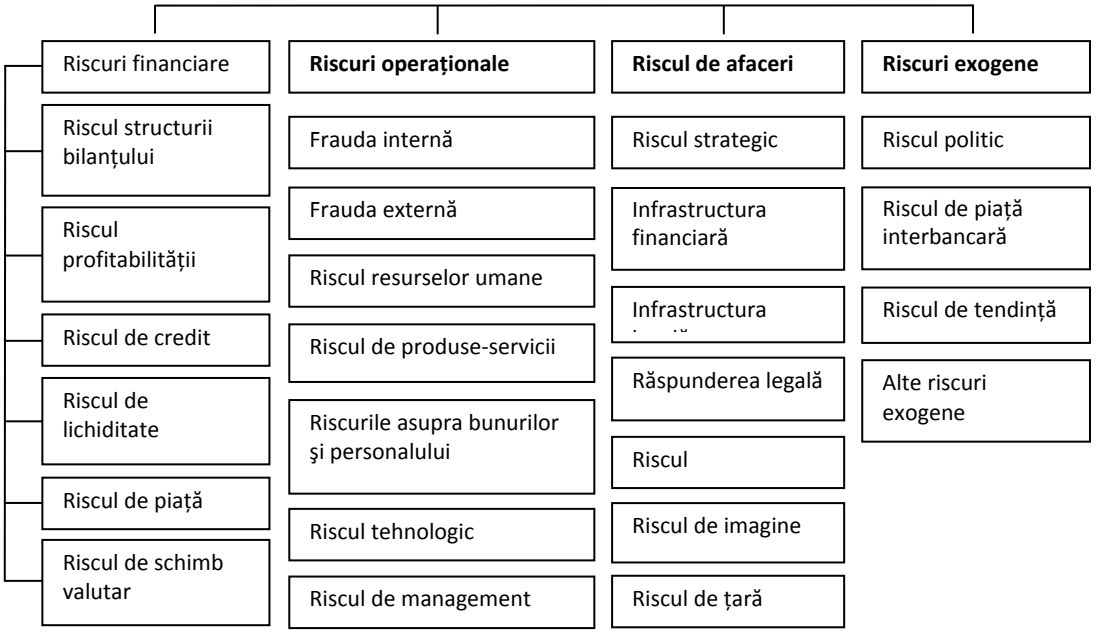


Fig. 1. Expunerea la risc a băncii.

A. Riscul operaţional

Riscul operaţional este esenţial pentru o gestiune şi un control eficient al tuturor categoriilor de riscuri. Este important ca definiţia acestui risc să ia în considerare întreaga varietate de riscuri operaţionale şi să surprindă cauzele semnificative care provoacă pierderile operaţionale majore.

Ca urmare, au fost identificate evenimentele de risc operaţional care au potenţialul de a produce pierderi grave, incluzând următoarele:

Eveniment generator de risc	Include
Frauda internă	Rapoarte internaţionale greşite, furturi ale personalului, operaţiuni ilegale în contul propriu al angajatului
Frauda externă	Furt, fals şi daune provocate de hackeri
Riscul resurselor umane	Revendicări ale personalului, violarea regulilor de sănătate şi siguranţă a angajaţilor,revendicări legate de discriminări
Riscul de produse şi servicii	Breşe în încrederea în bancă, folosirea inadecvată a informaţiilor confidenţiale, operaţiuni ilegale în contul băncii, spălarea de bani, vânzarea de produse neautorizate

Riscuri asupra bunurilor şi personalului	Terorism, vandalism, cutremure, incendii, inundaţii
Riscul tehnologic	Erori de hardware şi software, probleme de telecomunicaţii, lipsa consumabilelor
Riscul de management	Erori în introducerea datelor, erori în gestiunea garanţiilor, documentaţii legale incomplete, acces neautorizat la conturile clienţilor, performanţe negative ale contrapartidei

Pentru utilitate practică şi claritate teoretică este important să deosebim riscul operaţional de celelalte tipuri de riscuri.

Important este dacă înţelegem prin risc cauza devierii negative de la un final aşteptat sau dorit, sau dacă vedem riscul ca fiind efectele negative. Uneori se foloseşte o combinaţie de cauză şi efect pentru a identifica şi demarca riscul.

De aceea, se consideră că, identificarea şi demarcarea riscului operaţional în opoziţie cu riscul de creditare şi riscul de piaţă este esenţială. Matricea de identificare a riscurilor este redată în fig. 2.

		EFECT					
		Manifestare directă					
		Pierderi datorate valorii contrapartidei	Pierderi din schimbarea valorii de piaţă	Alte pier-deri	Pierdere opţională		Manifestare indicată
					Creşterea cheltuielilor	Scăderea veniturilor	
CAUZA	Informaţii incerte/greşite despre contrapartidă	A / B / a	B	B	B	B	B
	Informaţii incerte/greşite despre piaţă	A					
	Alte cauze	A					
	Procese, persoane, sisteme neadecvate sau eronate, evenimente externe	I / a	II		III	IV	V

Figura 2. Matricea de identificare a riscurilor (RIM)

Matricea cauză/efect de mai sus, cunoscută ca,,Matricea de identificare a riscului" (Risk Identification Matrix - RIM), este folosită pentru identificarea şi demarcarea riscurilor operaţionale. Cauzele sunt folosite pentru a demarca riscul operaţional de celelalte categorii de riscuri.

B. Riscul de creditare

Evaluarea rating-urilor de credit continuă să fie un proces cu anumite imprecizii insuficient reglementate, bazată pe metode cantitative, care au făcut evaluări greşite, aşa cum s-a constatat în actuala criză financiară mondială declanşată în 2008. În viitor această abordare trebuie să fie standardizată, atât în ceea ce priveşte băncile ca instituţii ce alcătuiesc analize de rating, cât şi în ceea ce priveşte împrumutătorii ca şi subiecte ale punctajului de rating. În plus, procedurile de rating trebuie adaptate pentru a fi compatibile cu sistemele de rating, din orice zonă a pieţei de capital. Pierderile din credit, în prezent prea puţin legate de rating trebuiesc urmărite îndeaproape.

Ca şi pe piaţa obligaţiunilor, rating-ul şi pierderile "aşteptate" trebuie să fie corelate mai strâns. Cu toate acestea, în domeniu nu există o bază de date suficient de cuprinzătoare pentru a face o analiză amănunţită a istoricului unui participant, ca şi pe piaţa obligaţiunilor pe plan internaţional.

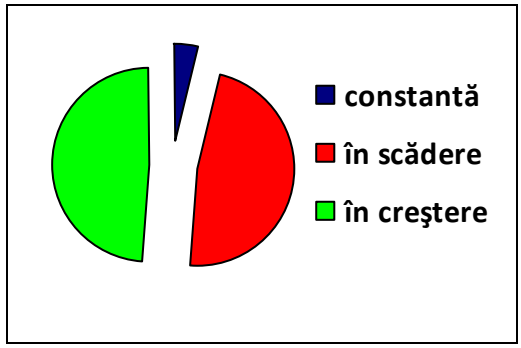
Este nevoie de cercetări aprofundate pentru evaluarea beneficiilor obţinute în urma riscurilor asociate cu o construire atentă a portofoliului de credite. În acest moment băncile par a nu fi suficient de implicate în gestionarea concentrărilor de credite, atât din punct de vedere al domeniilor economice, cât şi din punct de vedere geografic.

Rolul gestiunii riscului de creditare este acela de a maximiza rata profitului obţinut de către bancă în condiţiile menţinerii expunerii la riscul de creditare în parametri acceptabili. Băncile trebuie să gestioneze riscul de creditare global al portofoliului, precum şi riscul individual aferent fiecărui credit sau tranzacţie în parte. Băncile ar trebuie să stabilească legatura dintre riscul de creditare şi celelalte categorii de riscuri. O gestiune eficientă a riscului de creditare este o componentă de bază a cadrului gestiunii riscurilor bancare şi este esenţială pentru succesul pe termen lung al oricărei instituţii bancare.

Pentru majoritatea băncilor, împrumuturile acordate reprezintă cea mai mare şi cea mai evidentă sursă a riscului de creditare; cu toate acestea, există şi alte surse printre activităţile unei bănci care generează risc de creditare, inclusiv operaţiunile extrabilanţiere, care, deasemenea nu sunt reglementate şi standardizate. Băncile se confruntă din ce în ce mai mult cu riscul de creditare în diferite instrumente financiare, altele decât împrumuturile, incluzând poliţele, tranzacţii interbancare şi lichidarea tranzacţiilor. Toate acestea impun o reglementare şi standardizare unică şi stabilirea de limite corespunzătoare.

Banca primeşte fondurile de la deponenţi şi acordă credite ce implică un anumit risc de creditare. Deoarece expunerea la riscul de creditare continuă să fie sursa principală de probleme a băncilor din întreaga lume, acestea, împreună cu organismele de supraveghere bancară trebuie să înveţe din greşelile din trecut. Băncile trebuie să fie conştiente de nevoia de a identifica, măsura, monitoriza şi controla riscul de creditare, precum şi nevoia de a avea capital adecvat pentru a acţiona împotriva acestor riscuri şi de a compensa riscurile care se produc.

Dintr-un sondaj efectuat de BNR reiese că riscul de creditare este perceput de majoritatea băncilor participante ca fiind în creştere, pe fondul extinderii activităţii de creditare, în special pe segmentul de retail. Relaxarea condiţiilor de creditare (inclusiv în privinţa garanţiilor) pe acest segment, cât şi lipsa unui Birou unic de riscuri bancare, sunt factori cu influenţă negativă asupra acestui risc; în plus, dat fiind gradul înalt de substituţie valutară a activelor, riscul valutar contribuie la accentuarea riscului de creditare (vezi fig. 3).



Sursa: Date preluate din sondajul BNR.

Fig. 3. Tendința riscului de creditare în viziunea participanților la sondajul organizat de BNR.

Analizele efectuate au demonstrat că în dezvoltarea activităților bancare de administrare a creditelor, trebuie să se țină cont de:

- eficiența şi eficacitatea operațiunilor de administrare a creditelor, incluzând monitorizarea documentației, cerințelor contractuale, acordurilor legale, garanției, etc.;
- acuratețea şi oportunitatea informațiilor oferite sistemelor de gestiune a informației;
- adecvarea controalelor asupra tuturor procedurilor de "back office";
- respectarea politicilor şi procedurilor de gestiune recomandate precum şi a legilor şi reglementărilor în vigoare.

Pentru ca diferitele componente ale administrării creditelor să funcționeze la parametrii optimi, managementul superior trebuie să înțeleagă şi să demonstreze că recunoaşte importanța acestui element de monitorizare şi control al riscului de creditare (vezi fig. 4).

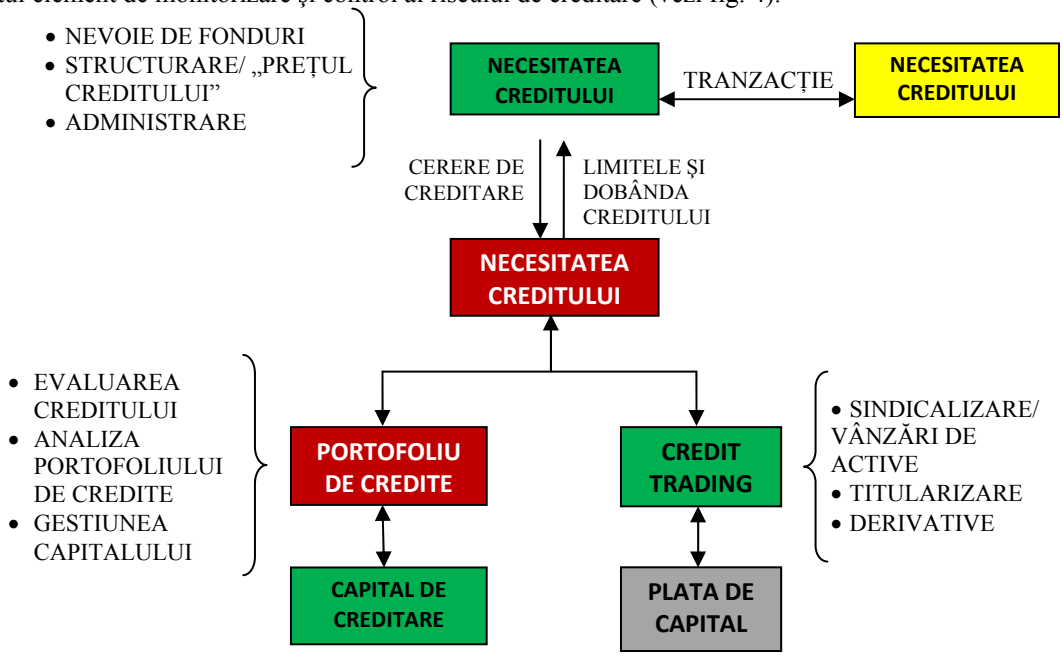


Fig. 4. Schemă a operațiunii de creditare

C. Riscul de lichiditate

El apare ca urmare a incapacității băncii de a-şi onora obligațiile scadente. Riscul de lichiditate include imposibilitatea de a gestiona scăderile sau modificările neplanificate ale surselor de finanțare. Acest risc se manifestă şi ca urmare a eşecului băncii de a recunoaşte şi a se adapta la schimbarea condițiilor de piață care afectează capacitatea de a lichida active, rapid şi cu pierderi de valoare minime. Pentru a se cunoaşte tendința acestui risc în viziunea operatorilor financiari pe piața românească, BNR a efectuat un sondaj al cărui rezultat este redat în tabelul de mai jos.

Tendința riscului de lichiditate în viziunea operatorilor financiari de pe piața românească.

		Număr respondenți	Procent total răspunsuri	Procent total răspunsuri valabile	Procent cumulativ
Răspunsuri valide	În scădere	6	13,33	16,67	16,67
	constantă	23	51,11	63,89	80,56
	În creştere	7	15,56	19,44	100,00
	Total	36	80,00	100,00	x
Nu au răspuns		9	20,00	x	x
Total		45	100,00	x	x

Sursa: BNR

Sondajul efectuat de BNR relevă faptul că în contextul predominanței resurselor atrase pe termen scurt, majoritatea ponderii plasamentelor pe termen mediu şi lung (rezultat al creşterii cererii pentru creditele de investiții imobiliare/ipotecare şi destinate achizițiilor de bunuri de folosință îndelungată), face ca riscul de lichiditate să rămână o preocupare a operatorilor din sistemul bancar românesc. Tendința riscului de lichiditate în viziunea participanților la sondaj, reflectă o creştere de numai 19%, paralel cu o scădere de 17% (vezi fig. 5).

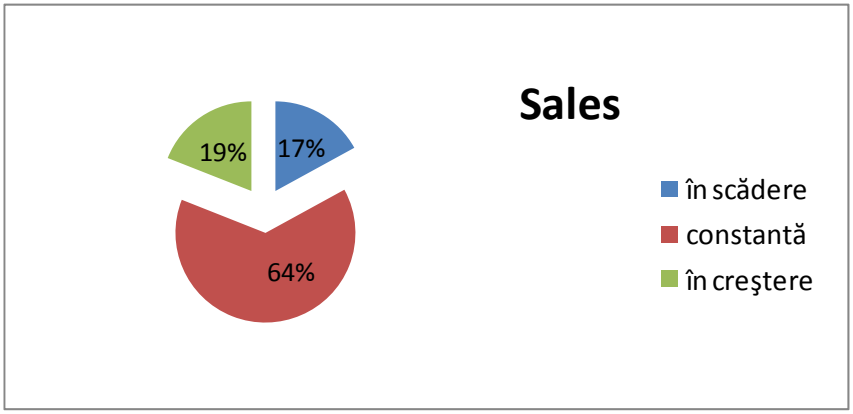


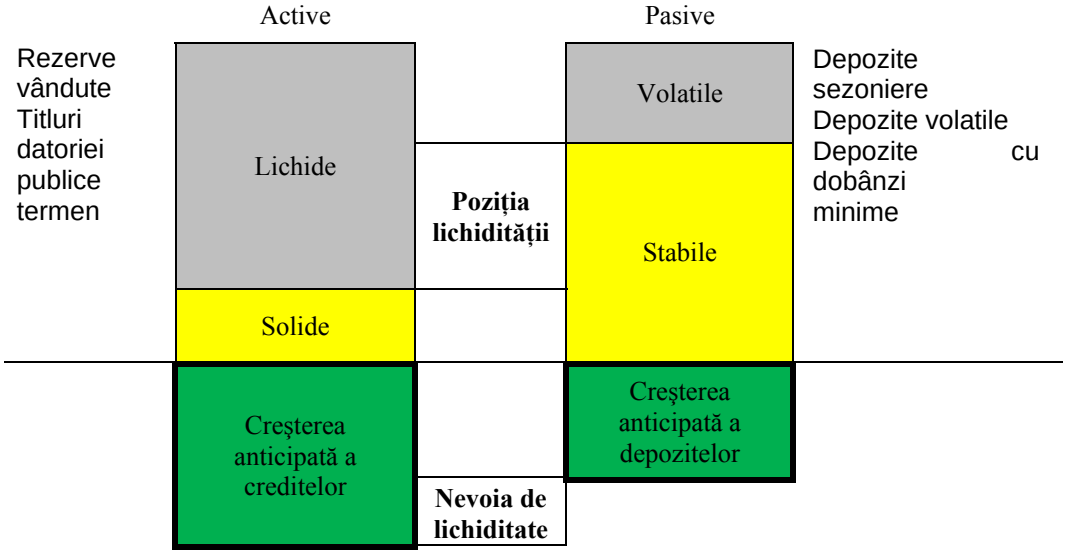
Fig. 5. Tendința riscului de lichiditate în viziunea participanților la sondajul BNR.

Tendinţele pe termen lung în evoluţia nevoilor de lichiditate

Nevoile de lichiditate pe termen lung sunt corelate cu aşa numitele tendinţe seculare care caracterizează comunităţile de clienţi ai băncii şi pieţele pe care operează banca.

În figura de mai jos (fig. 6), liniile mai groase delimitează creşterea anticipată a depozitelor şi a cererilor de credite pentru perioada de calcul. Aceasta deoarece creşterea activelor este determinată de creşterea creditelor, iar creşterea pasivelor are drept cauză creşterea depozitelor.

Fig. 6. Planificarea lichidităţii pe termen lung



Rezultă o nevoie de lichiditate de acoperit, ce implică eforturi şi responsabilităţi sporite din partea băncilor pentru a le asigura. Această nevoie de lichiditate a făcut ca în cursul anului 2009, an de criză economică şi financiară, BNR să solicite la 12 bănci să crească capitalizarea cu fonduri propuse (o parte în septembrie 2009 şi alta în trimestrul I 2010), astfel încât acestea să se încadreze în limita ratei de solvabilitate de minimum 12%.

Concluzii

Pentru a crea o gestiune adecvată a riscului avem nevoie de proceduri, tehnici şi metode care pot fi folosite atât pentru a limita, cât şi pentru a gestiona diferite tipuri de riscuri. Se poate concluziona că, administrarea unei bănci trebuie să se bazeze pe o serie de proceduri şi tehnici pentru implementarea unui sistem de gestiune a riscului, şi anume:

1. Standarde şi rapoarte

Stabilirea de standarde, pe categorii de riscuri, trebuie să reprezinte instrumente obligatorii ale gestiunii riscurilor şi controlului. Standardizarea rapoartelor financiare se impune alături de rapoartele publice şi de nevoia de management a informaţiilor legate de calitatea activelor. Astfel de rapoarte interne au nevoie de standardizări asemănătoare şi intervale de constituire a rapoartelor mult mai scurte, cu rapoarte zilnice sau săptămânale, care să înlocuiască periodicitatea trimestrială a GAP-ului.

2. Limitări

Standardele minime de participare, se folosesc în domeniul asumării riscului, numai la acele active care depăşesc un anumit standard de calitate. În schimb, folosirea de limite trebuie utilizată pentru acele investiţii financiare care sunt eligibile şi impun limite pentru a acoperi expunerile.

3. Recomandări în ceea ce priveşte investiţiile şi strategiile

Strategiile sunt indicate din punct de vedere al concentrării şi implicării pe anumite părţi ale pieţei, ale extinderii raportului optim active-pasive, sau a expunerii şi a nevoii de a se eschiva de riscuri de un anumit fel. De fapt, recomandările (quitlines) trebuie să ofere sfaturi cu privire la cel mai potrivit management activ.

4. Stimulările

Practica a demnostrat că acordarea de stimulente şi compensaţii managerilor pentru riscurile asumate de aceştia, reduce nevoia pentru efectuarea de controale costisitoare. O gestiune adecvată a riscurilor trebuie să asigure băncii capacitatea de a identifica şi aprecia riscurile bancare, de a le controla, elimina, evita sau de a le finanţa. Alte priorităţi de avut în vedere de managementul băncilor se referă la anitciparea pierderilor, constituirea rezervelor, interogarea gestiunii riscurilor bancare în sistemul global de gestiune al băncii.

D. Agregarea riscurilor

Modelele RAROC şi VAR sunt considerate metode de a cuprinde gestiunea globală a riscurilor. Cu toate acestea, în mod frecvent, deciziile de acceptare a riscului şi a preţului unei astfel de poziţii nu au la bază o analiză a riscului. Dacă trebuie controlat riscul agregat, aceste componente ale procesului de asumare a riscului trebuie integrate mai bine în activitatea bancară.

În fine, pentru a conduce un asemenea sistem complex de gestiune a riscurilor este nevoie de anumite cunoştinte legate de riscurile şi de abordările folosite pentru gestionarea lor.

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SOME CONSIDERATIONS OVER CONSUMPTION AND HAPPINESS IN THE ROMANIAN SOCIETY

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Abstract

How much money does a man need to be happy? "Just a little bit more" is how John Rockefeller[1] famously answered this eternal question. Over time, many studies focused on determining this undefined "a little bit more", in terms of a little bit more money, thus increasing incomes, or in terms of a little bit more goods and services, thus increasing consumption. Individuals have the tendency to overestimate the utility of extrinsic goods and activities, like income and status, overestimation deepened by the contemporary consumerist philosophy. Around the world, a growing number of economists, social scientists, corporate leaders and bureaucrats are trying to develop measurements that take into account not just the flow of money but also access to health care, free time with family, conservation of natural resources and other noneconomic factors that have a intrinsic utility. The aim of our paper is to reframe this subject for the case of a developing country and to explore if and how consumption influences the happiness of Romanian individuals. The study is based on a survey of recent literature illustrated by descriptive statistics regarding the level of national incomes, consumption credits and the degree of self-perceived happiness and satisfaction with life. The conclusions that can be drawn reside within the larger framework of the hyperconsumption society and its characteristics.

Keywords: *consumption, happiness, national incomes, hyper consumption society.*

1. Introduction

Happiness is probably one of the most frequent answers to the question regarding the purpose of our lives, the first natural law being expressed as "the man was born to be free and happy" (Lipovetsky, 2007, p 292). In our continuous attempt to reach it, we have abandoned the eudaimonic approach according to what happiness arises as people function and interact within society. Thus, an approach that places emphasis on non-material pursuits such as genuine interpersonal relationships and intrinsic motivations (Deci and Ryan 2001). Nowadays, the dominant paradigm is the hedonic one, where happiness is the result of avoiding pain and seeking pleasure.

In the name of this type of happiness the overconsumption society has rapidly developed. Acquiring more, bigger and expensive goods seems to have become synonym with satisfaction and happiness. The modern individual doesn't know any other way to live than by possesion and by consumption.To believe you can retain the real through an image, to fill in a content through a

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1 The richest man in the world at that time, and one of the richest of all time

simple cover, to posses things through signs and signs through things, this is the common description of the consumption society, in total opposition with a contemplation society (Brune, 2003). Linking more explicitly consumerism to the level of happiness, in "Success Intelligence," (2005) Robert Holden wrote, "The rise of consumerism has certainly influenced our thinking about happiness and success…We are making every effort to 'buy, buy, buy!' our way to happiness and success" (p. 110). While buying things can temporarily bring short-term pleasure, our prior levels of happiness soon return. In other words, we can't buy our way to happiness.

In addition, the importance of the theme has been also reflected in a quantitative manner. According to the count of Kahneman and Krueger (2006), between 2001 and 2005, analyses on data regarding life satisfaction and happiness were present in more than 100 papers, in comparison with just four papers written in the period 1991-1995. This suggests a raised awareness, in the economists line also, that "happiness" is an interesting and empirically relevant concept that needs an interdisciplinary approach.

Within the above context, this paper explores the findings in the branch of economics of happiness applied at a first base level to the Romanian society. The privacies endured in the communist regimes, the lack of products, the lack of liberty of expression, the lack of mobility and the list of interdictions can continue, are important factors in trying to depict the psychology of the Romanians in face with capitalism and consumerism, and by consequence to a model of happiness, copied after the western and American examples. We will discuss in what degree some of the main developments in this field can find an echo in our contemporary reality, in line or in opposition with the global trends.

2. Literature review

The revelation of happiness insights into the economic science can be traced to Brickman and Campbell chapter from 1971, "Hedonic relativism and planning the good society". The conclusion of their study was, or should have been, from the beginning intriguing for mainstream economics: improving the objective conditions of life (income or wealth) doesn't have any lasting effects on personal well-being. The economists didn't put too much emphasize on this insight, until 1976, when Scitovsky brought a new light on the subject through "The Joyless Economy". He deepened the idea that happiness depends on where one stands in relation with others and not at all on one's absolute standard of living. Many comforts are satisfying at first, but soon become routine and taken for granted. Consumer demand for them remains undiminished, but the original motivation, the desire for additional satisfaction, is replaced by the new and very different motivation of wishing to avoid the pain and frustration of giving up a habit to which one has grown accustomed (Scitovsky, p 137).

In this vicious circle, the commonly accepted view that consumption increases individual utility or well-being, has flourished and has derived into a strong consumerist wave. The neoclassical theory of consumer behavior has three important pillars to rely on: consumer sovereignty and exogenous preferences, rational behavior and insatiability (handbook, p 153). These hypothesizes provide the theoretical basis for the general widespread support to endless increases in economic growth because, according to Ackerman, 'the only meaningful forms of individual satisfaction result from more consumption' (Ackerman 1997:652).

An important voice, from the other side of the argument, to which I subscribe, is that of Juliet Schor (Schor, 2002) who understands consumption primarily as a social process. From her

perspective, in terms of function and motivation, "consumption derives from social communication and symbolic action, rather than the drive to meet basic needs such as food, shelter or clothing. We create our culture and the quality of social connection through our consumption practices". The majority of consumerism critics acknowledges as a primarily observation and departure point the observation that people spend a lot of money purchasing goods that don't actually produce lasting satisfaction or happiness: "as a society, we invest an enormous amount of money in some things, like advertising, or dubious product enhancements, while neglecting certain other important social priorities, like health, education, famine relief, and so forth" (Heath, 2001, p 3).

Further discussing the classical factors put in correlation with happiness, Boes and Winkelmann (2006) argued that the relationship between incomes and subjective well-being is an asymmetrical one in the sense that the income significantly diminishes the probability of a bad mood, but it doesn't influence the high levels of satisfaction. The very simple and common sense explanation of economics stands in defining the marginal utility law: the benefits are progressively diminishing after a specific point – saturation – because any unity added has a lower value added to happiness. To illustrate this point Zamfir (1989, p. 172) formulated the following example: a person who wins 6000 monetary units (m.u) will not be twice as satisfied than a person who wins 3000 m.u, but maybe, to take a probabilistic guess just 1.25 more. At an aggregate level, in terms of a country's wealth, we find similar remarks: once the level of income surpasses the poverty limit, it seems that money don't have any impact on happiness (Formula, 189). Enlarging this framework, consumerism, grossly measured in a rise in material standards, ceases to add happiness in established consumer societies (Trentmann, 2004).

Other arguments can be traced to contest the expected level of happiness of a country determined by just looking at its incomes level. In the World Values Survey, a project under way since 1995, Ronald Inglehart, a political scientist at the University of Michigan, found that Latin American countries, for example, registered far more subjective happiness than their economic status would suggest (figure 1).

In contrast, countries that had experienced communist rule were unhappier than noncommunist countries with similar household incomes - even long after communism had collapsed. Of course, this is a major fact to take into account when analyzing our own national pattern to happiness. It is worth stating at this point that a concept of gross national happiness[2] (GNH) was developed in an attempt to define an indicator that measures quality of life or social progress in more holistic and psychological terms than gross national product or GDP.

[2] The term was coined in 1972 by Bhutan's former King Jigme Singye Wangchuck, who has opened up Bhutan to the age of modernization, soon after the demise of his father, King Jigme Dorji Wangchuk. He used the phrase to signal his commitment to building an economy that would serve Bhutan's unique culture based on Buddhist spiritual values.

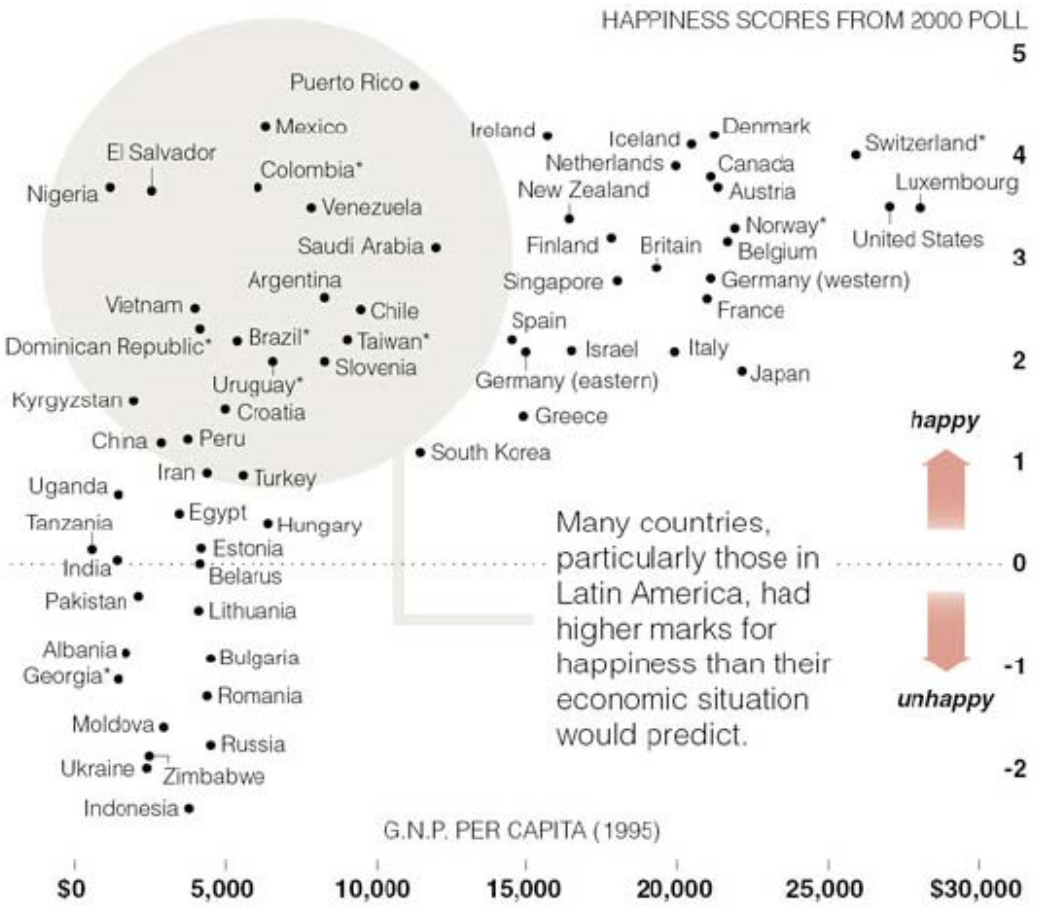

Figure 1. Happiness Scores
Source: Ronald Inglehart, "Human Beliefs and Values: A Cross Cultural Sourcebook based on the 1999-2002 Values Surveys"

3. On the one hand, consumption…

The idea that modern neoclassical economics define happiness on the basis of consumption is widely disputed. The objective of this chapter is not to expand this dispute but to present some static and dynamic numbers related to the consumption practices in Romania, in order to further put them in connection with some happiness statistics.

According to the report "Consumers in Europe" (2009, p 71), the average consumption expenditure per household in the EU-27 stood at EUR 24 447 in 2005, ranging from a high of EUR 52 754 in Luxembourg to a low of EUR 2 863 in Romania. Adjusting to take account of differing purchasing powers, there was still a wide range between the Member States, with the same countries at each end of the ranking; expenditure reached a high of PPS 51 932 in Luxembourg, which was almost 10 times the level recorded in Romania (PPS 5 324).

Starting from this drastic statistic result that positions us at the bottom, it would be interesting to see in detail how our country has ranked in respect to the structure of consumption expenditures per household. We find out that the sector on which we spend the most money is represented by food and non-alcoholic beverages with a percent of 44.2 %, compared to the lowest level registered as 9.3 % in Luxembourg. We are surpassed by Ireland on the alcoholic beverages segment but we have our comeback, occupying the first place at the total expenditures on tobacco (3.5%). At the other end, we have the lowest mean consumption in areas like "Housing, water, electricity, gas & other fuels", "Furnishings, household, equipments & maintenance", Health, Transport, Communication and many segments of "Recreation and culture."

One should nevertheless have in mind that this perspective is only a static one, at the level of the year 2005. Its relevance is conferred by the interesting country comparisons and, even if it a pessimistic image, it is important to see the larger context in which our country has evolved.

From a dynamic point of view, the graphs below (figure 2 & figure 3) are describing the evolution of real income and of real final consumption of households, for the period 1990-2008, respectively 1990-2006. The series are emphasizing ascending trends for both the analyzed items, allowing us the asses that even if we have very low rates of consumption compared to the EU countries, the internal indicators have known a considerable growth.

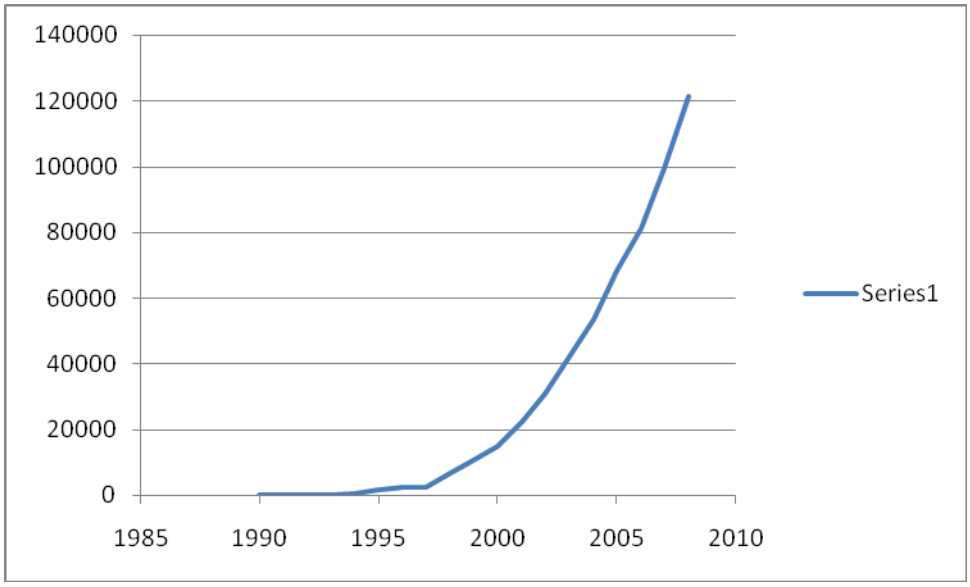

Figure 2. The evolution of real income in Romania between 1990-2008
Source: personal calculation with data provided by the National Institute of Statistics

Frey (2008) acknowledges, as a robust and general result, that richer people, on average, report higher subjective well-being. However, additional income does not increase happiness ad infinitum. The relationship between income and happiness is not linear, and it was observed a diminishing marginal utility with absolute income.

As many empirical studies show it (Frey, 2000; Kenny, 1999), this considerable increase in per capita incomes, also observed in recent decades in many other countries, did not raised

happiness in general. As we will also present in chapter 4 for Romania's case, the national indices for subjective well-being have virtually remained flat over time.

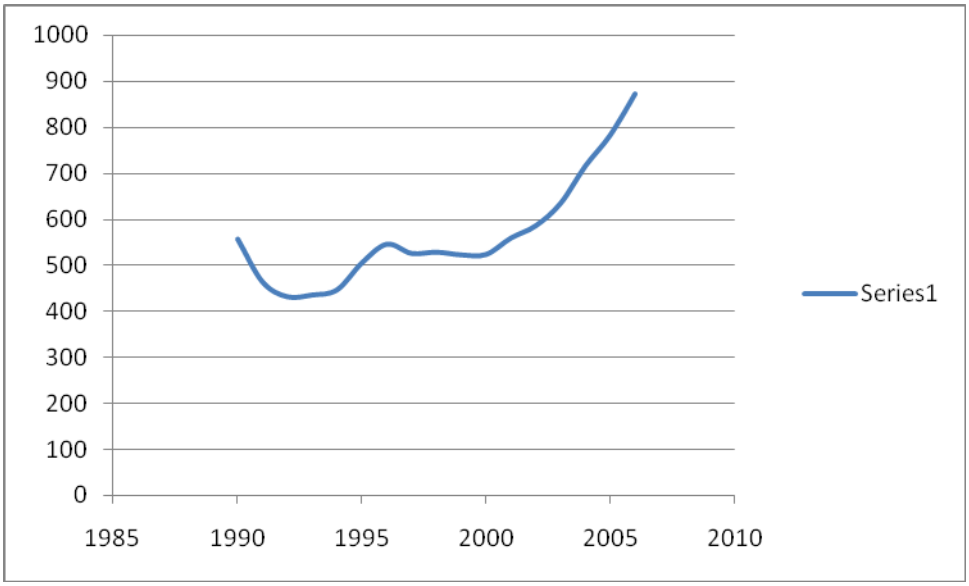

Figure 3. The evolution of real final consumption of households (in billions) in Romania between 1990-2006
Source: personal calculation with data provided by the National Institute of Statistics

Equally relevant to the consumption issue is the fact that in the period from 2000 to 2004, Romania has experienced explosive growth in the retail credit industry. Progress towards European (EU) accession, the continued expansion of foreign banks in the Romanian market, rising purchasing power among individuals in urban areas, and strong consumer demand—particularly in the area of white goods[3]—caused an explosion in the availability of retail consumer credit.

Even if the credit frenzy diminished in the last years, The Financial Newspaper announced in 2008 that Romania is the country of consumption credits, with more 76% of the existing debts entering into this category. A UniCredit study informs us that, with a level of almost 15% of the GDP, the market for consumption credits contracted by Romanians surpasses the value of similar markets from more developed countries in the region like Turkey, Czech Republic or Poland, outrunning the average of the area. What we need to highlight is the fact that the credit for

[3] White goods encompass nearly every common household item made of fabric. Sheets, bedspreads, comforters, bath towels, kitchen towels, washcloths, curtains and draperies, and table linens – including table cloths, runners, napkins, and place mats – are all considered white goods. Many retailers categorize other household items, such as bed and throw pillows, as white goods during their sales.

White goods can also be the household appliances that accomplish everyday housekeeping tasks, whether active or passive. White goods in this capacity are all the large, typically electrically powered appliances in the home. The refrigerator, stove, washer, dryer, dishwasher, and water heater can all be called white goods. White goods' recycling is the proper and environmental disposal of these appliances.

companies didn't followed the same trend, with a value of only 18% of the GDP, compared with 29% in Hungary or 52% in Germany.

4. …On the other hand, happiness

In the previous chapter we have discussed some of consumption triggers, mostly in the paradigm of extrinsic utility. This section will be dedicated to surveys and studies that have captured our self-perceiving well-being.

Despite the global increasing interest for this topic, stated in the introductory and literature review part, our country has very few surveys related to subjective happiness. The most recent and complex enquiry that we could found was conducted by the National Institute of Statistics, with the general theme of the population state of health (2008). The study included a question that asked the adult respondents about their subjective perceptions of feeling full of life, of calm and peacefulness, of having a lot of energy, and being happy all or most of the time. Almost half of the respondents (49, 3%) agreed on 3 or 4 of these items, and the other half was divided in two positions: 24, 1% agreed only on 1 or 2 of the 4 items and 26, 6% didn't agree of none of the 4 items. On the other end, regarding the perceptions of unhappiness, the scale was developed through the following assertions: having been very nervous, having felt down that nothing could cheer one up, felt down-hearted and depressed, worn out, or felt tired. A greater majority (84, 4%) didn't identify with none of these characteristics, 11% asserted with 1 or 2 of the 5 items and a percentage of 4, 7% agreed on 3 to 5 items.

The results reflect an average state of happiness, but just at a speculative level, we can ask ourselves if the respondents were influenced by the fact that this was a survey focusing on health, in the sense that they didn't want to look somewhat depressed in order to be linked to an easy form on mental disorder, like depression for example. These can be manifestations assimilated to the overconsumption society and its high levels of anxiety.

Outside the national area, in the study Happy Planet Index for the year 2009, Romania ranked 70 from a total of 143 countries, covering 99 per cent of the world's population. The research targets were embodied in the three fold index – high life expectancy, high life satisfaction, and a low ecological footprint[4]. Our country has obtained the general etiquette of 3 components middling. An important observation to make would be regarding our country's ecological footprint, which has a low value compared to other countries, but still has a local ecological deficit.

Another study "Average happiness in 148 nations 2000-2009 - How much people enjoy their life-as-a-whole on scale 0 to 10" situated us also just a little below the middle range, with a 5.7 score. The same for the how long and happy people live question, with 40 years compared to middle range of 42, and the inequality measure – 2.47, above the average of 2.3.

We found some more elaborate data on a global database of happiness (table 1). We have represented below both the original question and the statistical information. The scale range from 1 to 4, very = 4, quite=3, not very=2, not at all = 1.

[4] The ecological footprint is a measure of human demand on the Earth's ecosystems. It compares human demand with planet Earth's ecological capacity to regenerate. It represents the amount of biologically productive land and sea area needed to regenerate the resources a human population consumes and to absorb and render harmless the corresponding waste. Using this assessment, it is possible to estimate how much of the Earth (or how many planet Earths) it would take to support humanity if everybody lived a given lifestyle.

Taking all things together, would you say you are…:

- *very happy*
- *quite happy*
- *not very happy*
- *not at all happy*

Year	Original Range	On Original Range		On Range 0-10	
		Mean	Standard Deviation	Mean	Standard Deviation
1990	1-4	2.63	0.68	5.84	2.13
1990	1-4	2.63	0.68	5.84	2.13
1998	1-4	2.55	0.7	5.61	2.2
1999	1-4	2.39	0.74	5.11	2.32
2005	1-4	2.55	0.71	5.7	2.02
2005	1-4	2.56	0.74	5.6	2.27
2005	1-4	2.56	0.74	5.72	2.07
2006	1-4	2.63	0.75	5.84	2.28
Average		2.56	0.72	5.66	2.18

Table 1. Results of happiness questioner
Source: Veenhoven, R., *World Database of Happiness*, Erasmus University Rotterdam.

All of the above studies point out a moderate level of happiness, with almost indistinguishable variations in time. Enclosing here the ascendant trends of consumption and incomes will immediately lead us to the speculative allegation that they aren't influencing factors of happiness. Doubtless, we cannot take for granted this statement, without a further rigorous econometrical analysis. However, we can acknowledge it as a pertinent departure point and a valuable insight in developing future research.

Conclusions

We have begun our study with the tricky question of how much money do we need to buy happiness. We continued in the same delicate manner wondering about the role of consumption in a hyper consumption society. As if it wouldn't be enough, the object of our reflection was a developing country, which seems to escapes the common sense logic and often creates intricate paradoxes.

The research foundations in this area are somewhat recent and they flourished lately, even under the umbrella of a journal totally dedicated to happiness studies, being often regarded as a

counter-revolution to standard microeconomics. Economic growth, unemployment, inflation, inequality, as well as institutional factors such as good governance, are the main factors analyzed to see how they affect individual well-being. We focused on a component of economic growth, and the innate perception we tried to discuss was that of a proportional dependence between consumption and happiness. We've had in mind that it is generally accepted that consumption increases wellbeing by lifting people out of poverty and that it has a negative impact if it fails to place them at a higher social position.

The data available in both fields, interpreted only through some descriptive statistics and qualitative implications, brought just the incentive to go deep in analyzing this issue. Compared to the other countries of EU, it is an incontestable fact that we have very low rates of consumption, excepting food, beverages and tobacco. Moreover, we seem to perceive ourselves as being moderately satisfied with our life. So the natural question that arises is: which way we have to go in order to enhance our happiness. Adhering to consumerism critiques and in the light of the statistics, we reached to a first road indicator showing the necessity of reassessing the direction of neoclassical economics and incorporate findings from other social sciences like psychology, sociology or anthropology.

There are many limitations, especially at a mental level, in accepting that interdisciplinarity becomes more and more a norm in doing high quality research. At an operational level, the lack of more focused national surveys and appropriate data is also an obstacle sometimes hard to overcome. Nevertheless, we are confident in the huge potential of this, and other young branches of economics, and we will continue our research in the complex field of economic behavior.

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THE CONTENT, PREMISES AND FACTORS OF THE OFFSHORING OF BUSINESS SERVICES

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Elena MĂRGULESCU[**]

Abstract

The percentage of companies applying to the offshoring of business services is growing constantly. Large transnational companies play the most important role in the services offshoring phenomenon both through the captive offshoring and subcontracting to local suppliers. The analyses show however a different strategic approach in American and European companies. Hosting these corporations by a growing number of countries depends however on ensuring by the hosting countries of those factors that matter in the decision regarding the offshoring of business services.

Keywords: *offshoring of business services, international outsourcing, offshoring premises and factors*

Introduction

The outsourcing of the activities or functions resulting from the global segmentation of the value chain specific for the production and supply of any product or service, known simply under the name of outsourcing, involves the transfer of those activities or functions to other companies from that country or abroad, while offshoring involves the transfer of their production only abroad, either intra-firm, inside the subsidiaries of the mother-company abroad (captive offshoring), or extra-firm, to other firms (external offshoring).

Although internal outsourcing (to other firms in the same country) is widespread, because we are talking about globalization, we are referring to offshoring (captive or not captive).

Offshoring reflects, in essence, the resulting revolution from the services' commercialization. Traditionally, most services were until recently non-marketable, in the sense that this required the buyers and sellers presence in the same place and at the same time. Unlike goods, they could not be traded between parties placed in different countries (medical services, fitness services, etc..). Other services do not require physical proximity of the parties, but instead they have to be delivered face-to-face due to technical or traditional constraints (sharing, storage, processing and transmission of information). These services were non-marketable because:

- certain types of information could not be stored
- others could be stored, but could not be transmitted quickly and economically across borders for processing,
- others were traditionally processed inside the company (accounting, data storage, design),
- others, traditionally presumed face-to-face presence (medical, financial, legal consultantions).

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With the development and application of the new information and communication technologies (ICT), such barriers were more frequently demolished.

ICT enables the digitization, encoding and standardization of knowledge and, consequently, the production of a wide range of services which can be fragmented or modularized, the resulting components being relocatalbe, in order to obtain cost or quality advantages, economies of scale or another advantages. Thus, the arbitrage strategies of various factors on national and international level have become feasible in the sphere of services.

1. The content and premises of the services offshoring

There, too, is reason to believe that modularity in services is more complex than that from the manufacturing field. Also, new technologies often simplify the services' "production", and in this way enhances their relocation. The chapter "export of services " from the external balance of payment of different countries experienced with this revolution in services, a significant restructuring of content.

Thus, the U.S. recorded the largest increases in imports of services and increasing share in global imports of services from 1% in 1992 to 13% in 2002. In the category "other private services", the largest increases can be observed in the chapters " computer and data processing services" and "accounting services, auditing and recording data". The total value of U.S. services imports in 2002 were of EUR 205 billion dollars (see Table nr.1).

Table nr.1

Import of certain categories of services in the U.S.A in 1992-2002

Type of service	Average annual growth rate,%	U.S. services imports in 2002, million $
Computer and data processing services	31	1057
Accounting, auditing and records management services	21	716
Management, consultancy and PR services	17	1188
Research, development and testing services	16	1040
Training services	14	361
Total business, professional and testing services	13	10732
Total other private services	11	69436
Total private services	**7**	205234

Source: UNCTAD, World Investment Report 2004, The Shift Towards Services.

Regarding the reverse flows, those of export services of the groups " other business services "and" computer and information technology", the highest increases were registered in the U.S., India, Ireland, England, Sweden, Spain, China and Israel (in this order).

Developing and emerging countries export a variety of services, among which include: 1. Cultural and audiovisual services: production and distribution of films and videos, radio and TV transmissions, audio, recreational services, cultural and sports news.

2. Business services: back-office processes, customers services, technical support. For example: indexing, input and data processing, electronic publications, translation of legislation, arbitration support, correspondence management, remote secretarial services, typing, telemarketing, design websites.

3. Computer and computer related services, which include hardware and software installation, data processing, database services, computer and office equipment maintenance and repair.

4. Higher education and training services, where content can be provided in audio/ video or Internet format (distance learning, training and retraining, etc.)..

5. Financial services covering insurance and insurance related services, banking and other financial services. The most common organizational forms are joint ventures and subsidiaries of transnational companies from developed countries.

6. Health services include medical services, dental care, bodycare, paramedical, hospital and social services. For example, delivery of laboratory samples, diagnosis, consultation, X-ray or CT scan interpretations.

7. Internet services: installation, content providing, audio-visual services, business services, computer services.

8. Professional services: legal representation, accounting, auditing, taxes, fees, architectural and engineering services, accounting services, document management, personnel and IT services.

9. Film animation in the context of new 2D and 3 D requirements.

By the training level required, services are classified as:

a) basic qualification services (call centers, data entries and records, etc..)

B) average qualification services (financial, accounting, programming, routine analysis, back-office services, etc..),

c) highly qualified services (research - development, design, architecture, medical tests, education, training, etc..).

Requirements for these services to be relocatable are:

- to involveno face to face interaction
- to have a high information content
- the working process must be compatible with the distance transmission and the Internet
- to involve large wage differences
- installation barriers to be insignificant
- social protection requirements to be modest.

Factors that prevent compliance with these requirements and consequently prevent the offshoring of services are:

- technological limitations (such services can not be digitized or separated from other activities)
- need face to face interaction (marketing, delivery, etc.),
- the need to be closw to customers (fashion, creativity, innovation, medicine, privacy, etc.)
- occupational requirements, labor market restrictions, lack the necessary qualifications or knowledge of foreign languages,
- law and intellectual property rights protection
- risk aversion.

As time passes, more and more of these barriers are overcome, or seem to be overcome, both in terms of technological developments and government policies.

In many respects between the factors that determine the modularity and the globalization of production of goods and services there are many similarities, but some differences persist, such as:

- the offshoring of services is structurally simpler and faster in terms of resources, endowments and equipment necessary, than the offshoring of production,

-the offshoring of services mainly affects white-collar workers, not the blue-collar workers from the manufacturing sector,

- the offshoring of services potentially addresses to a larger number of companies in all areas,

- the offshoring of services require less investments and links with local suppliers.

The market of services offshoring was still in an early stage back in 2002, both in absolute size and in comparison to the outsourcing market[1].

For example, the offshoring market (external outsourcing) for IT services was estimated at U.S. $ 1.3 billion, which is less than 1% of the global outsourcing market for these services (data are not yet associated with the entire group "IT services", because they do not include the outsourcing of software development services and other IT services). But the growth forecast shows a U.S. $ 24 billion level for 2007, with an increase of offshoring in the total outsourcing from 1% in 2002 to 14% in 2007.

The share of companies that rely on the offshoring of business services is growing, although in 2004 a study on the first 500 companies in Europe, conducted by UNCTAD in cooperation with Roland Berger Strategy Consultants (RBSC), found that only 39% of them experienced the offshoring of business services, equivalent to 20,000 jobs, but 44% of them were planning to increase it in coming years. In the U.S., the share of companies that adressed to the offshoring of services was 25% and 23% in Japan.

Large transnational companies play the most important role in the phenomenon of services offshoring, both through captive offshoring, and through subcontracting to local suppliers. The captive offshoring can be implemented both for their own activities and / or to serve third parties. Offshoring is not limited however to transnational companies, but is implemented also by smaller companies.

Attracting these corporations by a growing number of countries in pace with the amplification of the above mentioned trends depends also on ensuring a proper and higher skills level, according to the increasing complexity of services. At least for now, the increased complexity of services generated a process of agglomeration of the possibilities of offshoring at a relatively small number of countries.

The expanding volume of services offshoring was a factor in the restructuring or the emergence of some transnational companies in a position of service providers to other companies, similar to the appearance of contract manufacturers in production.

Since outsourcing is most developed in the U.S.A., most contract services suppliers originate from this country. Some of them have turned into global players, establishing branches all over the world, and being requested by FDI promoting agencies in many countries.

The advantage of these transnational companies in their position of contract services providers is twofold:

- they benefit from the existing connections with customers in the U.S. and Europe

- they have, due to their global network of subsidiaries, a greater flexibility in offering the perfect solution for every client.

Within the call-center services,the leading service providers are the U.S. companies Convergys, ICT Group, Sitel and Sykes (see Table 2.).

[1] UNCTAD, World Investment Report 2004. The ShiftTowards Services.

Table nr.2

The largest transnational companies, contract providers of call / contract centers services in 2003

Company	Company turnover ($ billion)	Number of employees	Year of foundation	Year of first relocation through offshoring
Convergys	2,3	55000	1998	2000(India)
ICT Group	0,3	11000	1987	2002(Filipine)
Sitel	0,8	26000	1985	2001(India)
Sykes	0,5	16000	1977	1997(Filipine)

Source: UNCTAD, World Investment Report 2004, The Shift Towards Services.

After initiating the process of international relocation these companies have rapidly expanded their network of branches. Thus, Convergys founded untill 2003 branches in India, Argentina, Brazil, Mexico, Indonesia, Philippines, Singapore, Korea, Taiwan, Thailand, Sri Lanka. Sitel has established subsidiaries in Canada, Colombia, Mexico, Panama, Jamaica, Morocco, India and Philippines.

However, in 2003, only less than 10% of services supply took place through the network established in less developed countries, the rest being covered by the existing subsidiaries from the developed countries. But this proportion is changing from year to year, in favor of locations in emerging countries.

In the field of outsourcing of business processes and IT related services there is also an increasing number of suppliers, the largest being IBM Global Services, EDS, Accenture and Hewlett-Packard. Only in India in 2003, IBM had 15,000 employees, while the other companies had 3000 employees each.

Notably, companies prefer to outsource a wider range of services, or an even more limited, but with wider geographic distribution, if they work with a single global supplier, instead of concluding several contracts with a number of local suppliers, from different countries. So, the companies providing services with a global presence are in a better position to attract customers.

The supplying companies from the emerging countries try to overcome this disadvantage by reverse relocation to the U.S.A. and Europe, in the latter case seeking to find the best locations in terms of cost. Several Indian companies have made this strategic step since the years 2003-2004: Infosys with the business consulting subsidiary in the U.S.A., Satyam with software development centers in the Czech Republic, Hungary and Poland, Tata Consultancy Services with the software development center in Hungary, Progeon (created by Infosys for back-office services) with the call-center in the Czech Republic. This strategy is also adapted to an other western customers' requirement who often pretend joint solutions, while a part of the outsourced services is provided locally, in the country, and the other part by abroad situated locations.

2. Decision factors of outsourcing and offshoring of services

Any offshoring decision means the company's option to relocate functions of services which were achieved by then in their own country within the company, to suppliers from other countries (to their own foreign subsidiaries or other firms).

Propensity towards offshoring can be estimated partly also by services outsourcing development on national level. A company that has outsourced an activity to an independent provider in her country, is more prepared to explore, in the next stage, the search for independent foreign suppliers.

The outsourcing of the business processes on the local market is not a new phenomenon, but it was developed in the U.S.A in the late '80s, when the companies began to focus more strongly on their core competencies and capitalize as much as possible the new information technologies and telecommunications, in order to be able to outsource to third parties other competencies. A growing number of companies have outsourced business processes, related both to the front-office (customer interaction) and back-office operations (data processing, financial activities, accounting, human resources, research). If, at the end of the year 2002 the global market of this outsourcing was estimated at U.S. $ 110 billion, the level of 2007 was estimated at 173 billion dollars U.S..

In the second stage of the decision analysis, if it was established that offshoring is advantageous, the company has to decide the optimal variant of the alternatives:

- to "produce" services in the company, by forming a subsidiary in a foreign economically justified location,
- to buy services from one or more independent firms.

Statistical data of 2002 show **differences in strategy among American companies, more likely to establish foreign affiliates, and European, more likely to contract service providers in other companies.**

Thus, the intra-company trade represents over 71% of the "business services, professional and technical" imports of the U.S.A and in 1997-2002 the value of the intra-firm imports rose even more faster than the import of these types of services from independent sources.

Instead, in Europe, only 45% of the largest companies which have a rich experience in this field preferred the services offshoring to their subsidiaries or joint ventures set up abroad, and 48% have outsourced these activities to third parties.

Should be noted also, that a company can decide the offshoring of two types of services to the same foreign location, in two different ways:

- by offshoring to their subsidiaries or joint ventures,
- by outsourcing to independent suppliers.

For example, Bank of America has established a subsidiary in Hyderabad, India, to transfer there all the back-office operations of its U.S. units, with over 1,000 employees in 2005, while software implementation services have been outsourced to Indian companies such as Infosys Technologies and Tata Consultancy Services in Bengalore in Mumbai.

Similarly, Exxon Mobil and GE have established subsidiaries in Hungary for back-office operations, while K & H Bank has outsourced these operations to a local supplier, EDS.

The main factors that have influenced this decision are the following:

1**. The need to control those activities,** especially when involving intellectual property rights or sensitive information. As in other economic activities, the more strategic those services and closer to the core competencies of the companies are, the less willing are the companies to outsource them. In this situation there are, for example, the financial services or the research and development activities, preponderantly transferred to their own subsidiaries (transnational companies such as Oracle, Texas Instruments, General Electric, Cisco, Hewlett-Packard, IBM and Microsoft have established research and development centers in India).

2. **The internal interaction degree** involved in the respective activity. When the services can be split, but involve a closer connection with the other business activities (services, manufacturing, research and development) to ensure a greater efficiency, they will not be outsourced. By contrast, the back-office and front-office operations that can be easily standardized

and separated from the other activities are more easily subject to outsourcing. The same thing happens when the software developments are outsoursed: the standard or routine activities are contracted with Indian corporations, for example, and the most sophisticated are kept in business.

3**. The existing of the service providers in the emerging countries.** The activity of such providers in the emerging countries is a relatively a recent phenomenon and has become an alternative to the strategies of the western companies, for about a decade. For example, when transnational companies began to transfer their back-office functions to India, they couldn't find there local companies to undertake the outsourcing. Therefore, in 1998, American Express had to set up their own subsidiaries. Only after 2000, other airline companies that wanted to outsource similar services have found local Indian companies able to take over. For example, Delta Air Lines has outsourced some of the services booked by the call-center company Spectramind, a subsidiary of Wipro company. Also, Swiss International Airlines, Austrian Airlines and Sabena have outsourced the accounting services for the revenues resultinf from the cargo and people transport, ticket booking, flight schedules and administration support to air navigation to the company AFS, a subsidiary of Tata Consultancy Services, the largest Indian software company. There is also a range of services, which was developed more rapidly in the emerging countries, as the software services, for which local suppliers competitors can easily be found, while other services have evolved later, so that competition is lower (for example the financial analysis services). Availability of local suppliers in emerging countries is correlated with other factors such as intellectual property protection, cultural and linguistic differences, the information availability on local business.

4**. The volume of the activities that can be outsoursed**. From the analysis of the corporate decisions can be seen that there is a greater temptation to keep in the company those activities with a bigger workload or added value, in order to benefit from the efficiency surplus resulting from the operations of the large yield series. Offshoring's version to subsidiaries is the most frequently used. At smaller sizes of activities, the offshoring to third parties enter into discussion with more power.

5. **The costs reducing** is one of the main motivations of offshoring, as confirmed by numerous studies. Cost reduction can be achieved either by searching for locations with lower costs, or by consolidating operations and reduce the costs with infrastructure, personnel training and management. Any international bank that has, for example, 50-60 data centers, each with infrastructure, specialists and maintenance costs, can strengthen them in 5-10 centers. This means costs reductions and allows the creation of centers of excellence, and if combined with lower labor costs, the savings can be considerable. It is estimated that the U.S. banking industry saved by offshoring to India about U.S. $ 8 billion in 1999-2002. In Europe, about 80% of the largest transnational companies with offshoring experience reported savings ranging between 20-39% and another 10% of them showed even greater savings. In call-centers, labor costs in developed countries represent 50-70% of total costs. In India, the salaries were at the beginning of this decade

80-90% lower than in England. However the savings derived from wages are diminished because of higher costs of infrastructure, personnel qualification and travel. Overall the savings are situated in the margin of 30-40% compared to the costs in England and something more compared to that ones from the U.S.A.

6**. A better quality of the services** is another important factor in the decision of services relocation. Many transnational companies have been surprised to find this, the factors in this respect being of two categories:

- when the "back-office" services of the services customer become "front-office" services of the services provider, the latter gives a higher attention to the quality of the services
- mostly, the low-cost locations use a more educated staff than the one used in developed countries. If in India they are university graduates in industrialized countries are school or college graduates.

3. Foreign direct investments (FDI) market connected to the services offshoring

If in 2001, the offshoring of the most services was concentrated in a small number of locations, namely (in this order) Ireland, India, Canada and Israel, countries that held 71 % of the total offshoring services market (mainly software development and other IT services), later, due to the costs raising in many locations usual at that time, and due to the improved conditions from other countries, the number of locations of interest has increased considerably.

An analysis from 2004, regarding the attractivity of the first 25 offshoring destinations, shows that India ran detached, followed by China, Malaysia, Czech Republic and Singapore. Brazil is on the first place in Latin America, South Africa in Africa and among the developed countries, Canada and New Zealand were headed.

For the big European transnational companies the distribution is similar. Almost one third of the offshoring projects were led to India, 29% to Western European countries (Ireland, Portugal, Spain, England), 22% to Central and Eastern Europe (Hungary, Poland, Romania), 8% to Latin America and under 4% to Africa.

FDI flows play an important role in offshoring:

- through captive offshoring,

- through the founded subsidiaries of specialized service providers.

It is true that, while such investments create more jobs, they do not involve large capital flows and have not a significant share in FDI statistics. For example, in 2001, in India, the FDI related to offshoring services were of U.S. $ 300 million, respectivly 10% of the total FDI.

From the methodological point of view, it should be mentioned that it is difficult to find accurate statistical figures on services offshoring, based on the currently existing industrial classification. It is easier to use statistics based on the projects number (not value) of the transnational companies making "greenfield" service activities, or expansion of investments in export-oriented services.

The main categories of export-oriented services are:

1. Back-office services (shared services centers),
2. Front-office functions (call / contract centers),
3. IT services (including software),
4. The regional districts.

The content of these statistical categories of the export-oriented FDI projects is presented in Table nr.3.

Table nr.3

The definition of the export-oriented FDI projects related to the offshoring services

Projects categories	Content
Call / Contract Centres	Support services Support/Technical consulting Post-sales Job application Claims Support/Client consulting Market Research Services Call Services Prospecting

	Information Services Customer Relationship Management
Shared Services Centers (back-office services)	Claims Processing Accounts Transaction Processing Questionnaires Processing Customers Relationship Management Processing Pay Processing Services Data Processing IT Outsourcing Logistics Processing Quality Providers Billing
IT Services	Software Development Testing Application Engineering and Design Product Optimization
Regional General Districts	General Districts Coordination Centres

Source: UNCTAD, and OCO Consulting

The share of the developing countries and of the Central and Eastern European countries in thetotal FDI projects related to the offshoring services has increased from 37% in 2002 to 51% in 2003. The four categories of services had in 2002-2003 a significant proportion, of 12% from the total FDI projects.

Statistical data provided by UNCTAD include only the "greenfield" FDI and the expansion FDI for the existing facilities, not including acquisitions. Although the share of the latter in 2003 was minor (1-3%) the tendency was to increase. For example, in India, during 1998-2002, FDI in IT services was of 90% "greenfield", 10% through joint ventures and less than 1% through acquisitions. In Europe, FDI in shared services centers have achieved 46% "greenfied", 51% by expanding and 3% through acquisitions.

Call Centres

More than half of the 500 FDI projects in call-centers, recorded in 2002 and 2003, were orientated to the developed countries, especially to Canada, Ireland and England. It demonstrates that the geographical proximity and linguistic and cultural affinity are still important in offshoring decisions. In Ireland, 2/3 of the call-center industry employees working in subsidiaries of the foreign companies, are mostly American. Irish call centers are specialized in services such as telesales and marketing, customer support services, technical support and software for various industries.

Geographical distribution of FDI in call centers from developed countries shows that 80% were oriented to Asia,the main recipients being India (60 projects), China (30 projects), Malaysia (16 projects) and Singapore (16 projects).

In Central and Eastern Europe were located 31 projects, mostly in Hungary. Half of the projects came from IT companies and business service providers, followed by telecommunications and electronic companies.

Shared Services Centers

The developing countries and the Central and Eastern European countries attracted 65% of the export-oriented FDI projects, about a half going to India. In Central and Eastern Europe the priority destinations were Hungary, the Czech Republic and Poland (especially for European companies). U.S. companies have invested more in Chile and Costa Rica. Among developed countries, Ireland ranks first. Providers of projects were mainly financial and IT companies.

IT Services

The FDI projects in IT services were equally distributed between the developed countries and the developing countries, but with a significant gap growth (growth rate of over 100% in 2003, for locations of all developing countries, and only 6% for developed countries). Top locations for the category of developed countries were England, Germany, USA and Australia. Asia dominated areas in development. Of the over 300 projects directed toward developing countries, 37% were directed to India, 19% to China and 11% to Singapore. Czech Republic, Brazil and South Africa were the main receivers in the appropriate areas.

Regional Headquarters (RHQ)

Investments in RHQ have a far longer history without being tied to the cost of labor, lower in certain geographic areas. They are included in the statistical evidence for representing export-oriented services and many countries want to attract them. Almost 40% of FDI for RHQ were oriented in 2002-2003 towards developing countries, placing itself on the top China, Hong Kong, Singapore United Arab Emirates. Brazil leads Latin America and in Central and Eastern Europe the favorite destinations were Hungary and Romania. Among developed countries, U.S.A., UK and Canada have dominated the top locations. As suppliers of FDI, on the first places were the IT industry (25% of the projects), followed by electronics and automotive.

Table No. 4

Distribution on industries of the export-oriented FDI projects related to services offshoring in 2002-2003

Domain	Call Centres Projects Share No. in total	Shared Services Centres Projects Share No. in total	IT Services Projects Share No. in total	General Regional Districts Projects Share No. in total
Business Services	116 22	24 17	- -	17 35
Chemicals	3 0,6	1 0,8	1 0,2	15 2,8
Electronics	42 8	6 4,4	4 0,6	57 10
Energy	14 3	5 3,6	- -	15 2,8
Financial Services	30 6	4 29	2 0,3	32 5,7
Food and Beverage	3 0,6	4 3	- -	20 3,5
Hotels, Tourism, Leisure	3 0,6	2 1,5	- -	19 3

Internet	12 2	1 0,8	- -	8 1,5
IT and software	154 30	33 24	618 97,8	132 23
Natural Sciences	7 1,3	3 2	- -	51 9
Light Industry	2 0,4	2 1,5	- -	20 3,5
Machinery and industrial goods	18 3,5	1 0,8	- -	28 5
Metals/Mining	5 1	1 0,8	- -	10 1,7
Telecommunication equipment	20 4	3 2	4 0,6	15 2,8
Telecom Services	30 6	- -	3 0,5	25 4,4
Transport Equipment	30 6	6 4,4	- -	55 9,7
Others	24 5	6 4,4	- -	47 8
Total	513 100	138 100	632 100	566 100

Source: UNCTAD, World Investment Report 2004, The Shift Towards Services.

Table No. 5

Geographical distribution of export oriented FDI projects related to services offshoring in 2002-2003

Region/Country	Call Centres Projects Share No. in total	Shared Services Centres Projects Share No. in total	IT Services Projects Share No. in total	General Regional Districts Projects Share No. in total
Total	**513 100**	**139 100**	**632 100**	**565 100**
Developed countries	279 54	48 35	293 46	339 60
Western Europe	174 34	38 27	208 33	200 35
UE	169 33	38 27	198 31	185 33
Germany	20 4	1 1	34 5	22 4
Irland	29 6	19 14	14 2	15 3
UK	43 8	7 5	73 12	64 11
Canada	56 11	3 2	14 2	25 4
USA	15 3	2 1	26 4	80 14
Australia	19 4	3 2	26 4	24 4
Japan	11 2	- -	16 3	8 1
Developing countries	203 40	72 52	315 50	209 37
Latin America and Caraibean	29 6	5 4	22 3	10 2
Asia	167 33	66 47	283 45	195 35
South, East and South-East Asia	149 29	64 46	265 42	158 28
Central and Eastern Europe	31 6	19 14	24 4	17 3

The Czech Republic	9 2	6 4	5 1	- -
Hungary	11 2	7 5	4 1	4 1
Poland	3 1	5 4	4 1	3 1
Romania	1 -	- -	2 -	4 1

Source: UNCTAD, World Investment Report 2004, The Shift Towards Services.

Conclusions

On the ground of the data analyzed for the period 2002-2003 (and the trend was valid for the following years also), we can say that:

- while **the number of theFDI projects related to the services offshoring is higher in the developed countries, their growth is more dynamic in the developing countries.** If, in the case of the latter, 63% of projects are located in South and South-East Asia, this region dominates especially in IT services (80% of projects).

- because a large number of projects went to developed countries, it indicates that **the factor cost/ low wages has not owned a 100% share of the offshoring decision**.

On the base of the conducted surveys, it resulted the following hierarchy of factors in services offshoring decisions towards the developing countries and countries in transition:

a) For call centers:
- lower costs
- the existence of qualified personnel
- foreign languages
- ICT infrastructure
- Legislation or business environment

b) For shared services centers:
- lower costs
- the existence of qualified personnel
- foreign languages
- ICT infrastructure
- infrastructure and logistics
- legislation or business environment

c) For IT services:
- market growth
- qualification of the workforce
- customers / markets proximity
- low costs
- technological institutes / universities
- industrial parks
- ICT infrastructure

d) For regional headquarters:
- market growth
- qualified workforce
- clients proximity
- legislation or business environment
- infrastructure
- ICT infrastructure

It is also worth mentioning the fact that **the European transnational companies are less prone to services offshoring than the American companies.**

Thus, in 2004, over 2/3 of Indian exports of software services was oriented towards the U.S.A. For the FDI projects it could be observed the same trend, the U.S.A. being on the lead with 2/3 of the IT services projects, 60% of call-center projects and 55% of shared services projects.

In Europe, even among the large transnational companies, less than 40% had experienced in 2004 the offshoring of services and over half of them had no such plans for the near future.

The interst in offshoring varies from country to country. U.K. is the next closest to the U.S.A. model and ranks first in all four types of services (in Europe).

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HUMAN RESOURCE MANAGEMENT: AN ANALYSIS OF STRATEGIC APPROACH

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Abstract

Globalization tendencies appeared as an outcome of scientific and technological innovations in 20th century impact the Human Resource as well as most other department ın a company. Like in many companies, HR department accompanied by the change of sectoral structure in a business is the main element which determines Economic Performance. This study investigates the causal relations between company performance and its HRM Department.

Keywords: *Strategic Human Resource Management, Human Resource Management, Performance, Competitive Advantage*

1. Introduction

People are an organization's most important asset that is very strategic instrument for a company's market competition. We now define 'human advantage' as being competitive strategy and systems-based view of the value of human resource which makes towards adding value to customers, towards managing cost, through accelerating operational and management processes, and in challenging the status quo through innovation and change. For about the past decade or so, the mantra of Human Resource has been "be a strategic business partner."

The importance of involving HR in development, planning, and implementation of competency-based strategies has been well-communicated. (Beatty & Schneier 1997; Ulrich 1997).

Strategic HRM, a global human capital management consultancy, partners with organizational leaders in human resource management transformation, leadership development, organizational development, and change management. The mission of HRM is to enable organizations assess, address, and alleviate human capital related conditions inhibiting organizational growth, high performance, and achieving competitive advantage in their markets. Wright and McMahan (1992) noted that strategic HRM is primarily focused on ''the pattern of planned HR deployments and activities'' that are intended to help organizations to achieve their objectives.

Strategic HRM represents a new generation of organizational consulting firm. A consultancy composed of seasoned consultant-practioners recognized as thought leaders and skilled practioners. They are organizational change agents respected for delivering data-driven feedback and action recommendations.

There is a rapidly growing literature on the interaction between strategic HRM apply and companies's performance, with many analysts drawing policy conclusions on the basis of HRM application that involve only a HRM and an economic variable.

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2. Literature Review

Strategic human resource management research has mostly gravitated towards financial measures of performance in order to assess the effectiveness of human resource management initiatives. At a basic level, strategic HRM research has tended to gravitate toward measures of financial- or market-based organizational performance as its dependent variable (Becker & Huselid, 1998; Rogers & Wright, 1998).

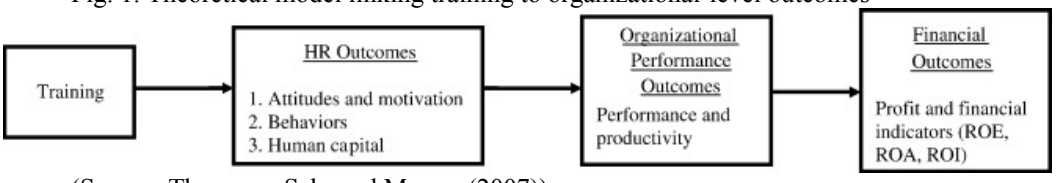
While traditional HRM research has generally focused on individual level outcomes such as job performance (e.g. Wright & Boswell, 2002), job satisfaction (e.g. Seibert, Silver, & Randolph, 2004), and motivation (e.g. Bloom, 1999), strategic HRM research has focused on unit or firm level outcomes related to labor productivity (Huselid, 1995; Koch & McGrath, 1996; MacDuffie, 1995)scrap rate (Arthur, 1994), sales growth (Batt, 2002; Guthrie, 2001), return on assets (ROA) and return on investment (ROI) (Delery & Doty, 1996), and market-based performance (Huselid, 1995). These aggregate level outcomes can further be differentiated by department level, plant (site) level, business unit level, and firm (corporate) level performance measures (Rogers & Wright, 1998; Colakoglu, Lepak, Hong 2006).

3. Strategic HRM vs. HRM

Basic stages of HRM are

1. Design and implement orientation session(s) for all employees.
2. Develop and disseminate a code of ethics.
3. Provide detailed job descriptions to professional staff.
4. Establish a staffing plan.
5. Diversify skills.
6. Utilize a mix of mechanisms to get the staff you need.
7. Hire some entry level professionals.
8. Emphasize training.
9. Simplify the organizational structure.
10. Get internal procedures and policies in place early.

Fig. 1. Theoretical model linking training to organizational-level outcomes



(Source: Tharenou, Saks and Moore, (2007)).

Guest's model of human resource management is very useful in that it defines the modern lexicon of human resource management. Gone are the references to the functional areas of personnel management described earlier. Human resource management clearly encompasses these older regulatory hangovers, but goes much further in embracing the management of change, job design, socialization and appraisal as the key levers to achieve organizational success. Guest's model also sets the agenda for what human resource management is trying to achieve – integration with the business strategy of the organization, employee commitment, flexibility and quality. These are still very much the aims of human resource management. Taking commitment as a major element of human resource management Storey (1995) came up with one of the best original definitions of human resource management: Human resource management is a distinctive

approach to employment management which seeks to achieve competitive advantage through the strategic deployment of a highly committed and capable workforce using an array of cultural, structural and personnel techniques.

Fig. 2. Guest's normative model of human resource management

Human resource management policies	**Human resource management outcomes**	**Organizational outcomes**
Organization and job design. Management of change	Strategic integration	High job performance
Recruitment, selection and socialization	Commitment	High problem solving, change and innovation
Appraisal, training and development	Flexibility/adaptability	High cost-effectiveness
Reward systems Communication	Quality	Low turnover, absence and grievances

(Source: adapted from Guest (1987))

Strategic human resource management (SHRM) has received a great deal of attention in recent years, most notably in the fields of human resource management (HRM), organizational behavior, and industrial relations. SHRM research is distinguished from traditional HRM by two key characteristics: 1) an organizational system level approach to HRM, and 2) a concern with the effects of HRM on firm performance. The concept of firm strategy is often though not necessarily included in SHRM research, as well. Nevertheless, firm strategy has generally received inadequate and superficial treatment in SHRM education, a limitation that makes SHRM teaching unnecessarily narrow and reflects weaknesses in the SHRM research stream itself (cf. Chadwick & Cappelli, 1999, 2005).

Strategic HRM focuses

1. Market-based performance

This implies that as a firm's time perspective goes from short term to long term, the core performance measures of success should shift from customer satisfaction through market-based performance to financial performance (Hultink and Robben, 1995).

For market-based performance, we measured sales growth and market share growth, two key business goals for every company. It has been suggested that high market-based performance predisposes the firm to improved financial performance by altering customer buying behavior in a favorable manner (Kerin 1990; Szymanski 1993 and Anderson 1994).

Manufacturing cost efficiency and new product flexibility capabilities mediate the influence of strategy integration on market-based performance.(Swink, Narasimhan, and Kim 2005)

2. Return on investment

ROI is one of several approaches to building a financial business case. In other words, A performance measure used to evaluate the efficiency of an investment or to compare the efficiency of a number of different investments. The term means that decision makers evaluate the investment by comparing the magnitude and timing of expected gains to the investment costs.

Decision makers will also look for ways to improve ROI by reducing costs, increasing gains, or accelerating gains.

To calculate ROI,

$$ROI = \frac{(\text{Gain from Investment} - \text{Cost of Investment})}{\text{Cost of Investment}}$$

Return on investment is a very popular metric because of its versatility and simplicity. That is, if an investment does not have a positive ROI, or if there are other opportunities with a higher ROI, then the investment should be not be undertaken.

3. Return on assets

ROA tells you what earnings were generated from invested capital (assets). Thus, ROA gives an idea as to how efficient management is at using its assets to generate earnings. An indicator of how profitable a company is relative to its total assets. In other words, Return on assets measures a company's earnings in relation to all of the resources it had at its disposal. Thus, it is the most stringent and excessive test of return to shareholders. If a company has no debt, it the return on assets and return on equity figures will be the same.

To calculate ROA, by dividing a company's annual earnings by its total assets.

$$= \frac{\text{Net Income}}{\text{Total Assets}}$$

ROA for public companies can vary substantially and will be highly dependent on the industry. This is why when using ROA as a comparative measure, it is best to compare it against a company's previous ROA numbers or the ROA of a similar company. The higher the ROA number, the better, because the company is earning more money on less investment.

4. Sales growth

Sales growth, same stores, %. Increase in sales for comparable months in stores that have been open for more than 12 months. For investors looking at a company from the outside, forecasting sales growth rates--even in the near term--is a bit like looking through the fog. A company's market share can also have a big impact on its future sales growth.

5. Scrap rate

Company scrap rates could be estimated if company original values of fixed assets and investment data were available. Therefore, scrap rates are estimated based on subsets of the whole company where the necessary data to do so are available.

6. Labor productivity

Labor productivity measures the amount (or value) of output generated per hour worked. Why does it matter? Greater labor productivity enables firms to produce a given amount of goods or services with a smaller number of labor hours and since payroll cost is related to the number of hours they use, this helps firms control their costs, making their enterprises more profitable.

Labor productivity is average real (inflation-adjusted) output per hour of labor; it is defined for the nonfarm business sector (the overall economy, excluding government, farms, residential housing, nonprofit institutions, and private households). Labor productivity differs from total factor productivity (TFP), a concept discussed later in this paper, in that increases in capital per worker increase labor productivity but not TFP.

Looking across the potential measures of HR effectiveness, Dyer and Reeves (1995a, 1995b) suggested that measures of organizational performance in HR research may vary based on the measures' level of proximity to the HR practices. According to their categorization, HR practices have their most immediate impact on employees since employee outcomes such as turnover, absenteeism, job satisfaction, commitment, and motivation are in a closer line of sight to

HR practices. They propose that HR practices also have the strongest effect on such employee outcomes, as these outcomes are to some extent the initial goal for designing the HR practices. The second category of organizational performance which is more distal to HR practices than individual level employee outcomes includes more macro level outcomes associated with aggregates of individual efforts, such as indicators of productivity, quality of products and customer service. The third category of performance noted by Dyer and Reeves (1995a, 1995b) encompasses financial and accounting outcomes, such as ROA, ROI, and profitability. Finally, the most distal performance measure to HR practices is the capital market outcome, such as stock price, growth, and returns.

4. Methodology

The first group is in a traditional HRM environment. They consisted of 42 people, 26 females, and 16 males. The second group is in a strategic HRM environment. They consisted of 42 people, 24 females, and 18 males.

The functional HR factors within companies is likely to influence the practices used by respondents. For example, the test results shows that over 21% of Group B respondents indicate that labor productivity is their functional area, while only 15.1% fit into that category in Group A. The type of HR functions used, the commitment to HR quality, awareness of risk, and other factors could be largely influenced by these relative proportions. As the test results shows, nearly 48% of Group A respondents HRM characteristics, while over 68% of Group B respondents SHRM characteristics.

In order to explain the relationship between the variables, this paper uses survey questions, correlation analyses are suitable for estimation purposes, when the results are compared each other. The highest positive relationship is calculated between job performance and labor productivity(r=995947). On the other hand, there is no strong relationship between job satisfaction and sales growth(r=0.057210).

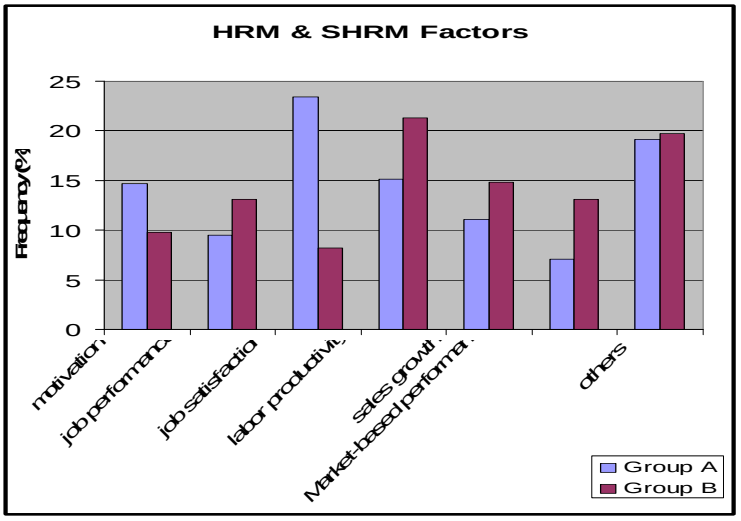
Table 1 shows t-test value

	Std. Error	**t-Statistic**	**Prob.**
Motivation	1.031.617	-1.336.642	0.2389
Job performance	1.542.992	-0.052559	0.9601
Job satisfaction	0.341293	-0.685521	0.5235
Labor productivity	0.658338	0.850669	0.4338
Sales growth	2.766.139	0.229428	0.8276
Market-based performance	2.094.123	0.379985	0.7196
others	0.088837	1.181.155	0.2907

Table 2 shows correlations among variables

Variable	**1**	**2**	**3**	**4**	**5**	**6**
Motivation	1.000.000	0.985433	0.961653	0.954244	0.090947	0.992694
Job satisfaction		1.000.000	0.950424	0.950006	0.057210	0.993539
Job performance			1.000.000	0.995947	0.075365	0.949943
Labor				1.000.000	0.110973	0.946379

productivity		
Sales growth	1.000.000	0.070649
Market-based performance		1.000.000



A and B differ considerably in several characteristics. Group B individuals' responses focused on labor productivity according to survey. Moreover, the individuals in Group A tend to be younger and more likely to work in financial functions, where there may be significant concern with skill, accuracy, and advanced practices.

Finally, the SHRM factor to be thought to bring up more in the future is the most important factor for accelerating and expansions of globalization.

Conclusions

We proposed that research progress requires addressing some basic definitional and levels of analyses issues involved in conceptualizing and measuring the HR system construct. Drawing on previous strategic HRM literature, we identified six components of the HR system structure: Market-based performance, Return on investment, Return on assets, Sales growth, Scrap rate, and Labor productivity. Concepts and insights from the literature on organizational levels of analysis provide important guidelines to researchers in conceptualizing and measuring these strategic HR system structure components. In addition, distinctions between strategic HR system components may help to shed some light on current methodological debates in the strategic HRM literature and avoid the potential for misattribution across strategic HR system components. Finally, we can begin to develop and test more complex and comprehensive models that promise to enhance our knowledge of the inter-relationship between strategic HR system components and firm performance outcomes.

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PROCUREMENT PHASES IN THE PROCESS OF PROCUREMENT IN KOSOVO

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Abstract

Critical studies of the procurement process in Kosova, and comparisons with the best European and worldwide experiences, are a good base for developing an efficient procurement system. I conducted a Survey in the Office of Procurement. A particular part of the work has been dedicated to procurement procedures. Comprehensive Study of Procurement in Kosovo based on facts and statistical indexes figured through statistical software SPSS, MINITAB, EXEL (highlights author of study), created easiness in compiling of this study. Evidences proceeded at the program created possibility for real reflection in the procurement field, experiences, difficulties and problems as well as Law deformation of Procurement Institution in Kosova. The objective of study was double: First, focusing on empirical studies and few pioneer experiences in the field of procurement, in the years 2000-2006 which showed the reality of the situation - personal experiences, failures and actions or events beyond their control. Second, based on research results and theorical/science achievements and positive experiences at the EU countries and worldwide in the procurement field, to suggest Kosova Institutions concrete models, practical and functional of Kosovo procurement. In order for the research to become much more resultant and conclusions more objective, theorical science model and research base are laid down first. Due to this aim, the study is based on the method of direct interview. In the research are included 43 units of Procurement in Kosova Questionary is followed by associated paper in regard to make it clear at interviewers for object of research and ensure confidentiality of answers. In order to avoid problems in the evaluation of answers given from canvasser, for any question one by one is defined the manner of reporting of results. Compiled work of study is based on primary and secondary data. Primary data are provided through data collection with survey from Procurement Entities, while, Procurement Law, regulations and Guidance as well as relevant Literature in the field of Procurement have been used as secondary data.

Keywords: *procurement process in Kosovo, publication of contract notice, design contest, tender evaluation*

1. Introduction. Formal procedures of tendering and Procurement Procedures[1]

Procedure whereof Government solicits offers, create condition and terms, as well as selects contractors is the essence of procurement process.

Planning procurement from the very first step on is very important[2]. So, the compilation of a procurement plan constitutes an essential issue of the procurement process and it has the purpose

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[1] Sue Arrowsmith, John Linarell, *Methods of Procuement, Regulating Public Procurement National and International Perspectives,* p. 459.

[2] Sue Arrosmith, *The Law of public and Utilities Procurement*, p. 355.

of stimulating competition and allowing the purchase of products with the more convenient prices. The procurement process starts with the procurement plan for various purchases (goods, works and services); it also starts with the provision of funds for procurement, which needs to be approved from persons duly authorized by the Law on Procurement and Finance. The Procurement Plan should describe certain projects, which have to be determined from Units or Departments, as a part of a Contracting Authority.

Units acts as an office guide for compilation of a procurement plan as much as exact of tendering.

Preparation of procurement year plan comprises the following activities:

- Describing quantity, quality and time for purchasing of supplies, services and works;
- Conducting a market research, in order to provide information for existing products and for actual suppliers able to provide these products;
- Defining the Procurement Method to be used;
- Managing the Procurement Process and the publication;
- Setting up the type of procedures;
- Setting up the type of procurement for supplies, services and works.

Preparing a good Procurement plan is very difficult. It is always important to consult experts in different field, who have experience in planning processes of contracts and request units which are beneficiary certain procurements.

2. Procurement phases

Publication of Contract Notice

The publication of the contract notice is considered an essential component of each regime of public procurement[3]. The aim of advertising or publishing a contract is to announce certain tender to Economic Operators, in order to create a proper competition. The Procurement Law anticipates certain regulations of contract notice. In Kosovo publication of contract notice it is regulated by the Public Procurement Law for contracts having a value equal or over 10.000 Euro.

Contract Notice can be loosed as the standard form as follows:

- Designation and subject of tender;
- Name and address of the Contracting Authority;
- Type of procedure;
- Deadline for submitting a tender;
- Main qualifications, professional, technical, economic and financial criteria;
- Awarding criterion (lowest-priced or most economically advantageous offer),
- Information regarding the delivery of goods, services or works,
- Notice of pre-bid conference, if necessary,
- Determinate price for the requirement of tender dossier, being the case,
- Contract value,
- Languages to be used for submission of the offer,
- Possibilities to ask for clarifications,
- Deadline within which tender dossier can be required,
- Common Procurement Vocabulary

Classic procedures for awarding contracts

[3] Sue Arrowsmith , *Regulating Public Procurement National and International Perspectives*, p. 553.

Different methods of awarding public procurement contracts derive from the theory and practice of many countries. Local and International newspapers and advertising through electronic web pages. This procedure is realized through certain terms of tendering. Applying of these includes:

Open procedure. Open procedure is considered as the most transparent procedure for public procurement[4], since it gives a possibility to present offers to all tenderers, on equal basis. Contracting Authorities will use an open procedure for awarding a public contract as much as possible and they will to use other procedures only where necessary. The use of other procedures is feasible only when the conditions to make use of the open procedure are not fulfilled. The meaning of the open procedure stays in the possibility, given to all potential candidates, to submit a tender.

Fundamental Principles of the open procedure are: transparency, equal treatment, competition, non-discrimination. These principles are used at all procedure steps. For example, when preparing the tendering procedure, at the moment of publication of the contract notices, at the evaluation of tenders, etc.

Open procedure can be realized through publication of the contract notice at the local procedure, can come to the one tender which can be chosen based on evaluating of tendereres as per Kosovo actual procurement Law states: *'Contract is awarded to eligible, qualified who has submitted responsible tender with appropriate/low price and other conditions presented before from CA at the tender dossier'.*

The Contract shall be awarded to the Bidder whose tender has been determined by the Evaluation Committee to be substantially responsive to the bidding documents as required from Contracting Authorities and who has offered the lowest evaluated Bid Price[5].

Open procedure do not create limitation at tenderers but contrariwise create a maximum of competition among tenderers. By using this form of procedure chances are very small to come across collusion, misuse or material benefit got by procurement officers or at any other level of management of Contracting Authorities.

Restricted procedure. Another method of procurement is the restricted procedure. GPA Article VII (3)/ defines this procedure as a *'selective tendering procedures',* since only qualified suppliers can be invited to submit a tender[6]. Best practices of procurement enabled usage of this procedure, so the Public Procurement Law permits and foresees particular regulations for using it in very special cases. In these cases the contract can be awarded only to Economic Operators that have determined technical, professional and economical capabilities. The main characteristic of this method if compared to open procedure is that it can be made in two phases: the first part relates to the pre-qualification phase, while the second part relates to the real tendering phase.

In the first Phase unfortunate candidates shall be rejected and the only qualified tenderers can be selected. Minimal requirements for qualification of candidates are:

(i) Eligible requirements
(ii) Professional suitability requirements
(iii) Economical financial standing
(iv) Technical and/or professional capabilities

In the second phase all qualified candidates are invited to submit their tenders; previously tender dossier containing technical specifications and conditions of contract has been prepared. This procedure is not such as restricted due to all interested candidates enables to submit requirements for participation. However, restriction of the method can be seen in the second phase,

[4] Sue Arrowsmith *, Regulating Public Procurement National and International Perspectives*, p. 460.
[5] *Ibidem.*
[6] *Idem.*, p. 468.

where the qualified candidates are invited to submit tenders and from all of them only one candidate can be awarded the contract. Open procedure also requires certain qualifications. The difference between the open procedure and the restricted procedure stays in the fact that in the first phase of the restricted procedure non qualified candidates can be eliminated, whereas in the open procedure all candidates have to be evaluated against administrative criteria, qualification and financial capabilities, and only Economic Operators that meet all criteria can be awarded the contract.

Negotiated Procedure after Publication of a Contract Notice. In general, negotiated procedure without of contract notice permits the procurement entity to avoid the application of the usual rules of open competition and transparency[7]. Negotiated procedure involves a procurement procedure which enables the Contracting Authority to invite Economic Operators and negotiate with them the contract conditions. At the first stage of procedure, similar regulations are applied as in the prequalification phase of the restricted procedure.

In the case of publication of contract notice for services, supplies or works without any discriminatory intent makes a nature of complex technical, financial or professional, negotiated procedure can be used in these cases as below:

- it is not possible to be prepare detailed technical specifications;
- the overall contract price cannot be envisaged.

This procedure includes two phases:

- Prequalification (open procedure) phase, and
- Negotiated (restricted) and tendering phase.

The Negotiated procedure after publication of a contract notice starts with the publication of the contract notice. The Contracting Authority invites candidates to submit a tender/proposal that complies with the minimum criteria specified in the contract notice and in the tender dossier, in accordance with clauses 47-52 of the current Procurement Law of Kosova (no.02/L-99, advertised with Regulation no. 2007/20). Non-qualified candidates shall be eliminated from the further participation. Afterwards the Contracting Authority will engage in negotiations with each qualified tenderer regarding the contract conditions (technical, economical, legal, etc.), in order to adjust tenderers' proposals to the concerned requirements contained in the contract notice and in the tender dossier.

After the tendering phase, the Contracting Authority has to identify and to award the contract to the bidder having submitted the best and most economically advantageous tender/proposal. Due to this, the negotiated procedure is not as transparent as the open or the restricted procedure and that explains why the application of this procedure is regulated in a categorical manner in the Procurement Law.

Negotiated Procedures without Publication of a Contract Notice. Contracting Authorities can make use of this procedure when only one possible supplier is available, or when the contract has to be awarded to the beforehand contractor[8].

The rationale behind the negotiation and the tendering phases is practically the same used in the Negotiated Procedure after publication of a contract notice.

The main characteristics of this method are:

- It does not involve publication of the contract notice and it is not open to competition
- It is only used in certain specific cases and its use is regulated by Clause 34 of Law nr. 02/L-99 on Procurement in Kosova, published with Regulation No.2007/20.

[7] Sue Arrowsmith , *Regulating Public Procurement National and International Perspectives*, chapter 9.
[8] Sue Arrowsmith , *Regulating Public Procurement National and International Perspectives*, p. 625.

In the Negotiated procedures without publication of a contract notice the Contracting Authority negotiates the conditions of the contract with one or more candidates, who are invited directly without prior publication of contract notice. The Contracting Authority can use negotiated procedure without publication of contract notice when only one supplier is available:

- for objective and compelling technical reasons;
- for objective and compiling arctic reasons;
- for valid legal reasons requiring the respect of exclusive rights;
- in case of monopoly (ex: delivery of water, electricity, gas or heating services);
- in case of extreme urgency;
- when additional deliveries from a current supplier/service or works provider is required, since using a different supplier would result in a significant incompatibility or in technical difficulties.

Performances of negotiated procedure without publication of contract notice in any manner do not release the Contracting Authority from some obligations, such as:

- to play an active role in the preparation of the contract, particularly with regard to price, terms of submission, quantities, technical characteristics and guaranties;
- to insure that the contract price is not higher then due trade price;
- to assess carefully the concerned product, service or work quality;

The main steps in the Negotiated procedure without of publication of contract notice are:

- invitation of candidates;
- verification that candidates fulfill qualification criteria as specified in the invitation;
- negotiation with candidates of conditions of contract set out in the contract notice;
- contract award.

Design Contest[9]

When a Contracting Authority intends to conduct a design contest, it shall prepare a design contest notice and then the procedure can be conducted as an open or a restricted procedure. It is important to point out that this method can be conducted as a pre-qualification. After this, the procedure to be followed can be the contract award without publication of a contract notice. The objective of a design contest is to enable the Contracting Authority to obtain a plan or design/project selected by a jury, after set it in competition, with or without given prices.

This method find application in the fields of spatial planning, reconstructing, architectonic, engineering, data processing and works linked to designing.

Price Quotation Procedure. Price quotation procedure[10] is permitted for the low and minimal value contracts, for supplies and services. Therefore, the use of this method is designed from the essential elements as supplies and services with procured by common nature do not need to be specially produced or customized.

The current Procurement Law of Kosova states that 'each contract that has foreseen value equal or higher than 1,000 Euros, but lower than 10,000 Euros shall be considered 'low contract value', as well as each public contract that foreseen value is lower than 1,000 Euros shall be considered as' minimal contract value'.

The Price quotation procedure starts with sending a written request to at least 3 suppliers. Quotations should be obtained within not be less than 10 calendar days from the date of invoice of the request for price quotation. The selection of suppliers who will receive the price quotation

[9] Regulation no. 2007/20 on the promulgation of the law amending Law no. 2003/17 on Public Procurement in Kosovo adopted by the Assembly of Kosovo ratificated on 6 June 2007 by UNMIK/Regulation/2007/20.

[10] Regulation no. 2007/20 on the promulgation of the law amending Law no. 2003/17 on Public Procurement in Kosovo adopted by the Assembly of Kosovo ratificated on 6 June 2007 by UNMIK/Regulation/2007/20.

request shall be made in a neither way that no Economic Operator has to be discriminated nor favorite.

In order to conduct a price quotation procedure it is not compulsion to publish contract notice. Contracting Authorities directly send the written tender dossier to Economic Operators. Initially, the Contracting Authority prepares the tender dossier, which contains the following:

- description of the procurement object;
- selection criteria;
- technical specifications/terms of references;
- price specification (it will have to contain total and fix price);
- deadline for submission of quotations.

Tender Opening

Organizing the tenders' opening means that all interested contractors in the procurement can submit a tender[11].

Submitted tenders at the case of open procedures, restricted or negotiated after publication of contract notice can be only publicly opened. With these results opening of envelopes and identification of tenders submitted on the limited time. The Contracting Authority has to define in the contract notice and in the tender dossier the time and place for opening of public tenders. The opening of tenders has to take place immediately after the expiration of the deadline for submission, as defined in the tender dossier and in the contract notice.

Tender evaluation. Tender evaluation means responsively assessing of tenders, that is considering if the tender is acceptable and comparable, and which tender shall be accepted by the Procurement Entity for awarding[12.]

The phase of procurement where there can be a selection of responsive tenders is the Evaluation of tender.

It is important that the tender dossier contains all requirements and conditions of tender indicated in a clear manner, since it will be on the basis of the indicated requirements that the successful bidder will be awarded the contract.

On the one side, the Contracting Authority will have to go through the evaluation of all tenders (no less than three tenders should be received to have a valid submission) which have met the set requirements. On the other side, the Contracting Authority will have to assess tenders between responsive tenders. So we can say that evaluation of tenders and require responsibility capacity and professionalism in the field of a concerned tender. Only persons qualified in that precise field can be members of the evaluation committee. These persons can be selected within the Contracting Authority but can be also contracted from outside. The procurement officer can be a member of the evaluation session in order to ensure compliance with the procurement rules.

For the each evaluation session a panel of evaluation has to be formed, with an odd number of members, who cannot be less than three. However, decision shall be unanimous.

An important rule is that tenders that are devoid of information shall be eliminated. Should the panel find any absence, unconformity or any minor irregularity, it has to ask tenderers for clarification.

The Chairman of the evaluation committee can also decide to disqualify/reject a tender, if he/she thinks the tender is not complete and cannot be complete even with additional clarifications.

Evaluation of tenders in general follows these steps:

- Assessment of tender submitted on time;
- Assessment of tenders submitted by qualified candidates;
- Assessment of complete tenders;

[11] Sue Arrowsmith *, Regulating Public Procurement National and International Perspectives*, p. 466.
[12] Sue Arrowsmith *, Regulating Public Procurement National and International Perspectives*, p. 649.

- Assessment of administratively complete tenders;
- Assessment of technically complete tenders;
- Comparison and evaluation of tenders;
- Listing of financial tenders (from the lowest to the higher price).

A key issue that has to be carefully addressed is that tenderers shall be treated equally. If a tenderer is given the chance to provide additional information, then all tenderers should be given the same opportunity.

Contracts - General Principles

The meaning of contract is linked to an agreement between two parties, as individuals or legal organizations that conveys their rights and obligations. Only a person or legal entity can be part to a contract, while immovability, premises, animals can be only the object of a contract.

The basis of a contract is the agreement or expression of bilateral consent. The parts can express their consent at the same time or through separate declarations.[13.]

Some examples of agreements are:

- Treaties -agreements between Countries;
- Stakeholders Agreements between Stakeholder Companies;
- Supply contracts;
- Service Contracts;
- Work Contracts;
- Renting Contracts etc.

The final aim of procurement is arriving at signing a public contract. The main elements of this contract are: the title of the contract, the general and special conditions, the terms and the manner of payment and the date of signing of the contract.

3. Research findings and discussion of findings

In this part of work are reflected the main results that comes from research of main characteristics of the survey of procurement, level of procurement staff, number of certified staff of procurement.

Number and type of contracts based on Procurement Units. Regarding type, the biggest number of contracts contains supplies contracts 1.584 or 47, 28%, then service contracts 1.030 or 30, 8%, and 736 or 21, 97% work contracts. Looking base on Procurement units 1.249 contracts or 37, 28% from the realized total number at year 2006 contain realized contracts at Procurement Units into Public Enterprises. The higher number of contracts it is realized at two Public Enterprises, at KEK and PTK. After come realized contracts at Procurement Municipality Units, totally 850 contracts or 25, 4% from the total number of contracts realized at year 2006, and contract realized at Procurement Units at Other Authorities, in all 608 contracts or 18, 15%. Less numbers of contracts are realized at Ministries of Kosova Government, totally 246 or 7,34%, afterwards at Agencies and Regulatory 397 or 11,85%. This can be explained with fact that number of Procurement procedures at those units in general is small, and reason is low Budget.

Number and type of procurement procedure based on procurement units. Regarding research results through direct interviewing of 43 procurement units, derives that at year 2006 are realized totally 7.069 procurement procedures. From them the biggest number contains open procedure 2.403 or 33, 99%, the number of prove quotation procedure (no. of procurement procedures price quotation) 2.032 or 28, 75%, the number of minimal procedure (nr. of procurement procedures with minimal value) 2021 or 28, 58% and number of procedures without

[13] Lotar Hofman(2006), Contracts-General Principals.

publication of contract notice 447 or 6, 32%. The number of other procedure based on this research is smaller, 111 or 1, 57% are restricted procedure, 31 or 0, 44% are design contest, and 24 or 0, 34% are procedures after publication of contract notice (no. of procurement procedures negotiated after publication of contract notice.

Contract value based on procurement units at year 2006[14]. Contract values based on procurement interviewed at year 2006 it is enough different. Extreme values of contracts particularly are registered at Public Enterprise and at other Procurement Authorities. Minimal and maximal values of contracts based on procurement units turns between 451.495,36 €, and 2.600.000€ at interviewing procurement units at Ministries, 35.000 € and 9.000.000€ at Municipality units of Procurement 84.474 € and 124.000.000 € at Procurement Public Enterprises Units and 70.000 and 12.000.000 at Procurement units at Other Authorities of Procurement.

Number of annulled procedures based on main reasons and Procurement Units. More than 80% of annulled contracts are registered at Public Enterprises (106) and in level of Procurement Units at Procurement Municipality Authorities (89). Analyzing specific reasons of annulling of contracts it worth to stress that it is relatively small number of Authorities which are ready to answer at this question lay. So, from 43 interviewed procurement units, only 18 from them are answered.

When plan was handed over in year 2006. Particularly stressing from 43 Interviewed Procurement Authorities, only 34 of them has been answered at question for the approving of Procurement Plan. From the analyze it is noticed that at interviewed at Procurement units, 88, 2% from them it is stressed that Procurement plan approve on time and 11, 8% of cases approve late. At this research Procurement Units it seems that more exact at plan approving are Public Enterprises. So, it is noticed that on time Procurement plan has been approved 11 of 13 Procurement Municipality units, 4 of 6 Agencies and Regulators, 3of 6 Ministry Procurement units, and 5of 8 Other Authority units.

Conclusions

The following are given conclusions and main recommendations that derive from this work, that can help at least a little to the Authorities in Kosova in order to create a vision and more real approach toward development of the procurement field in the future.

1. Procurement process in Kosova is rather new. The first cells of procurement units were established in the year 2000.

2. The number of contracts realized in the year 2006 was higher in Public Enterprises and Municipalities. This is presented as a derivation of high budget of the Public Enterprises and high needs for the large-scale procurements.

3. The Procurement Law in Kosova is very strict. According to this, I recommend that for Public Enterprises there should be a separate Procurement Law, as it is happening in the European Union Countries.

4. To have as fewer cancellations of tenders, and for this process to be characterized as a high efficiency scale, I recommend that in future more clear and exact technical specification and other tender conditions should be made, in a detailed manner in the tender dossier.

5. I recommend being more applied open procedure of tendering then price quotation procedure and minimal procedures.

6. Due to specific conditions that Kosova has, small trade etc, the Procurement law should be amended to require only two responsive tenders instead of three, in order to avoid the very often repeated tender cancellations.

[14] Source: Research Rezults (author: 2007), Prishtina.

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EUROPEAN UNEMPLOYMENT TRENDS AND SOCIAL DUMPING - FINANCIAL CRISIS AFTERMATHS -

Simona MIHAI YIANNAKI*

Abstract

High unemployment is widely regarded as the most important challenge facing European policy-makers today. At unemployment rates of between 6.5% and 25% across the countries of the Union, Europe's performance compares particularly unfavourably with that of the United States. But does this answer for an inability to understand the fundamental causes of the problem, being them economic, social or political or a failure to find the economic policies that will solve it? Or is there merely a lack of political will in the social system application? Is 'social dumping' still present under a common EU social policy of the Lisbon Treaty and if so, which is its 'face 'now? Is social dumping to be welcomed, as a healthy energy which will oblige countries to lighten the excessive and harmful regulations imposed on EU labour markets? How should the circumstances of the new EU member states be taken into account when applying labour legislation concerning social policy and when tackling unemployment?

Keywords*: unemployment, social dumping, migration, EU labour market, market rigidities*

Introduction

The facts are that the OECD, a think tank of rich countries, expects to attain a post 1945-high of 10% unemployment or some 57million people in late 2010.[1]

In E.U, as in the world, states are pursuing divergent routes in their way out of the 2007-2009 financial crisis. Except for solutions with strong political, economic and social contents, present integration theories in Europe spin around three main ideas: federalism, neofunctionalism and liberal inter-governmentalism, with the later acquiring the leading position[2]. Strictly related to the labour market, some solutions rely on general politics, others on trade unions, while others on the flexibility of the wage contract, facts which lead to a centre-periphery type positioning among countries. Since the Maastricht treaty did not manage to shift towards the 'flexibility' solution entirely, the Lisbon treaty now in force, with article 28 states that workers may "take collective action to defend their interests, including strike action", it immediately qualifies this "fundamental right" by explaining that "the limits for the exercise of collective action, including strike action, come under national laws and practices".

Under this context of law and the need to tackle new involuntary unemployment[3] trends as a result of the latest financial crisis, this paper addresses the area of E.U. unemployment in the main regions of E.U. trying to identify differences and common issues for the purpose of forecasting, utilizing the New Classical Macroeconomics theory, modified so that it comprises agents'

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[1] The World in 2010. Beyond the economic crisis. *The Economist*. 2009.

[2] Richard Baldwin and Charles Wyplosz. *The Economics of European Union Integration*. 3rd Ed. Mc Graw Hill. 2009.

[3] Assar Lindbeck and Dennis J. Snower. *The Insider-Outsider Theory of Employment and Unemployment*. The MIT Press Cambridge, Massachusetts, London, England 1988. pp.47.

engagement in information acquisition and presenting unexploited gains from trade. The analysed data are mainly from secondary and tertiary information as input sources.

The novelty of the study is that it keeps away from analyses set out by previous financial crises except for the first oil price crisis in the 1974, where the author has identified specific common parts related to the topic of the study.

It looks into the specific scenario settings of the latest economic recession in an integrative way at macroeconomic level. For such purpose, the study redefines the unemployment forecasting procedure focusing on four main E.U. models (the continental, the Nordic, the Anglo-Saxon and the South-Eastern European model), rather than by each country characteristics. The reason is dictated by the minimal error input of the most populated countries in E.U., building up to over 90% of total E.U. population and employed population.

Next, since the main concern post crisis and post Lisbon Treaty remains the 'social dumping', the paper reviews the theory of unemployment and social dumping in terms of migration waves and market rigidities, important in productivity determination.

Then, as a spin out of unemployment and as a main concern for corporate and social wage policies, the study looks into the social dumping effect of raising unemployment trend in E.U., providing thus also an analysis of the most recent cases in E.U. (the Rüffert, the Laval, and the Viking cases).

Finally the conclusions relate to the impact of "imported" unemployment on social dumping if any and recommendations regarding possible ways to reduce chronic unemployment and avoid future social dumping effects not through law implementation but rather through practical applications of social work, strengthening of EU social policy that may assist the creation of a high skill and high productivity growth convergence.

1. The European labour market and the premises for forecasting post financial crisis unemployment trends

In order to forecast unemployment, it is recommended to see what kind of unemployment we deal with, specify the terminology employed within this paper, besides the theories used, as well as review some main causes of the concept applied for the financial crisis period and immediately thereafter.

1.1. Terminology

In Keynesian economics, Duffy (2009) declares that involuntary unemployment is represented by the gap between the number of people working when the labor market is in equilibrium and the total number of people available to work. Unemployment is but one symptom of a malfunctioning labour market (Baldwin & Wyplosz 2004, p.429).

The discussion in this paper regards involuntary unemployment type 1, 2 and 3, as mentioned by Lindbeck and Snower (1988). "U1: At prevailing current wages and expected future wages (normalized for productivity differences), the unemployed workers would be better off being employed than remaining unemployed, but they are unable to find jobs.

U2: At prevailing current wages and expected future wages (normalized for productivity differences), some workers are unsuccessful in finding jobs because they face a more limited choice set between work and remuneration than incumbent employees face.

U3: Workers unsuccessfully seek work at real wages that fall short of their potential contribution to society (given the appropriate, feasible intervention) „[4].

[4] Assar Lindbeck and Dennis J. Snower. *The Insider-Outsider Theory of Employment and Unemployment*. The MIT Press Cambridge, Massachusetts, London, England 1988. pp.47.

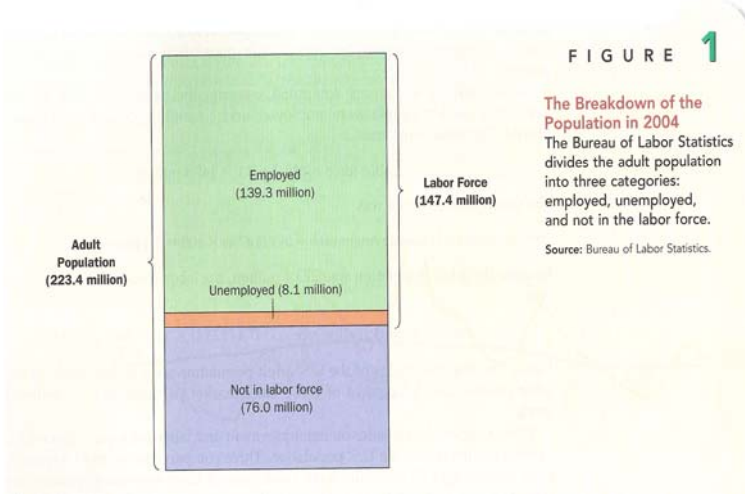


Fig.1. The U.S. example of breakdown of population in 2004 as per the Bureau of Labour Statistics[5].

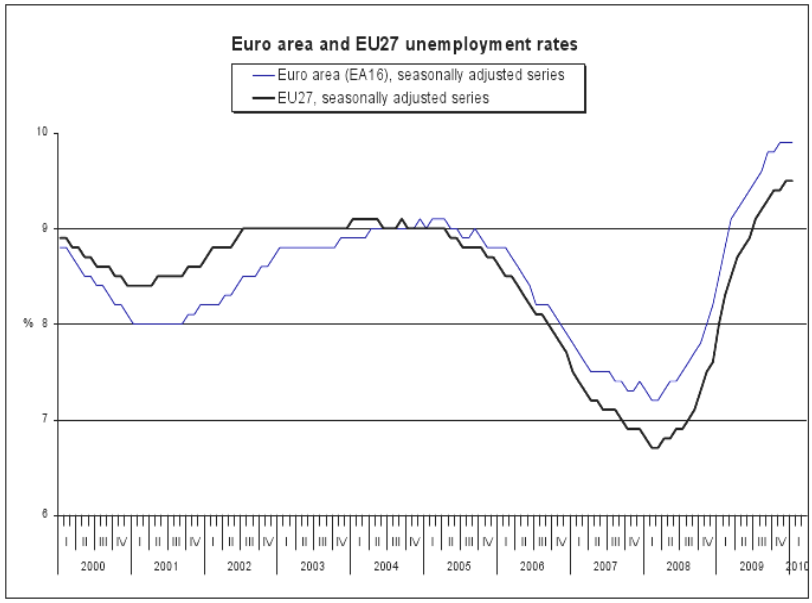


Fig. 2. The EUROSTAT statistics for EUO area and EU 27[6] unemployment rates[7].

[5] Gregory N. Mankin. *Principles of macroeconomics*. Thomson South-Western, 2007.

[6] The euro area (EA16) consists of Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Slovakia and Finland. The EU27 includes all countries in the European Union.

[7] The Eurostat News Relese euroindicators. 29/ 2010. http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-01032010-AP/EN/3-01032010-AP-EN.PDF. (accessed 15 March 2010)

Grant, Vidler with Ellams (2003, p. 92)[8] help us define the term 'unemployment', which indicates that labor markets are not clearing. Some of those willing and able to work cannot obtain a job. The existence of unemployment signifies that a nation shall not be producing on its production possibility curve and so will not be achieving productive efficiency. The extent to which unemployment causes labour market failure is obviously influenced by the number of people who are out of work. Moreover, it is influenced by how long people are out of work. The longer someone is unemployed, the more they get out of touch with the skills needed and the greater the risk that they may quit hoping in finding a job!

1.1.1 How to measure unemployment

Firstly, Mankiw (2007) writes that it is the job of the Bureau of Labor Statistics (BLS), which is part of the Department of Labor to carry this task. The BLS produces data on unemployment but also on other aspects concerning the labor market once per month. For instance, types of employment, length of the average workweek along with the duration of unemployment. The data under discussion are derived from a regular survey of about 60,000 households – named, the *Current Population Survey*. Then, the BLS -based on the answers to survey questions- places each adult (aged 16+) in each surveyed household into 1 of the 3 following categories:

- Employed: This category includes those who worked as paid employees, worked in their own business, or worked as unpaid workers in a family member's business. It also includes those who were not working but who had jobs from which they were temporarily absent due to e.g. vacation, illness, or bad weather.
- Unemployed: This category includes those who were not employed, were available for work, and had tried to find employment during the previous 4 weeks. In addition, it includes those waiting to be recalled to a job from which they had been laid off.
- Not in the labor force: This category includes those who fit neither of the first 2 categories, e.g. full-time students, homemakers, or retirees.

Unemployment rate = (No. of unemployed/Labor force)x 100

1.1.2 Historical background

"All peoples throughout all of human history have faced the uncertainties brought on by unemployment, illness, disability, death and old age [and] in the realm of economics, these inevitable facets of life are said to be threats to one's economic security"[9]. Grant and Vidler (2000, p. 22) hold that unemployment did not exist in communist times. All those of working age were given a job. State-owned companies produced not according to demand but in response to orders from the Ministry of Economics. Many firms employed way too many workers by western standards[10].

1.1.3 Other employed terminology:

- Unemployment rate: the percentage of the labor force that is unemployed (Mankiw 2007, p.878).
- Labor force: the total number of workers, including both the employed and the unemployed (Mankiw 2007, p.875).

[8] Susan Grant, Chris Vidler with Andrew Ellams (2003, pp. 92-4): ECONOMICS A2 for Edexcel. Great Britain: Oxford. Heinemann Educational Publishers.

[9] 'Traditional Sources of Economic Security', http://www.ssa.gov/

[10] N.Gregory Mankiw (2007): PRINCIPLES OF ECONOMICS Fourth Edition. U.S.A.: Ohio. Thomson Higher Education.

- Natural rate of unemployment: the normal rate of unemployment around which unemployment rate fluctuates (Mankiw 2007, p.616)..
- Social: this term derives from the Latin *socius* meaning, a partner or acting jointly11.
- Dumping: The export of products at a price below their cost of production.
- Labour Migration/mobility: labour relocation from one nation to another in search of better wages or other benefits

1.2. Unemployment and its causes

Unemployment level is the difference between the labour that people would like to supply at the going wage (L1) and the number of workers actually hired (L0); this is marked as u0 in the left panel of the diagram (see Fig.3 below).

At the same time collective/unionist negotiations do not necessarily imply lack of unemployment nor higher or lower unemployment rates, but rather a different discourse on other elements of the job, which is job security and or immigration issues (see right hand side of Fig. 3 below). In the case immigration is viewed nota s a substitute, but as a complement, then it raises the demand for native workers and this may results in higher wages, higher employment and an ambiguous impact on unemployment.

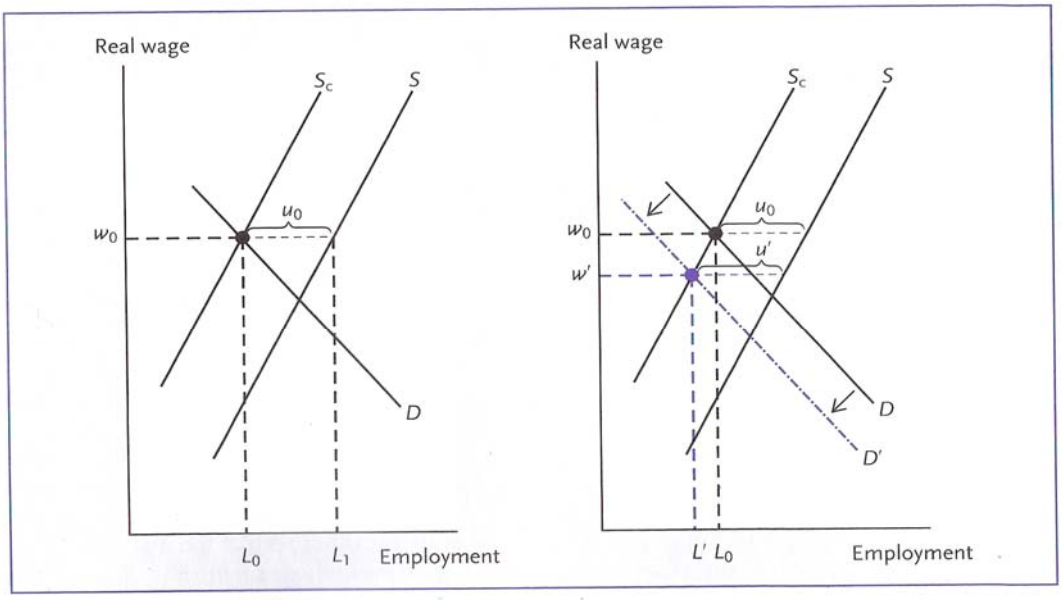


FIGURE 7-13: A SIMPLE MODEL OF UNEMPLOYMENT

Fig. 3. A simple model of Unemployment[12]

Another factor that might lead to a rise in the level of unemployment in an economy is when generous unemployment benefits exist. Some economists in Moynihan & Titley (2000, p.249)[13]

[11] HEINEMANN ENGLISH DICTIONARY (1995). UK: Oxford. Heinemann Educational Books Ltd 1979.

[12] Richard Baldwin and Charles Wyplosz. *The Economics of European Union Integration*. 3rd Ed. Mc Graw Hill. 2004. p.203.

[13] Dan Moynihan & Brian Titley . 2000. *ECONOMICS ~ A Complete Course ~ Third Edition*. UK: Oxford. OXFORD UNIVERSITY PRESS. pp. 249, 259, 279-287,312

textbook, argue that these so called 'unemployment benefits' may reduce some people's willingness to find work. Maunder, Myers, Wall and Miller (2000, p.225-6)[14] offer the example of the UK, where people have had to show that they really are available for work before unemployment benefits are paid. However, others argue that these benefits actually reduce the costs of searching for employment and thus, help the unemployed to look for work (Moynihan & Titley 2000, p.249).

One common belief is that immigrants cause unemployment (Baldwin & Wyplosz 2004, p. 202) while other authors find little or no effect of immigration on the risk of being unemployed, which has to do with the economic notions of "complementarity" and "substituability" (Baldwin & Wyplosz 2004, pp.200-204). More generally, immigrants who have skills that are complementary to the skill mix in the receiving nation are typically less likely to create losers in the receiving nation.

1.3. Unemployment and macroeconomic indicators

Many blame structural market rigidities for the underperformance of European labour markets. After the completion of the European Monetary System, it is vital to understand how labour market institutions will interact with other structural changes taking place in the E.U. and abroad, especially in the U.S.

Either obtaining an absolute or a relative efficiency, which everyone generally targets, becomes likely to turn out to be more important within the monetary union context, since increased specialization and more intense competition should lead to increased opportunities for workforce reallocation, increased migration waves and directions. At the same time, free mobility of capital will worsen the economies of those countries and regions which are relatively inefficient. Most of the cross border FDI and international portfolio investments into emerging markets dries up till recovery comes back.

Yet, since labour demand becomes more turbulent, the E.U. may call for measures to protect employment, especially since there is a limited maneuver space for the use of monetary and fiscal policies. Such policies are usually needed to offset asymmetric and economic shocks which, at their turn, lead to radical changes in major macroeconomic indicators, such as the Gross Domestic Product (GDP) and unemployment.

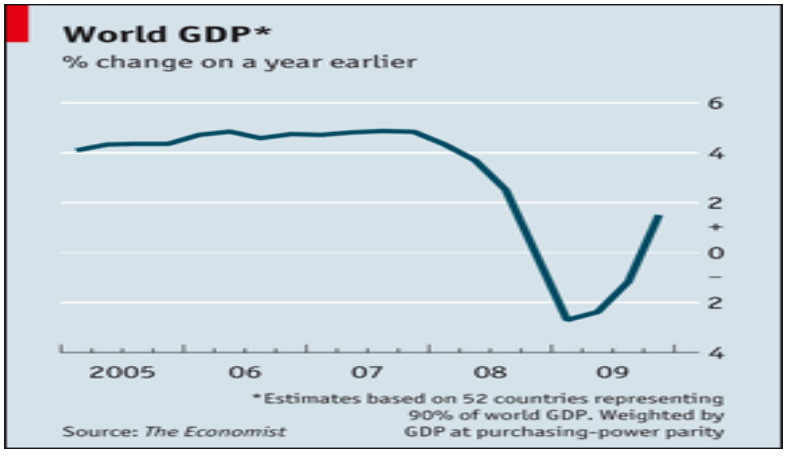


Fig. 4.World GDP forecast for 2010.

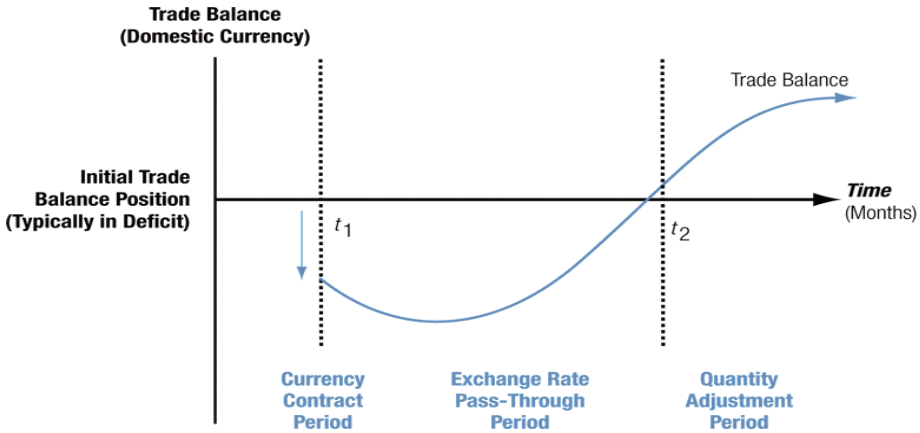
[14] Peter MAUNDER, Danny MYERS, Nancy WALL & Roger LeRoy MILLER: *ECONOMICS EXPLAINED*. UK: London. HarperCollins *Publishers* Limited. Pp. 225-226.

Which other indicators can show the way towards unemployment forecasting?

In other shock analyses[15], the explanations of the 1980s slump in Europe finds the principal source, or at any rate a major source, in the fiscal and monetary shocks originating in the USA in the first few years of the decade 1980s.

Again, after the 1990s and the IT bubble, the 2007 U.S lead financial crisis, due to sizable trade and financial deficit as a result of the bailout system applied in the U.S. and in some large E.U. economies for the purpose of backing up the mistakes of banks under the cover of financial innovation, these countries are now compiled to devalue their currency. Devaluing currency means an automatic spur in exports as in the J-curve as per Fig. 5 below.

However, the spur in exports does not necessarily reflect a more efficient way of producing such goods and services nor does it mean that these are produced mostly by the employed national people and not by immigrants. The economic problem arising when product quality is assessed through the product price have been studied in the context of many markets (e.g. Akerlof, 1970; Arrow,1963), not just the labour market, taking the forms of adverse selection and moral hazard. Besides, these also converge with the findings of Weiss, 1980 and Malcomson, 1981 in the "productivity differential models", where one cannot be distinguished the diference between high-productivity and low-productivity workers.



If export products are predominantly priced and invoiced in domestic currency, and imports are predominantly priced and invoiced in foreign currency, a sudden devaluation of the domestic currency can possibly result—initially—in a deterioration of the balance on trade. After exchange rate changes are passed-through to product prices, and markets have time to respond to price changes by altering market demands, the trade balance will improve. The currency contract period may last from three to six months, with pass-through and quality adjustment following for an additional three to six months.

Fig. 5 The J-curve.[16]

What we can infer from Fig. 5 above is that a period of 6 to 12 months of adjustment of trade balance deficit may be a way of buying time for redressing the foreign exchange course and the entire balance of payments.

[15] Jean-Paul Fitoussi and Edmund S. Phelps, The Slump in Europe. Reconstructinfg Open Econopmy Theory. Basil Balckwell. 1988. pp53.

[16] David K Eitman, Arthur Stonehill, Michael H. Moffett, Multinational Business Finance, 12th Ed. Pearson International Edition. 2010.

However, some devaluation can be self-destructive, it makes imports more expensive, then the solution is that instead of importing the goods one needs to get the production efficiency in the domestic market by "importing" the 50% costs of production, which in general is the labour cost, in brief, one should apply to the migrant's work force.

Studies held in the 1980s, also show that the package of policy innovations, by raising real interest rate in Europe and lowering the real value of the European currencies had predominantly contradictory effects upon both employment and output in Europe over the five year period of study 1981-1985. In that case some elements were missing compared to the new settings: the migration factor, the new wages costs, the subsidies in investments and bailouts, and possible liquidity spur and credit supply enhancement.

In this case EU should see increased employment in its consumer–good markets to offset reduced employment in the capital/financial-good market, thus the prices in the consumer-good markets should be over those in the capital–good market. But, a higher consumer-good price level entails a higher indexed or contractual wages, an effect which acts to reduce aggregate output and employment, leading to accelerated retirement of workers rather than re-employment at new firms, on top of further lay offs.

When considering the starting point of the financial crisis, the U.S. financial markets, the study tries to show the real domino effect into the E.U. markets, including the labour one.

Doesn't anyone know the Brahms-Solow lore that the higher interest rates in the US depress output in Europe? (the rise in interest rats spurs the fixed quantity of European money and to achieve faster velocity and thus push up output and that the sole effects of the reduced investment expenditure are to increase the amount of output that must be exported at a given interest rate. A real depreciation of Euro will drive mark-ups up thus cubing the supply of real balances and reducing output in EU and to reduce mark up sin the US thus boosting real balance there until the two interest rates are brought into a line.

The same structural balance of payments deficiencies will occur in E.U, the same devaluation of currency and the same trend to spur exports and then the need for 'imported' labor. However, the pure economic issue becomes then the labour efficiency or productivity or its costs. Thus, the trade between a flexible-wage in the U.S. and a rigid-wage Europe in a theoretical landscape is in fact a move from autarchy to free trade that may more or less double European unemployment, especially in certain countries. Why is that?

1.4. Today's unemployment compared to the post 1973 crisis one

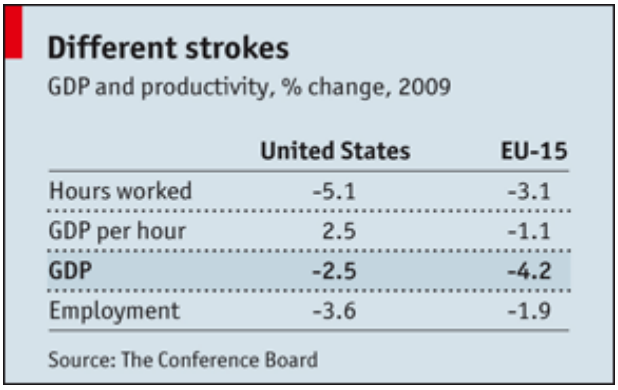
Unemployment has been steadily increasing since the first oil shock in Europe, while the rate of increase unemployment in the US has been three times lower in the 1980-1984 period than in the period following the first oil shock. These trends reflect contrasting evolutions, as unemployment rate has actually decreased in America since 1982 and there is not a single year where it did so in Europe until the bumpy recovery that began in Germany, UK and Italy in 1986. In the period 1974-1980 the annual job creation was higher then the previous period of rapid growth of GDP in 1964 to 1973. In contrast, in the 1981-1984 period, employment increased by 5.8 million in the US and decreased by 2.6 million[17] in Europe, bearing in mind the two regions have similar size of labour force.

Not so recently, the U.S. wages have risen to the European level, due to their flexible structures. Also, such entry as that of the unskilled "South" to world markets raises European unemployment. Europe's commitment to the high wage and limited hours of work wholly protects

[17] Jean-Paul Fitoussi and Edmund S. Phelps, The Slump in Europe. Reconstructinfg Open Econopmy Theory. Basil Balckwell. 1988. pp33-34.

the U.S from further unemployment shocks. Immigration to U.S. raises American income, but shrinks European income dollar for dollar, while European unemployment escalates, as shown in fig. 5 below.

As presented in the following Fig 6., in 2009, the U.S hours worked on average per employee dropped by 5.1 hours compared to only 3.1 hours in EU-15. Conversely, the GDP has dropped more in EU than in the U.S, but not yet the employment level. Comparing figures and patterns, we can see very similar reactions of macroeconomic indicators including the unemployment trend within the EU and the U.S. after the recent financial crisis and the post crisis period of the first oil-price crash in 1974.



Different strokes

GDP and productivity, % change, 2009

	United States	EU-15
Hours worked	-5.1	-3.1
GDP per hour	2.5	-1.1
GDP	-2.5	-4.2
Employment	-3.6	-1.9

Source: The Conference Board

Fig. 6. GDP productivity change in 2009 the U.S. vs. the EU 15.

One reason is the levier effect of the financial crisis that has not fully hit the bottom in the E.U., others base it on the shortening of the working hours per week in EU compared to the U.S., or others take the work force productivity as a whole, while other linked all these to the social dumping effect within the E.U. as a result of the latest integration wave from east to west.

Bearing all these in mind, we come back to the issue of capital and labour mobility. It becomes interesting to see if the recent EU enlargements have stirred the dispute about whether labour migration from the east to the west is causing the unemployment relocation, unemployment traps[18] and social dumping in the EU, with the effect of distressing traditional national systems of labour market regulation.

In general, studies[19] have shown that there is little evidence of greater labour mobility causing new social dumping pressures on a widespread basis. However, it goes on to suggest that the situation may change if the EU adopts neoliberal policies at the same time as promoting greater labour market openness between the Member States, as the Lisbon treaty does.

Regarding social considerations, the job and opportunity to work fairness, the income stability post the 2007-2009 financial crisis and the job security seem to be tackled by Europeans in their quest for building a dynamic knowledge-based economy, capable of sustainable growth with more and better jobs and greater social cohesion.

[18] Unemployment trap is created when, due to social insurance systems, the unemployed cannot afford to accept a job once they compare the wages that they would get with the unemployment benefits they receive, usually more rewarding.

[19] Jimmy Donaghey and PauTeague l. The free movement of workers and social Europe: maintaining the European ideal, *Industrial Relations Journal,* 37. Issue 6, Pages 652 – 666, 1 Nov 2006.

In concluding this section, it becomes key to understand the impact of GDP change as element of economic competitiveness, the migration issue and more the general response of the social systems (difficult to be quantified) for predicting future EU unemployment trends.

2. The four main E.U. models: the continental, the Nordic, the Anglo-Saxon and the South-Eastern European and the EU unemployment trends

Most EU countries put a high weight on social concerns relative to economic efficiency, while US and the UK incline to the other way.

In EU, labour market inflexibility and post financial crisis need for redress will incur higher costs in terms of unemployment and reduced growth potential, where unemployment may raise through migration of unemployment-prone workers towards areas with best social protection, while the best prepared and trained/educated will target more flexible labour markets. Thus, the choice is high social protection and heavy tax burdens, needed to compensate for it, alongside with economic effectiveness with low unemployment and moderate taxes and labour policies.

In E.U., we have identified four models, geographic-wise, coming also from a more egalitarian and solidarity type of labour markets, but inflexible towards more flexible ones, but individualistic. These are the following: the continental, the Nordic, the Anglo-Saxon and the South-Eastern European

2.1 The Continental Model

This model borrows from Bertola et al (2001), and it generalise things rather than playing on differences. We consider in this model countries, such as Austria, Belgium, France and Germany, countries concerned about detailed labour market legislation and all aspects of employment, with fairly high minimum wages, strict restrictions on dismissals, generous unemployment benefits which makes unemployment long-lasting and low employment rates with low hours worked and inflexible, where citizens are protected by highly developed welfare systems. This model faces high unemployment threats upon economic crisis due to their social model. Its representative countries have an unemployment level for end of 2010 ranging from 10% to 10.9 %, close to the average of 11% of the EU, due to government pump-priming in the labour markets.

Depending on the continental model needs of skilled and unskilled people, the rules of the game are played by labour laws modifications. Germany, a very common continental model labour market, as a whole is underemployed. When “guest workers” from Turkey, Italy and Greece, apart form other non-EU citizens, flooded in to ease labour shortages in the 1950s and 60s, Germans thought they would eventually leave. Since1980s the government has tried to pay them to go. For the past decade though, it accepts that Germany is an “immigration country”. A citizenship law adopted in 2000 mentioned that people not born German could become so was followed in 2005 by an immigration law that inched open the doors for skilled foreigners.

However, for various reasons, immigrants play a disproportionately small role in Germany’s labour force. Nearly 30% of Germany’s Turks, the largest group of immigrants, have no secondary-school diploma, and just 14% qualify to go to university. Some 16% are dependent on welfare, twice the share of native Germans. In 2005, for example, the unemployment rate among Turks was 23%, compared with 10% for native Germans.

While Anglo-Saxons were caught in consumptions, Germans kept saving. Domestic investment has not kept the pace. The result of Germans’ efficiency at exporting, combined with their reluctance to spend and invest, has brought in huge trade surpluses. Most recently, Germany’s excess savings have been directed abroad–often into subprime assets in America and government bonds in such countries as Greece. It would be not sustained to keep on thinking a

prudent Germany is responsible for Greece's high deficits or Spain's property bubble. But it is likely that, within a single-currency zone, usual surplus countries tend to be matched by usual deficit ones.

2.2 The Nordic model

Nordic countries including Sweden, Norway, Finland, Denmark and Netherlands offer even a more extensive welfare system than the continental one, with the exceptions of the Baltic countries[20] which may soon follow anyway the Lisbon treaty. The Scandinavians are deeply attached to income equality, achieved through wage compensation although not risk or talent rewarding, a heavy and progressive taxation, and by combining a unique degree of solidarity and social cohesion with relative harshness in tackling unemployment. The Scandinavians are however opposing the continental model on the ground of economic and social inefficiency, despite being themselves on the extreme side of large welfare state. Its representative countries have an unemployment level for end of 2010 ranging from 6.2% to 10.7 %, much under the average of 11% of the EU, due to strong social protection and efficiency re-boosts in their economies thanks to Norway's oil and gas resources, but not neglecting Sweden's exposure to the Baltic banking markets and Netherlands involvement in banks bailouts..

2.3 The Anglo-Saxon Model

In the past decade Britain has come across experimenting new active unemployment policies, yet structurally the U.K. in the post Margaret Thatcher era got closer to the US flexible labour system than the continental one. The relatively recent "welfare to work' program aims at paying people to work rather than servicing unemployment benefits, but together with the Scandinavians, Britain signed the Lisbon treaty, getting now closer to balancing economic efficiency with social cohesion, despite its visible closeness towards the US model. The U.K and the Irish economies are hit by levels of 10 to 12% due mainly to their exposure to the US markets, which means their unemployment rate will go faster down than in the one in the EU on the short term.

2.4 The South-East European Model

Most of the EU Mediterranean states (Spain, France, Italy, Portugal and Greece) and the Central-Easter EU states form apparently a disparate group, with a recent adoption of social welfare systems, with low social protection, ungenerous unemployment benefits. On the other hand, taking the example of Spain, this model has a tradition of strict employment protection. Under the Franco dictatorship, temporary work was illegal in Spain. Nowadays this issue is not valid, while the emphasis starts to be put slowly towards wage equality, relying though on still income sharing within the family, as a tradition.

In Spain, rigid labour market made most employees too costly to fire but condemns a third of workers to unstable, unprotected temporary jobs, under the context of delayed pension and labour reforms.

This is why this model tends to push for more employment rather than wage rigidities, but is becomes very vulnerable to diseconomies or market inefficiency. As far as it concerns the Eastern block, they have discover capitalism is harsh and their transitory phase to EU integration brings then closer to the continental model, keeping though their traditions and cultural closeness with the South Eastern Europe model.

[20] Unemployment in Latvia at 22.8%, is the highest in the EU. Growth is unlikely to resume until late 2011. (EIU).

The South Mediterranean countries are hardly hit by unemployment spurs, as well as other Easter countires such as Poland, Romania, Bulgaria, Greece, Spain and Italy that all have to follow tight fiscal policies and really watch closely macroeconomic indicators, under the close control of the EU and of the IMF.

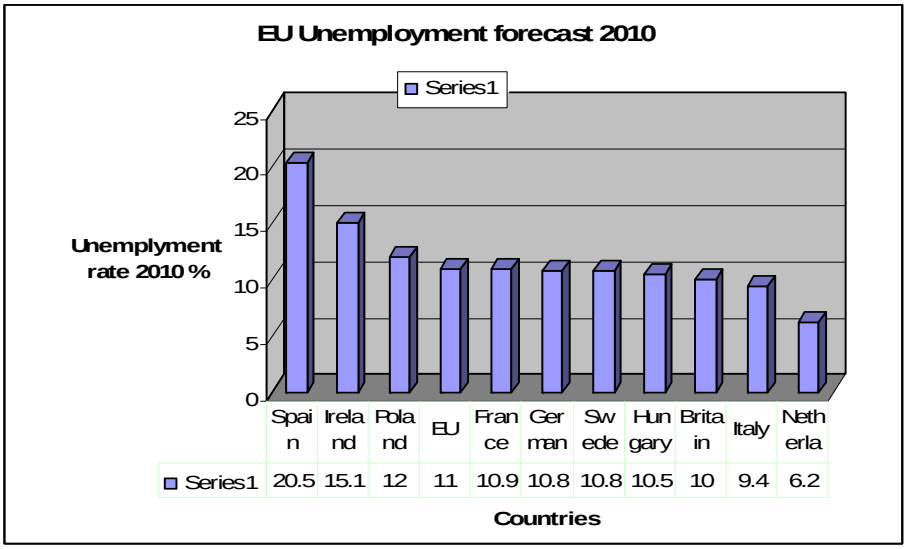


Fig. 6. Source: Economist Intelligence Unit, The Economist, 2009

In Greece, a multi-recession hit country, most recently the government wants among other things that high-earners pay more income tax and then wishes to cut back the public-sector payroll. By also raising the retirement age from 58 to 65 to the EU level, Greece early retirement has spurred. The number of female civil servants applying for early retirement has already jumped by 25% in 2010, yet its most productive workers are often women in their 40s and 50s. "It's the most efficient female colleagues who are lining up to leave". Thus, such effects may be unproductive on a short to medium term.

2.5 The details of the EU unemployment dynamics immediately post 2007-2009 financial crisis

The euro area (EA16) seasonally adjusted unemployment rate was 9.8% in October 2009, the same as in September. It was 7.9% in October 2008. The EU27 unemployment rate was 9.3% in October 2009, compared with 9.2% in September. It was 7.3% in October 2008.

Among the Member States, the lowest unemployment rates were recorded in the Netherlands (3.7%) and Austria (4.7%), and the highest rates in Latvia (20.9%) and Spain (9.3%). Compared with 2008, all Member States recorded an increase in their unemployment rate. The smallest increases were observed in Germany (7.1% to 7.5%), Austria (4.0% to 4.7%) and Romania (5.7% to 6.4% between the second quarters of 2008 and 2009). The highest increases were registered in Latvia (9.1% to 20.9%) and Lithuania (4.8% to 13.8% between the second quarters of 2008 and 2009). Between October 2008 and October 2009, the unemployment rate for males rose from 7.3% to 9.7% in the euro area and from 7.0% to 9.5% in the EU27. The female unemployment rate increased from 8.5% to 10.0% in the euro area and from 7.6% to 9.2% in the EU27.

Harmonized Unemployment Rate by Gender- total- 2009m 10

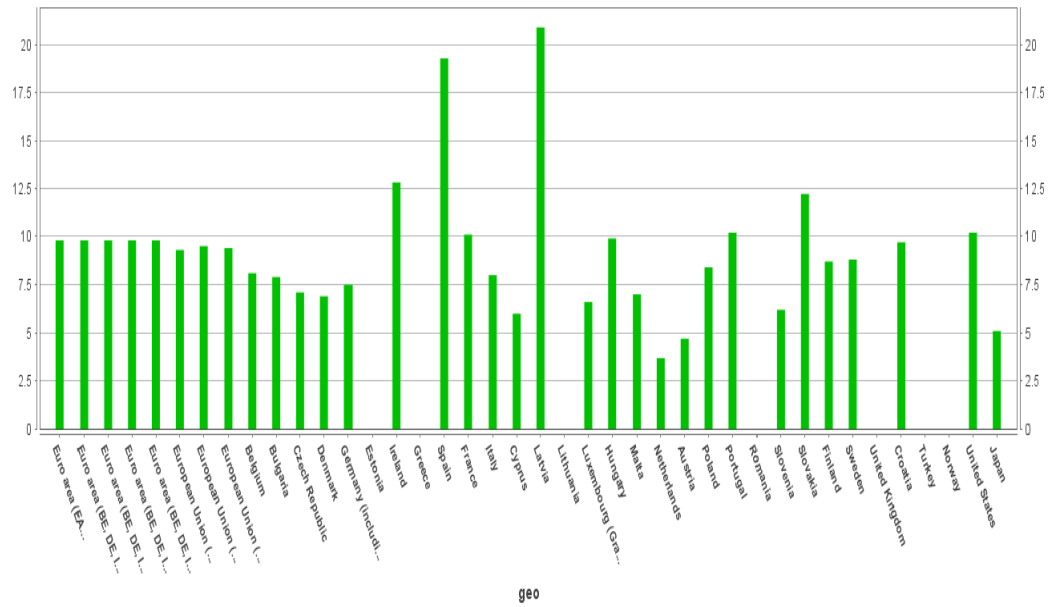


Fig. 7 Harmonized Unemployment Rate by Gender- total- 2009m 10

Unemployment has been rising sharply in the European Union since March 2008 as a result of the economic crisis. The increase was felt in every European Union country, by both males and females, young and old. However, the onset of the increase as well as its severity varies widely between countries. Men are clearly affected more than women, and young people appear to be quite vulnerable too.

Men have clearly been affected more by the current crisis on the labor market in the EU27 than women. Sectors such as construction, the financial sector and the automotive industry have been hit hard, thereby affecting predominantly men. Between the end of 2002 and early 2007, the unemployment gap was stable at around 1.3 percentage points, the female rate being higher. But in the last two years, most markedly since the first quarter of 2008, both rates have converged. In the first quarter of 2009, the male unemployment rate has moved closer, to only 0.3 percentage points below the female rate.

Working women make up a fast-growing percentage of the global workforce, which is now estimated at 46 per cent of the total[21]. In emerging markets, most working women are self-employed, earning low and irregular incomes, whereas most of immigrants women non-EU do not work for cultural and religious reasons.

In 14 Member States the female unemployment rate still exceeds the male one, most noticeably in Greece, Italy, Slovakia and the Czech Republic. In contrast, in Latvia, Ireland, Lithuania, Estonia and Romania the unemployment rate for males exceeds the female rate by more than 2 percentage points. Between the first quarters of 2008 and 2009, the male unemployment rate increased more than the female rate in all Member States except Malta, Poland and Romania.

[21] Insead Knowledge. Top 10 articles.(Q1 2010). http://knowledge.insead.edu/contents/top10.htm (accessed 31March 2010).

However, this situation may or may not be related to these countries increasing GDP growth nor to the U.S capital markets nor migration issues.

Youth unemployment has been increasing in the euro area and EU27 since the first quarter of 2008, in line with total unemployment. But the increase has been at a much higher pace for young people. Youth unemployment increased by 3.9 % between the Q1 of 2008 and the Q1 of 2009 in the euro area reached 18.4 %. In the EU27 the increase was 3.7%, leading to a rate of 18.3 % in the Q1 of 2009. In the same period, the total rate increased by 1.6 % in the euro area and 1.5 % in the EU27, which coincidently has been in line with inflation drop for the same period.

Estimated at 10.1% in 2009 from 7.2% in 2008 and forecasted at 11% in 2010[22], the EU unemployment imports not only the over the Ocean effect, but it reflects closely, coincidently or not, the social system patterns applied to each of the four models above presented and correlations with macroeconomic indicators.

3. Three representative cases of Social Dumping in EU just before the financial crisis?

Social dumping has become an important EU issue, yet few studies provide an economic assessment of the potential size of such effects. This paper examines the several social dumping effects in an era of greater European economic integration and the recent post financial crisis. First, in the previous section we have shown there are large differences within the EU in the composition of labour costs and labour market regulations, thereby establishing the potential for social dumping effects.

The development of the differences in employers' social security expenditure over the last thirty years appears to be of no evidence that high social charge economies have performed poorly during this period. The process of intra-union trade within an European economic and monetary union has been examined by Adnett (1995) and the conclusion made was that further European economic integration is unlikely to create significant dumping effects.

Also, Adnett (1995) explains how differences in productivity levels and the relative importance of direct earnings largely counterbalance the differences of social charges, while increased specialization within the EU reduces direct competition between 'low' and 'high' social charge EU states. The failure to find evidence of major social dumping effects does not automatically mean support for knocking down social welfare provisions in the EU. On the contrary, developing a strengthening of EU social policy may lead to the creation of a high skill and high productivity growth convergence in the EU under the protection of the European Union Charter of Fundamental Right.

This document sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens, residents in the EU. These rights are divided into six sections: Dignity Freedoms Equality, Solidarity, Citizens' rights and Justice. Fortunately, the recently adopted Lisbon Treaty gives the Charter the same legal effect as EU treaties.

Another important statement is "The Solemn Declaration on Workers' Right"s. This document highlights the Union's aim of achieving full employment and social progress, its recognition of the rights, freedoms and principles of the Charter of Fundamental Rights, its commitment to combating social exclusion and discrimination, its commitment to promoting social justice and protection and equality between women and men. The Solemn Declaration makes it clear that the EU Council must act unanimously when concluding international

[22] The World in 2010. Beyond the economic crisis. *The Economist*. 2009. p.46.

agreements in the field of trade in social, education and health services, when these could disturb the delivery of those services at national level. Hence, it simply provides enhanced room for labour market harmonization.

3.1 The Rüffert Case- Germany- 2008[23]

The Rüffert Case concerned the reward of public contracts to foreign workers by a district in Germany to carry out building work. German company Objekt und Bauregie (O&B) employed a Polish sub-contractor to employ Polish building workers, posted to Germany, on less than half the minimum wage agreed by German trade unions and employer associations. When it was discovered the 53 foreign workers were earning almost half of the applicable minimum wage for the construction sector for that German region, the local authority withdrew the contract and demanded payment of contractual penalties.

The construction company took legal action as a result. In deciding this case, the to the European Court of Justice (ECJ) essentially applied the provisions of the Posting of Workers Directiv. On 3 April 2008, the ECJ ruled that O&B should not be bound by the local Lower Saxony law that states public building contractors must abide by the existing collective agreements.

The court found that while member states may impose minimum pay rates on foreign companies posting workers in their state, the local law restricted the "freedom to provide services" and was not justified by the aim of protecting the workers because workers in the private sector were not covered by such protections! In essence, this ruling outlaws above-minimum wages and conditions being included in public tender contracts.

3.2 The Laval Case- Latvia -2008[24]

In 2004, Latvian firm named "Laval un Partneri" posted construction workers from Latvia to Sweden and refused to acknowledge the existing collective agreement with the Swedish Building Workers' Union. Swedish unions took action against Laval over the company's refusal to sign a collective labour agreement. Laval was party to a collective agreement under Latvian law. The case was brought to the Swedish Labour Court who referred it to the ECJ. Laval claimed to the ECJ that it was being discriminated against on the grounds of nationality and that the Swedish union was infringing upon its right to provide services. ECJ stressed that Article 49 of the Treaty of Europe (i.e. the free movement of services) rules out a Member State from constraining Foreign Service providers' ability to move freely with its staff on the territory of the Member State. However, Member States may apply their own rules on minimum wages, where it is appropriate for the protection of posted workers.

On the issue of the collective action and its justification, the ECJ mentioned that although the right to strike is an exclusive national competence, it must be exercised consistently with Community law. The ECJ states that the right to take collective action is a fundamental right which forms an integral part of Community law.

In fact, the ruling has struck the Swedish establishment "like a bomb", leaving the labour market minister to promise new laws that will make it mandatory for companies which conclude contracts in Sweden to follow the collective agreements settled between the Swedish employers union and the trade unions.

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[23] Eurofound. Industrial Relations. Ruffert case. Available on: http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/ruffertcase.htm

[24] Eurofound. Industrial Relations. Laval case. Available on: http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/lavalcase.htm

The ruling though has potentially wider political implications. This is something experienced in the UK, where ministers, confronted with unpopular EU law, try to sham their way round it – hence Brown's "British jobs for British workers" pledge – but the cold light of day will doubtless bring reality to the front.

Until the news broke, the chance of Sweden rejecting the Lisbon treaty or giving the voters the right to have a say to less was minimal, but the situation is now transformed, with the chances having increased substantially.

3.3 The Viking Case-Finland - 2007[25]

In order to cut costs, the Finnish shipping company Viking Line tried to re-flag its ship operating between Helsinki and Tallinn, under he Finnish flag, and with a predominately Finnish crew who benefit from a collective agreement negotiated by the Finnish Seamen's Union (FSU).

In 2003, the Finnish Viking shipping line decided that it could gain a competitive advantage by re-flagging its ferry as an Estonian vessel. Following legal actions in both the Finnish and British Courts the case was passed on to the ECJ in an attempt to clarify whether the EC Treaty prohibits collective actions seeking to prevent an employer from relocating its assets to another EU Member State where salaries and benefits are lower.

As part of its judgement, the ECJ declared that the right to take collective action is a fundamental right as recognised by the European Social Charter, the International Labour Organisation (ILO), the Charter of Fundamental Social Rights of Workers and the EU Charter of Fundamental Rights. The right to strike must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law.

And again, in December 2007, while the court found that collective action to protect posted workers from exploitation was legal, the unions had restricted Viking Line's right of establishment.

Three things come out from these cases and from the text of the Lisbon Treaty:

i. The right to take collective industrial action is not guaranteed as it is subject to member states' national laws;

ii. The right to take collective action to prevent the exploitation of posted workers by foreign service providers is subject to the company's right to freedom of movement and establishment under the EU Services Directive – a right which the ECJ has repeatedly and consistently upheld as being superior to workers' rights

iii. The collective action of workers and unions taken against foreign service providers is only deemed legitimate if it is "proportional" – that is, in defense of the most basic minimum conditions agreed on by EU bodies or set in law by the host country. What happens if workers want to take collective action in order to improve their conditions? The pattern will emerge where the minimum standards become the maximum. The higher-than-average conditions that may be included in public sector agreements are an infringement of the right to establishment.

We should not consider social dumping a phenomenon exclusively European, there is a considerable number of cases in the North American Economy[26] and other Developed regions.

[25] Eurofound. Industrial Relations. Viking case. Available on: http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/vikingcase.htm

[26] The Mexican maquiladora program, which was initiated in 1965, regarding the social dumping case between US and Mexico under the NAFTA. In the 1990s, more than half of all maquiladora (former Mexican employees from agriculture plants) employment was concentrated in the auto parts and electronics industries in the US, key industries in which employment has fallen sharply in the US. Though precise figures are not available, most if not all of the growth in maquilas represents the relocation of plants and the shift of jobs from the US.

4. Social dumping redefined under the international trade theory and unemployment

Social dumping is a term that is used to describe a temporary or transitory movement of labour, whereby employers use workers from one country or area in another country or area where the cost of labour is usually more expensive, thus saving money and potentially augmenting profit. In brief it means a diversion of investment towards countries with lax employment laws.

The Lisbon Treaty includes a new social clause. This clause obliges the European Union, when defining and implementing its policies and activities, to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

There is a controversy around whether 'social dumping' takes advantage of an EU directive on internal markets: the Bolkestein directive. In the UK, circa February 2009, this is an issue that has become a political '*hot potato'*.

In the goods market, social dumping is also a practice involving the export of a good from a country with weak or poorly enforced labor standards, where the exporter's costs are artificially lower than its competitors in countries with higher standards. Hence, it represents an unfair advantage in international trade. It results from differences in direct and indirect labor costs, which constitute a significant competitive advantage for enterprises in one country, with possible negative consequences for social and labor standards in other countries.

However, Will Martin and Keith Maskus (2001) also show that, contrary to the argument that weak labour standards provide an illegitimate boost to export competitiveness and a "race to the bottom". At the same time low labour standards tend to reduce competitiveness when they are the result of workers discrimination, abuse of market power etc. in the exporting country.[27] Competitiveness increases only in the medium-to long-run with productivity improvements.

According to international trade theory, "each country should specialise in what it can produce competitively, exploiting its comparative advantages"[28]. Developing countries have lower wages due to their lower labour yield and relative scarcity of physical and human capital – in labour intensive sectors, their inferior wages more than compensate for their lower productivity, so they tend to specialise in goods that are concentrated in their use of low-skilled labour, cheap land or abundant natural and energy resources. In developed countries, on the other hand, the higher wages are more than compensated by their high productivity that stems from their plentiful physical assets, technology and innovation. As a result, the developing countries cannot compete with the developed nation exporters.

The effectiveness of national social policy is influenced by the degree of economic integration, so deeper EU integration will emphasize the pressure for social policy reform and harmonisation – ultimately though, policy makers should make every effort for minimum standards which will be acceptable to all countries. Yet, harmonisation can be successful only between countries that are at similar standards of development and with comparable social preferences in the trade-off between efficiency and redeployment to the poor. Income discrepancies are already great among the existing EU members, and this is also applicable in labour market regulations and in the system of government of social policies.

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[27] Will Martin and Keith E. Maskus. Core labour standards and competitiveness: implications for global trade policy", *Review of International Economics*.. 9 Nº 2, 2001.

[28] Guillermo de la Dehesa .Are developing countries engaging in "social dumping"? .2007. available at http://www.voxeu.org/index.php?q=node/213

Establishing a single minimum wage or a single unemployment benefit level throughout the EU would not make sense since an average level would be too low for the richest countries and too high for the poorest ones, with the possibility of causing even higher unemployment. If harmonisation were to develop into measures obstructing the shift of production sites across countries, then this would harm the competitiveness of firms and would be counterproductive. Health and safety regulations and similar working conditions must not clash with different national tastes and customs, as this is undesirable. As one can understand, poor countries do not benefit from the burden of higher labour standards but rather from internal economic and social development.

Recent research has shown that the traditional view of social welfare in Southern Europe as 'rudimentary' is a misreading of its distinct nature: welfare arrangements in the region do not 'lag behind' as a whole, rather they suffer from serious imbalances that cause inequities and inefficiencies. Research performed on Greece and Spain labour markets shows that the welfare policies pursued in these two countries over the last 20 years were marked by strong expansionary trends that clearly outbalanced occasional cut-backs. This evidence lends no support to the 'social dumping' hypothesis. If anything, 'catching up with Europe' in terms of social as well as economic standards seems to have been elevated to something of a national ideal, shared by both government and opposition. As the expansionary thrust of 'welfare state building' is being exhausted, the biggest challenge facing Southern European welfare states is the construction of welfare institutions in tune with a changing society[29].

Increasingly, the charge of "social dumping" is heard as a rational for protectionist measures against developing country exports. Many labour unions politicians and businessmen in developed nations believe that lax working regulations and conditions, as well as weak political and social rights, provide developing-country exports with an unfair advantage. To counter this, they argue that either developing-country exports of cheap manufactured goods should be subject to antidumping duties to eliminate the "unfair" competitive factors, or these countries should impose higher labour standards.

5. Recommendations

This paper is for reduction of involuntary unemployment through watching macroeconomic indicators (as presented in section 1 above) and by arguing for a better policy mix which would on the one hand involve the EU maintaining its commitment to the free movement of workers and on the other hand strengthen labour standard-setting mechanisms at both the EU and national levels.

Labour standard-setting mechanisms can be enhanced by:

1. Skills and competence development for improving job quality through:
   - Training, education and employment performance either by the government, employer or self-conscious;
   - Skills and access to training;
   - Participation in work-related training;
   - Increasing working time spent on training;
   - Skills / job match;
   - Training and the information society.

[29] Ana M. Guillen and Manos Matsaganis Testing the 'social dumping' hypothesis in Southern Europe: welfare policies in Greece and Spain during the last 20 years, Journal of European Social Policy, 10, No. 2, 120-145 .2000

In brief, work quality facilitates the refining of polices for the benefit Europe's workforce as well as its other 'work quality' dimensions and its economy: increasing flexibility and adaptation to new forms of work organization and better balancing flexibility and security; insuring better career prospects for employees; improving health and safety at work improving social dialogue and work relationships. Member States' policies should consider the operating dynamics of this vicious circle (work quality-productivity-economic growth) and to utilize the positive interactions between quality and productivity.

2. Wage and earnings. Member States should consider setting national employment rate targets in addressing these objectives, action should concentrate on the following priorities:

- Improve adaptability of workers and enterprises,
- Increase investment in human capital through better education and skills,
- Retain and attract more people in employment, increase labor supply and modernize social protection systems.

3. Ensure employment-friendly labor cost developments and wage-setting mechanisms by:

- Reviewing the impact on employment of non-wage labor costs and where appropriate adjust their structure and level, especially to reduce the tax burden on the low-paid staff.
- Encouraging social partners within their own areas of responsibility to set the right framework for wage bargaining in order to reflect productivity and labor market challenges at all relevant levels and to avoid gender pay gaps,

Increase investment in human capital through better education and skills Europe needs to invest more and more effectively in human capital. Too many people fail to enter progress or remain in the labor market because of a lack of skills, or due to skills mismatches. To enhance access to employment for men and women of all ages, raise productivity levels, innovation and quality at work, the EU needs higher and more effective investment in human capital and lifelong learning.

Knowledge-based and service-based economies require different skills from traditional industries; skills which also constantly need updating in the face of technological change and innovation. Workers, if they are to remain and progress in work and be prepared for transition and changing labor markets, need to accumulate and renew skills regularly. The productivity of enterprises is dependent on building and maintaining a workforce that can adapt to change. Governments need to ensure that educational attainment levels are improved and that young people are equipped with the necessary key competences, in line with the European Youth Pact. In order to improve labour market prospects for youth, the EU should aim for an average rate of no more than 10 % early school leavers; and for at least 85 % of 22-year-olds to have completed upper secondary education by 2010.

Policies should also aim at increasing the EU average level of participation in lifelong learning of the adult working-age population (25 to 64 age group). All stakeholders should be mobilized to develop and foster a true culture of lifelong learning from the earliest age. To achieve a substantial increase in public and private investment in human resources per capita and guarantee the quality and efficiency of these investments, it is important to ensure fair and transparent sharing of costs and responsibilities between all actors. Member States should make better use of the Structural Funds and the European Investment Bank for investment in education and training. To achieve these aims, Member States must implement the coherent and comprehensive lifelong learning strategies to which they have committed themselves.

4. Expand and improve investment in human capital through:

- Inclusive education and training policies and action to facilitate significantly access to initial vocational, secondary and higher education, including apprenticeships and entrepreneurship training,

- Significantly reducing the number of early school leavers without discriminating between locals and immigrants,
- Efficient lifelong learning strategies open to all in schools, businesses, and public authorities and households according to European agreements, including appropriate incentives and cost-sharing mechanisms, with a view to enhancing participation in continuous and workplace training throughout the life-cycle, especially for the Low-skilled and older workers.

Conclusions

This study has presented the main concept of involuntary unemployment and its complementary vocabulary under a non-constructive- non-productive economic phenomenon approach in the European region. Also, the paper provides an outlook of the unemployment links with macroeconomic factors under a 'vicious circle' format, explaining the links within the international trade theory and the neoclassic approach to this concept, both as an indirect effect of the most recent financial crisis imported from the United States and as a stand-alone European structural perspective.

In this section of the study, the unemployment post 2007 financial crisis is compared with the one experienced in the period post 1973's economic crisis, emphasizing the common issues and dissociating the differences.

By trying to determine the European unemployment structures, the paper offers four major geographic models for unemployment in the EU, who due to their discrepancies give room for the creation of another concept: the social dumping. Moreover, the four EU unemployment models are used in obtaining details in building an EU unemployment dynamics analysis immediately post 2007-2009 financial crisis.

Therefore, the study has passed to a spinout of unemployment- the social dumping, a non-economic one this time, exemplified by three cases experienced in the EU. Taking into consideration the three mentioned examples, the paper follows then more detailed analysis of social dumping from international trade economics and social welfare viewpoints, linking it with more economic causes through the latest European legislation emerging from the recently adopted Lisbon Treaty.

Eventually, the paper presents several recommendations for diminishing unemployment from it most sensitive perceived effect at social and corporate level: the social dumping. The suggestions relate to improving job quality, setting national employment rate targets by manipulation of social protection systems, ensuring employment-friendly labor cost developments and wage-setting mechanisms and last but not least expanding and investing more in the human capital.

Grant, Vidler with Ellams (2003, p.142)[30] give an excess of policies a government may employ to reduce unemployment. Thus we consider also that the choice of measures shall be drawn upon the cause of unemployment, the rate and duration of unemployment and the circumstances of the other key macroeconomic and socially agreed objectives. As far as the short run is concerned, unemployment can be eliminated by measures that augment aggregate demand but in the long run, supply-side measures are probably going to be more effective social policies that look beyond biased causes of it, such as migration, culture or religion.

[30] Susan Grant, Chris Vidler with Andrew Ellams (2003, pp.142-3): ECONOMICS AS for Edexcel. Great Britain: Oxford. Heinemann Educational Publishers.

It is wellworth taking into consideration Keynes's saying that "economics is a moral and not a natural science", which means that educational courses in micro- and macro- economics should turn into economic and political history, economic theories, sociology, law, moral and political philosophy.

Future research on the same topic we recommend considering collateral and mutual implication of unemployment and social dumping in the economy, not only at EU level, but also at international level or other regional levels, as well as under a longitudinal study framework.

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MOTIVATION TO SHARE HOSPITAL BUILDING DESIGN KNOWLEDGE BY INFORMATION TECHNOLOGY IN HONG KONG

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Abstract

Hospital building design is important as it is the place where bacteria and microorganisms concentrate. Poor ventilation system and layout traps disease causing pathogens, threatens the lives of many frontline workers such as doctors, nurses, and health care assistants. While design knowledge sharing by IT ensures a rapid knowledge sharing among designers from all over the world, what are their motivations? Few or no paper has studied this issue. This paper studies this base on 4 traditional motivation theories: Theory X, Theory Y, Reinforcement theory, Two factor theory. Results show that positive reinforcement theory and motivation factors in two factor theory provide better explanation.

Keywords: *knowledge sharing, information technology, building design, motivation*

1. Introduction

In the olden days, knowledge sharing relies on face-to-face interactions, letter writing and phone call. Birth of information technology symbolizes a new era in knowledge management – the scene of someone who peeps from the window to see if the postman has brought us letters is less likely to be observed in our daily lives. Sitting in front of a notebook computer not only allows us to read tabloid magazine, but also enables us to know more about our world via email, websites etc. Reading books and professional magazines are no longer sufficient for building designers. To keep updating their knowledge, studying the latest design from other side of the globe has become a necessity. Whilst the outbreak of SARS in Hong Kong was a sad story, it has fastened the development of IT in knowledge sharing. Virtual classroom, websites etc had suddenly gained importance (as people avoided going outside at that time). The recent H1N1 incident has also touched the nerve of many hospital building designers again: is there any better way to prevent the spread of airborne pathogens in wards?

2. Knowledge and knowledge sharing

Knowledge is a broad and abstract notion that has brought epistemological debate in western philosophy since the classical Greek era (Alavi & Leidner, 2001). Current knowledge management literature has revealed that researchers define knowledge from different perspectives. For example, Baskerville & Dulipovici (2006) point out that knowledge can be regarded as valuable commodity for an organization in the context of knowledge economy and can be manipulated internally (e.g. create within organization) or externally (e.g. buy from outside). Knowledge, from this

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perspective, can be regarded as an object. Fong (2003) concedes that knowledge is a set of shared beliefs resulting from social interactions and embedded in the social context where it is created. This indicates that knowledge is contextual-dependent which contradicts the object view of knowledge. Alavi and Leidner (2001) summarize previous research and point out that knowledge can be regarded as a process, where people apply their experiences and gain continual knowing. Therefore, knowledge is closely related to human action. Similarly, Nonaka & Takeuchi's (1995) define knowledge as "*dynamic human process of justifying personal belief toward the truth"*. The relationship between knowledge and human action is also stressed. In this research, Nonaka & Takeuchi's (1995) definition will be adopted as building designers develop part of their knowledge by practical working experience.

Knowledge classification is another issue mentioned by researchers. The most well-known one is explicit-tacit classification. Explicit knowledge is defined as a concept which can be "*expressed in words and numbers, and easily communicated and shared in the form of data, scientific formulae, codified procedures, or universal principles*". On the contrary, tacit knowledge is "*highly personal and hard to formulize*". Tacit knowledge has its root in an individual's action, experience and ideals and it is quite context embedded. Hence, it is difficult to communicate or share tacit knowledge with others. Tacit knowledge can be further developed into technical dimension and cognitive dimension. Technical dimension is also known as "know-how" knowledge, which is "*informal and hard-to-pin-down skills or crafts*". Know-how knowledge is mainly acquired through long-term experience. That is the reason why senior workers are usually more skillful than junior workers in work place. Cognitive dimension concerns "*schemata, mental models, beliefs and perceptions*" which are integrated in our mind and we usually take them for granted (Nonaka & Takeuchi, 1995). Cognitive tacit knowledge shapes the way we perform and see the world. Only understanding the detachment of explicit and tacit knowledge is not enough, attention should also be paid on how to convert tacit knowledge to explicit knowledge. Highly personal knowledge has little value to the work team or companies until it can be converted into explicit knowledge and shared with the others. This research focuses on both explicit knowledge and tacit knowledge. Explicit knowledge may contain work procedures, documentations, etc. Tacit knowledge of designers mostly refer to the know-how knowledge which are gained through experience and understanding of the design work (Koskinen*, et. al.*, 2003).

Knowledge sharing is an activity by which individuals mutually exchange their knowledge or ideals and collaboratively generate new knowledge (Magnini, 2008). In working teams, knowledge sharing refers to the process where team members share task related ideas, information, and suggestions with each other (Srivastava*, et. al.*, 2006). De Vries, Van Den Hooff, & De Ridder (2006) conceptualize the process of knowledge sharing into two sub-processes: knowledge donating and knowledge collecting. Some researchers define knowledge from the perspective of single direction, for instance, Ding et al (2007) define knowledge sharing is the behavior by which '*individuals collectively increase other's understanding through the articulation and demonstration of personal knowledge*'. This definition is defined from the perspective of knowledge donator. This study looks at not only designers donating knowledge to others but also designers seeking knowledge from others. Thus knowledge sharing is a mutual process in this study.

According to Bakker et al (2006), knowledge sharing is mainly used in two ways in previous research: exploitation and exploration process. In exploitation process, exiting knowledge is captured, transferred, and used in other similar situations. Exploration is the process where old knowledge is shared, synthesized for generating new knowledge. Here, new knowledge refers to knowledge which is synthetically created and do not exist in collective before. It is also found out that knowledge sharing is more related to knowledge exploitation way in new product

development team (Bakker, *et al.*, 2006). This means that knowledge sharing usually happens in the form of discussion. Hospital building design can also be regarded as new product development since each building designed is unique. Thus, building design teams are also new product development teams. So knowledge sharing is regarded as part of exploitation process in this research.

3. Knowledge sharing by means of IT

The existing literature has shown that "IT" and "human" are the two major middleman in knowledge sharing. The IT-centric strategy emphasis the use of IT tools to "*facilitate the capture, access, and reuse of information and knowledge*" (Carrillo & Chinowsky, 2006). IT tools are especially good for facilitating storage or retrieving explicit knowledge which can be codified and documented, such as intranets, document management systems, etc. The human resource management (HRM) –centric strategy focuses on the means to "*motivate and facilitate knowledge workers to develop, enhance, and use their knowledge in order to achieve organizational goals*" (Carrillo & Chinowsky, 2006). This research focuses on the IT-centric strategy to motivate hospital building designers to share their knowledge. It examines how information technologies can facilitate and encourage designers to share hospital and health care buildings design knowledge.

Kankanhalli et al (2005) explain that there are two types of information technology in information system literature: the repository model and the network model. Repository model is more related to codification approach to knowledge management, where knowledge is codified and stored to facilitate knowledge reuse by providing access to codified knowledge. A key technology in this category is known as electronic knowledge repository (Kankanhalli et al, 2005). The network model is the personalized approach to knowledge management. This approach stresses the linkage among person for knowledge sharing. Knowledge directories are typical technological components of this approach (Kankanhalli et al, 2005). Knowledge directories mainly provide location of expertise, and electronic forum software which allow people to interact within communities of practice.

Information technology is a facilitator to support knowledge sharing processes and ease the knowledge sharing process (Riege, 2005). Information technologies provide people with quick access to large amount of information or knowledge at individual level (Riege, 2005; Hendriks, 1999). Hendriks (1999) suggests some of the examples of IT, e.g. electronic document management (EDM), document information systems (DIS) and document imaging systems. Those technology systems are mainly related to technologies of repository model, where documents are structured by means of categories and index. They even provide the search function for people to retrieve documents. These technological systems save time and effort significantly. Information technology can also reduce the barriers involved in knowledge sharing which are mainly resulted from physical distance, temporal distance and social distance (Hendriks, 1999). By eliminating physical distance barriers, information technologies can facilitate team work in and between business divisions and subsidiaries (Riege, 2005), e.g. virtual teams. Overcoming difficulties from temporal distance mainly means preserving knowledge over time, which is usually related to organizational memory (Hendriks, 1999). Maintaining organizational knowledge from past experiences is critical as it avoids reinvent-the-wheel and knowledge redundancy. Temporal distance also refers barriers in present such as difficulties in coordinating schedules (Hendriks, 1999). Under this circumstance, internet based discussion groups are helpful (Hendriks, 1999). Social barriers may concern with barrier come from differences in experiences levels, education levels, position levers, etc. Hendriks (1999) adds that different conceptual framework between

knowledge donator and collector is also considered as social barrier. Information technology can lower social barriers by tools of facilitating social translation, e.g., learning maps (Hendriks, 1999). Information technology also helps people to locate who knows the specific know-how or where can the knowledge be obtained in a quicker way, and thus improve the whole knowledge sharing process (Riege, 2005; hendriks, 1999). Some of the common examples of electronic tools in knowledge sharing and their corresponding pros and cons are noted in the table below.

E-tools	Pros and cons of the knowledge sharing method	Examples
Professional web-based communities	A1: Useful platforms in pooling individual's knowledge bit by bit together (Obonyo & Wu, 2008). D1: The success of information sharing relies on the members' activeness (Obonyo & Wu, 2008)	(Huband*, et. al.*, 2009)
Intranet	A1: Handy channel for information sharing within a short time (Ingirige & Sexton, 2007). D1: Users complain that intranet has failed to achieve what they expect (Ingirige & Sexton, 2007).	Intranet of Hospital Authority and various construction design team
Online games	A1: Online games can be interactive and interesting. D1: Information provided in each game is limited.	(Cheat Planet, 2009)
Blog	A1: Information can be posted by bloggers in a convenient way and received by readers without geographical limitation. A2: Blogs are archived in chronological order, new entries appended to the previous ones. (Shanyang Zhao, Internet and the lifeworld: updating Schutz's theory of mutual knowledge) D1: Validity of data depends heavily on bloggers.	(Perls, 2007)
Virtual classroom	A1**:** Upload any new information to the website at any time and in any place (Sun*, et. al.*, 2008).	(University of Salford, 2009)
Websites	A1: One advantage is to help quickly locate where the knowledge is and who knows the knowledge (Riege, 2005; hendriks, 1999). D1: Validity of data depends heavily on website providers	(Carr, 2008)

Table 1 Pros and cons of E-tools and the corresponding examples (Note: A1 refers to the first advantage, A2 refers to second advantage, D1 refers to first disadvantage, D2 refers to second disadvantage etc)

4. Special requirement in Hospital Building Design

Ventilation, heating, air conditioning system provide specially conditioned air to hospital staff and patients. This is particularly important to those wards where patients are particularly vulnerable to infection from airborne pathogens which might put the health of people around, including doctors and nurse at risks. Proper building design requires knowledge in characteristics of airborne pathogens, microbes, virus and bacteria. Similarly, knowledge of latest technological

development on ventilation, tools and equipment for controlling the spread of pathogenic particles are of utmost important. The science of aerobiology since the age of Louis Pasteur in the middle of 19th century provides the first insight on the relations between pathogens and air movement. In designing ventilation for isolation rooms for patients, current hospital design team usually provides negative pressure to ventilate the room with exhaust fan which exceeds the supply by more than 10% difference or more than 125 cfm difference. For example, to prevent the spread of Aspergillus (one of the airborne pathogens), high-efficiency particular filters, provide negative air pressure, dedicated exhaust and physical isolation of the construction area from patient care areas (Mayhall, 2004).

There is also another pool of literature which illustrates the importance of hospital layout. For example, nurses have different reactions on radial, double corridor, and single corridor. Similarly, renovations can bring positive effect on the mood and morale of staff in ward. Some designers believe in the idea of moral treatment. They introduce rural settings in hospitals provide goodness to patients and plant trees and woodlands in wards and cancer treatment centre. There is also heated argument over physical environment and mortality rates in hospital. Good ventilation, kitchens accommodation for nursing staff and drainage coupled with low patient density can lower the mortality rates in wards (Gesler*, et al.*, 2004). In Hong Kong, Lam (2004) has pointed out that a good design in hospital consists of standard ward floor with service corridors. To accommodate all vertical runs to the horizontal services, it is common to design a service floor below all ward floors. Careful zoning is required to avoid the use of large plant with large distribution systems. Use of service corridor/spine with sufficient width (Lam, 2004).

On top of the basic requirement on hospital building design, professional knowledge in hospital building design also stresses a combination of landscape design, medical science and environmental psychology. 100 soldiers in World War suffered from effort syndrome in London because of environmental stress is one of the vivid examples which show the important of environment in building design. Designers of the Pioneer Health Centre and the Finsbury Health Centre concern both the hygienic design and social ideas. Whilst it is an undeniable fact that the practicality of hospital designs from professional doctors and nurses' objectives are important, laymen's idea on what makes a good hospital building are of equal importance. Thus, the final product of a hospital actually reflects the compromise, debate, power struggle and controversy among all these stakeholders (Gesler*, et al.*, 2004).

Modeling, simulation, and visualization tools in building design which facilitate hospital building design

Various e-tools were applied for designing hospital to meet the needs of various stakeholders aforementioned. For example, DesignBuilder utilizes OpenGL solid modeler to allow building models assemble by stretching, cutting and positioning 'blocks' in 3-D space. Results of simulation provide visual feedback on actual element thickness, volumes and room areas (DesignBuilder Software, 2009). Hourly Analysis Program (HAP) offers energy analysis on energy consumption and operating costs (Carrier, 2009). Smart Draw provides templates of floor plan, ready-made graphics to increase productivity of building team (Smart Draw, 2009). FloVENT software offers a menu system for the design and optimization of heating, ventilating and air-conditioning (HVAC) systems. Computational Fluid Dynamics visualizes the airflows in the intensive care room, identifies turbulence which may cause encroackment of the 'clean' zone around the patient (Mentor Graphics, 2009).

Requirement	**Example of Building simulation tools**	**Example in Hong Kong hospital building**
Energy saving	DesignBuilder, Hourly Analysis Program (HAP)	Tuen Mun Hospital The solar heating system was designed to serve the hydrotherapy pool in the hospital. The closed circuit system utilises 96 m^2 of solar collector panels and can raise water temperature in the therapy pool from 24 to 36 ^oC. The designed pool capacity is about 240,000 litres and the rate of water circulation is 2.5 m^3/s. The solar system acts as a supplement to the steam heating system and is most effective during the daytime when the level of sunshine is sufficient (Deparment of Mechanical Engineering (HKU), 2005)
Requirement	**Example of Building simulation tools**	**Example in Hong Kong hospital building**
Airborne pathogens spread prevention	Mentor Graphics	Princess Margaret Hospital The VARI-centric balancing system controls the airflow and differential pressure between adjacent rooms and closes fully as soon as the pressure differential drops below the required level. To maintain negative pressures, VARI-centric air-pressure stabilisers small single-blade units with duties of about 80 l/s at 5 Pa are installed to prevent any new SARS infections. This enables the airflow to be switched to pass through an open door, forcing back airborne contamination without the need to alter air supply or extract rates (Modern Building Services, 2004). Heaven of Hope Hospital Western façade of the hospital building is arranged towards the sloping hill side for introducing natural air (Annonymous, 2004).
Green environment for patients	N/A	Kowloon Hospital Architect retains the green characteristics of the site (Annonymous, 2004). Lai King Hospital A garden was built for patients (Annonymous, 2004).
Building layout	Smart Draw	Tseung Kwan O Hospital A triangular ward blocks on 3 sides of each nurse station was built to ensure the nurses to have optimum views of each bed (Annonymous, 2004).

Table 2 Hospital buildings' requirements in Hong Kong

5. Traditional motivation theories

Kamara et al (2002) comment that an integrated approach consists of organizational, human and technological issues is necessary in building up an effective strategy of knowledge management. Some sort of motivators such as encouragement, penalties and direction have become necessary for companies to achieve their goals and targets (Li, 2006). Blind adherence to standard hospital template, e.g. DHSS notes no longer provide good value (Lam, 2004). Although there are more than 140 definitions of motivation, it can be simply interpreted as what causes people behave as they do (Denhardt*, et. al.*, 2009).

5.1 Theory X

Douglas McGregor is of the view that men are not self motivated, to reach targets of an organization, organization members have to be directed, forced and threatened with penalty (Li & Poon, 2007). Supporters of theory X opine that the major motivation in using IT for knowledge sharing comes from the punishment. Researchers such as Morden (1995) argues that minimal supervision is sufficient to motivate members of organization on what they should do. Others, however, concede that human can exercise discretion (Cooper & Phillips, 1997), punishment and fine are peripheral means to achieve goals set by organizations only (Stroh, 2005). Moreover, many authors disagree with McGregor, they think that punishment is not effective because of its mild nature or time lag (Peters, 1991).

5.2 Theory Y

While theory X supporters are pessimistic about humans' behaviour, theory Y theorists look human in a positive way. They have 4 basic assumptions:

1. people are active in nature, they are self control and directed (Denhardt*, et al.*, 2009).
2. Work is pleasurable and natural (Denhardt*, et al.*, 2009)
3. Employees do not resist to change and work towards the companies' target (Denhardt*, et al.*, 2009)

In light of this, they can work very well to reach the goals of companies, include the use of IT as an information sharing tool, so long as there is a good environment and they are treated as a valuable member in our societies (Kock, 2005). After all, theory X and Y represents two extreme cases rest on unrealistic assumption, an amalgamation of the two is more realistic (Li, 2006).

5.3 Reinforcement theory

Reinforcements, whether it is positive or negative, alter people's acts. There are two types of reinforcement: positive and negative. Positive reinforcement strengthens people's behaviour by offering pleasant consequences on specific actions. Negative reinforcement or avoidance learning works as people wants to avoid unpleasant results of their acts (Courtland*, et. al.*, 1993). Increase in salary and cash allowance are examples which can motivate employees to achieve certain company objectives (Davidsom & Griffin, 2006). Positive reinforcement tactic can motivate building designers to share their knowledge by IT (Courtland*, et al.*, 1993). Nevertheless, there is no guarantee on the success of such expensive incentives – it often produces too few winners and fails to bring sustainable effect. Competition among organization members creates much greater problems. (Li 2006) Negative reinforcement can also fail sometimes: when the expected gain from their acts are so great which is sufficient to offset the negative reinforcement, employees of a firm tend to accept penalty (Schermerhoen*, et. al.*, 2003).

5.4 Two factor theory

Herzberg's two-factor theory proposes that there are both motivation and hygiene factors (P. Hendriks, 1999). The set of factors which lead to dissatisfaction is called hygiene factors or

dissatisfies. It includes working conditions, company policies and pay. Motivation factors, also called satisfiers, are the set of factors which lead to satisfaction. It includes recognition, achievement and personal growth (Courtland*, et al.*, 1993). Motivation, not hygiene factors, provides useful insights on motivation for sharing knowledge. Salary penalties or Bonuses, for example, may increase people's use of knowledge sharing technologies. Nevertheless, hygiene factors, e.g. status can hardly be a motivator for sharing knowledge. They may frustrate knowledge sharing when they are absent, but they cannot boost people's motivation on knowledge sharing (P. Hendriks, 1999).

Theory	**Building team's motivation in using IT for knowledge sharing**
Theory X	Punishment
Theory Y	Good environment and they are treated as a valuable member in our societies
Reinforcement theory	Positive reinforcement strengthens people's behaviour by offering pleasant consequences on specific actions. Negative reinforcement or avoidance learning works as people wants to avoid unpleasant results of their acts
Two factor theory	Motivation factors, also called satisfiers, are the set of factors which lead to satisfaction. It includes recognition, achievement and personal growth

Table 3 Summary of 4 theories on motivation in using IT for building design knowledge sharing

6. Interview

In order to know more about the motivation behind knowledge sharing between building team and professionals in hospital, 3 facility team members who has worked for more than 5 years and had participated in building design process in Princess Margaret Hospital were interviewed. One of the major reasons for choosing this hospital is that she is one of the most well-known hospitals specializing in infectious diseases and had played an important role in SARS outbreak in 2003. It helps us understand more about the motivation to share the information and possible changes after the outbreak of SARS. They generally agree that there are the two major important requirements on hospital design: 1) energy saving, 2) prevention of pathogens, 3). The major e-tools in knowledge sharing are email and websites. They generally agree that one of the very good motivations for knowledge sharing was the monetary return from such acts. Building designers share their latest design on web with the aim is to attract more customers and clients. By posting some successful examples on web, they can also boost confidence of these customers. Besides, they can become better known by other companies, enhancing their reputation among companies of similar trade.

	Interviewee 1	Interviewee 2	Interviewee 3
Most important requirements in hospital design	Prevention on spread of pathogens	Prevention on spread of pathogens, energy saving	Use of energy efficient technology
IT tools application in hospital building design	Resource planning	Building design and modelling	Building design

IT tools for building design knowledge sharing	Websites of other building design companies, email	Software and network tools, e.g. supporting, program development, email	Online information
Motivations to share building design knowledge by means of IT	Designers hope that they will become more famous and conform to the objective of the firm: increase market share.	Increase designers' competitiveness among all of the other designers. Provide better building design for patients and hospital employees.	Designers show off their superb building design.

Table 4 Results of the interviews

Conclusions

It is never in doubt that information technology has brought convenience to our generation. Knowledge sharing is longer restricted in face-to-face interaction, letter writing and phone call. Theoretically speaking, 1) punishment (theory X), 2) good working environment is of importance (theory Y), 3) offering pleasant (positive reinforcement) or unpleasant results of their acts (negative reinforcement), 4) Motivation factors, such as includes recognition, achievement and personal growth are sources of motivation for building designers to share their knowledge by means of IT. The results of the interview show that designers want to become more famous by posting their design on web. This implies that positive reinforcement and motivation factors serve better for explanation on why design team members share their knowledge on building design.

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PARTICULARITIES CONCERNING THE CREATION AND IMPLEMENTATION OF THE MARKETING MIX IN PUBLIC INSTITUTIONS

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Abstract

The marketing mix is the essential instrument in implementing marketing in the public sector. This paper brings into evidence the particularities of conceiving, elaborating and applying the marketing mix in public institutions. The particularities of the marketing mix that is applied in public institutions are imposed, on one hand, by the role played by the public institution and the place it occupies in the contemporary society and, on the other hand, by the objectives it defines by its marketing strategy. The tactic by which the marketing strategy is applied refers to the optimum combination of at least four controllable variables (service/product, tariff/price, distribution and promotion) accomplished by the public institution. The analysis of the classic marketing mix components – used in the public institution – allows the underlining of the significant aspects that improve the public institution activity, as well as its image in the future.

Keywords: *marketing mix, public institutions, public sector, marketing strategy, controllable variables.*

Introduction

In the contemporary society, the public institution is the organisation by means of which the state implements its public policies conceived, drawn up and accepted for each stage of evolution of any country. The public institution, as support of the political power exercising, by the activity carried out, provides the public services necessary for the satisfaction of those social needs appreciated by the public power as being of public interest at a given moment. The social needs, undergoing a continuous increase and development at this millennium beginning, as result of the technical and scientific progress, of the increase of the level of culture and civilisation, confer to the public institution an increasingly important role nowadays but also in the near and far future. Hence, for each public institution, the choice of the most adequate development strategy, allowing it to delimitate its short, medium and long-run objectives becomes an ardent necessity.

The New Public Management, as a model of management of the public institution, grounds its activity on the combination of the political, legal and managerial approaches, but also on the orientation towards the entrepreneurial government and public administration market. This involves the anticipated study of the social needs, as well as their hierarchic structuring, in order the ensure, given the unlimited increase in opposition to the limited resources of the society, their fulfilment as quick, as satisfactory and in a quantity as high as possible.

The implementation of marketing in the public institutions, in this context, seems to be the only viable solution allowing the use with maximum efficiency of the resources provided by the

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society in order to satisfy the common welfare, both for citizens and for the public administration and the natural environment. The transformation and implementation of the marketing services into the public sector, as stated by the great American specialist Ph. Kotler implies: the focus on the customer, the segmentation and choice of the target markets, the identification of the competition, the use of all four instruments of the marketing mix, as well as the supervision, the control of the activity and the application of the any necessary adjustments.

In this paper, we intend to outline the specific manner of drawing up and implementation of the marketing strategy into the public institution, and especially of the marketing mix, as the main instrument of the marketing tactic, of the particularities of the four traditional variables defining the marketing mix also within the public institution.

Synthesising the marketing mix particularities in the public institution is important both at theoretical and at practical and applicative level. For the marketing theory, the outlining of the specificity of the public institution marketing mix represents arguments that come to support this new specialisation of marketing. For the practical activity of the public institutions, the understanding of the characteristics of the public institution marketing mix allows the specialists to adopt the best strategies and tactics in order to fulfil their mission. The particularities relating to the use of the marketing mix in the public institution will be outlined by the examination of the four „classical components" of the marketing mix, this facilitating the implementation of marketing in all types of public institutions, depending on the field of activity, under the words „satisfaction and value for the citizen".

The last decade literature relating to the management of the public institutions and to the marketing of services makes very frequently references to the necessity and possibility to implement marketing also in the public institutions, expressing interesting ideas regarding certain issues specific to the public institution marketing, concerning: the market, the consumer's behaviour, the public service and its price, the modality of distribution and especially of promotion by means of publicity.

On the grounds of the opinions expressed within the studies published in various specialised journals of marketing, in several chapters of some paper published in out country and abroad, in the interesting work of the marketing specialist Ph. Kotler, published in collaboration with H. Lee in 2007 „Marketing in the Public Sector", also translated into Romanian in 2008, we undertake, in this paper, to render in a synthetic and structured manner the specificity of the marketing mix in the contemporary public institution, thus continuing the analysis made in this area during the last years, the results of which have been published in our journal.

The opportunity to know and use the marketing mix in the public institutions

As in any organisation, in the public institution, a marketing strategy, irrespective of how rigorously grounded it is at the theoretical level, it cannot lead to favourable results without using adequate tactics, according to the specific situation of the organisation of that moment.

The main instrument of the marketing tactic, successfully used in all types of organisations, is the marketing mix.

The marketing mix unifies the controllable variables that the public institution combines in order to influence the market and to ensure a maximum possible economic and social efficiency. It concerns a certain structure of marketing efforts, a connection, design and integration, in various shares, into a marketing programme, of the four elements: the public service and its tariff, its promotion and distribution, in order to obtain the efficiency necessary to accomplish the strategic objectives within a limited period. The four traditional components of the marketing mix, also known as „the 4 P" (product – public service, price – public service tariff, placement – distribution

and promotion - communication) represent the key by which the public institution can act in order to obtain a maximum impact on the market and on the consumer, reflecting the manner of use of the different resource components it owns so as to obtain all desired results.

The marketing mix, as result of the combination and dosing of the related ingredients and of the necessary resources, offers the possibility to understand the answer of the public institution to the society exigencies. It emerges, at any moment, as result of the action of some extremely complex and heterogeneous factors, both endogenous and exogenous by nature. Theoretically, the components of the marketing mix may be combined in an infinite number, but in practice not any combination acquires this statute, but the one that, consciously made based on the functional connections existing between the objectives proposed and the means used, allows to obtain a maximum efficiency, ensuring the equilibrium necessary for the carrying out of a normal activity.

When conceiving the marketing mix, the nature and number of the variables used at a given moment, their dosing for achieving the desired aim, the relationships occurring between the organisation and the macro-environment, the market requirements, the possibilities of the public institution etc. are considered, so as to allow the fulfilment of the established purpose according to its vision.

The conception of the marketing mix is a complex process comprising several stages.

During the first stage, the marketing variables are identified and chosen by integrating the market-related information and in compliance with the particularities of the strategy and of the mix implementation. In any combination, the simultaneous presence of the four classical variables is necessary, although the importance of each one differs depending on the objectives established by the public institution and on the modality of manipulation of this combination in relation to targeted aim. Hence, many variants are conceived. The choice of the optimum marketing mix involves the reporting to the assessment criteria, imposed by the related strategic and tactic objectives.

During the second stage, the mix combination deemed to be optimum for the said period is integrated under the best conditions, this one being registered in the marketing programme and applied by means of specific operational practices. In order to obtain a maximum impact on the market, certain principles allowing the adequate dosing and the coherence of the marketing actions should be observed.

During the third stage occurs the quantitative and qualitative assessment of the mix optimum variant. This allows the appreciation of the extent to which the established strategic objectives have been accomplished, the discovery of the existing dysfunctions, offering also suggestions for a new combination, more efficient of the marketing mix ingredients.

The quality of the marketing mix reflects the capacity of the deciders to adapt to the environmental changes and to forecast them.

In practice, the marketing mix plays an essential role, as it creates, on one side, the differentiation in the consumer's perception and, on the other side, the instruments specific to the achievement of the strategic objectives concretised in „the 4 P", which, at their turn constitute, each of them, a marketing sub-mix representing a game of strategies and combinations of variables.

Between the four sub-mixes there is certain interdependency, a mutual conditioning we will also present in the following chapters.

The marketing mix with the four sub-mixes represents the optics of the public service provider, of the public institution, the instrument used to facilitate and to influence the efficient exchange of activities with the consumer customer. Yet, it shouldn't be neglected within the marketing activity the consumer's optic, the public service beneficiary's optic, for whom: the product – the public service represents the solution for satisfying the social needs, the price – the

tariff is the cost the customer has to pay in order to benefit from the said service, the placement – the distribution facilitates the access to the said service and the promotion reflects the concrete means of communication with the public service provider.

The following chapters will render the specificity of each marketing sub-mix within the public institution.

The public service – the public institution „Product"

The main component of the marketing mix is represented by the product, generically called public service within the public institution; it represents the activity organised and regulated by an authority of the public administration in order to satisfy a social need of public interest.

In the public sector, the term of product, as stated by Ph. Kotler is not familiar, as the product is usually associated in society with material goods. Therefore, we should specify that according to the marketing conception, the public service is a complex notion concerning:

- material goods – postage stamps;
- services – educational, medical;
- organisations – National Institute of Meteorology;
- ideas – projects for consumption rationalisation;
- places – Palace of Parliament;
- information – Protection in case of natural disasters.

In other words, the public service appears under multiple forms and represents any activity provided by a public institution, its essential finality.

It reflects a dynamic social and political reality occupying a structural position within the society, frequently modifying its form as the general social needs quickly change, especially during the last decades.

As the public service concerns only the activities necessary for the satisfaction of the social needs appreciated by the public power as being of public interest, it is subject to the legal regime regulated by public law principles within an adequate legal framework to be considered within the marketing activity. Therefore, for the marketing activity it is important to delimitate the three categories of public services, depending on the extend they bring their contribution to the satisfaction of the public interest:

1. public services not involving the participation of foreign persons and having as purpose the direct satisfaction of individual interests of beneficiaries or customers.
2. public services involving also the indirect participation of other persons and seeing the customer as a user and not as a beneficiary (i.e. the maintenance of a network of roads).
3. public services involving the participation of certain citizens, being destined for the entire community, the persons not individually knowing the result (i.e. national defence, diplomacy).

The large range of fields within which the public institution carries out its activity makes the public service take a large diversity of concrete forms, thus negatively affecting the marketing activity. Hence, it is highly important to classify the public services depending on the presence and nature of the market relationships (practiced by international organisms such as: O.N.U., U.E., O.C.D.E.) which delimitates:

- **market services** – obtained as result of the sale-purchase process;
- **non-market services** - which are distributed by other mechanisms than the market ones and which are provided by the governmental organisms; They may be:
  - **collective public services**, being provided for the general benefit of the community, such as: justice, army, police, etc.; but also:

- **individual public services**, from which the citizens benefit in a direct manner: education, medical assistance, social security etc. being almost compulsorily consumed by them.

Within the marketing activity of the public institution it is important to consider the general service characteristics obviously also concerning the public services such as: those provided by the network industries (potable water supply, thermal and electrical power supply, natural gas distribution, sewerage, transports and communication, post services etc.), as well as other economic activities subject to related obligations by the public service (public lighting, land registering, social building construction, etc). These characteristics of the services, as well as the specificity of the public institution accomplishments generate a series of particularities within the „product" policy.

The **marketing research** aims to identify the public needs that the public institutions are going to meet, but it does not necessarily pursue to determine the forms to be taken by the public services, but to satisfy a higher number of citizens, who will be obviously satisfied at quite different levels, as their pretensions are variate and the public institutions cannot afford to answer to all of them due to the limited resources. The marketing of the public institutions should bring its contribution to the definition of the types of services to be provided at certain standards.

The developed European countries have already initiated strategies for implementing the public service standards concerning the following types of **models**:

- **central** – which imposes the establishment of certain standards published and reported at the level of the central administration (i.e. the Great Britain);
- **standard** – adequate to the market strategy which facilitates the customer's option and the competition between institutions;
- **contextual** – adequate for the strategy of increase of the public sector receptivity.
- **decentralised** – adequate for the countries where the public sector is decentralised, as it facilitates the accumulation of the experience based on which the decisions are grounded, thus contributing to the increase of responsibility and to the attenuation of bureaucracy. It imposes the adaptation of an ethical code of the public institutions allowing the transparency and receptivity of the public clerks and the standardisation of certain public services.

If the public services are provided for free, without transgressing the equality principle, the marketing should pursue its adaptation to different types of public in order to be efficient, and in case of discriminations, these should be done based on criteria objectively accepted by the entire public.

The main attribute of the public service to be considered within the marketing policy of the public institution is its **quality** by which the performances of the public institutions are appreciated, being defined by **opportunity** or adequate character involving the recognition of the differentiation of needs and of the appreciation of the importance of the service-related issues. The impact of the service on the customer is appreciated by the **service provision quality** mainly referring to: punctuality; accuracy; accessibility or material advantages of the service; availability; continuity; frequency; security; simplicity; agreeability; correctness; confidentiality; neutrality; equality etc;

Depending on the type of public service, each public institution should also establish within its system of objectives the one concerning the increase of the public service quality and it should delimitate the main ways to accomplish it.

Of course, depending on the public service specificity, the other defining elements of the product should be considered, such as: the denomination, which may render the said service attractive or not, the design, the „packaging", the ergonomic issues such as the comfort of the library chairs, the lighting, the general ambient for a theatre, museum, etc.

It depends on art of the marketing specialist, on its talent to adapt each element of the product policy to the specificity of the said public service.

Public service distribution

The policy of distribution of the public services, at first sight, seems not to be very important within the marketing mix of the public institution. But, it cannot be ignored as it designates all the economic and technical and organisational processes of coordination and transmission of the flow of rendered services from the provider to the beneficiary, under conditions of maximum efficiency. But the meeting between the provider and the consumer of public services, respectively the public institution and the citizen or other organisations, is different from what happens in case of distribution of material goods, due, on one hand, to certain characteristics of the public services, such as: intangibility, perishability and inseparability and, on the other hand, to the content and structure of their distribution.

The distribution of the public services includes all the activities carried out within the space and time separating the public institution from the beneficiary of the public services and refers to the following:

1. the distribution network – represented by the location of the buildings and equipment where the meeting with the public service consumer takes place. It is important for the beneficiary to have an easy and cheap access to this location. Therefore, especially as regards the local public administrations, the location of the public services is also selected based on political criteria, allowing the elected public clerks to use them as arguments within their electoral campaign. When the distribution network disadvantages the public service consumer, this one can refuse to consume them (for instance to use the library, the recreation places etc.), even if they are for free, and for the paid ones, the consumer can find more advantageous alternatives. Therefore, the location of the public institution in the territory and of the network is highly important. The latter may be:

- decentralised – with many places, but a limited number of services or with many services;
- concentrated – in few places of provision of a significant number of services.

2. the distribution channel – concretised in the route followed by the „offer of services" up to the beneficiary, which in most of the cases is direct, without intermediaries, thus advantaging the consumer, as this one saves time and intermediation-related expenses. As the distribution channel is the means for placing at the beneficiary's disposal the provided public service, the best decision should be made as for the place, time and modality of access, so as to reduce the customer's effort. The experience evidences that often the access facility is the most important when the customers have to choose. Therefore the location of the public institution and its working hours, the waiting time, the parking place, the ambient for carrying out the specific activity, really matter.

3. the meeting with the beneficiary – involves the travel of either the service provider or the service beneficiary. The communication means render very often unnecessary the physical presence, thus saving time. The use of the Internet becomes more frequent and efficient; the same for the phone, fax, especially for orders or for document transmission.

What is specific to the public service distribution is that it doesn't mainly involve a physical movement of material goods, but especially an adequate communication of ideas and, therefore, it occurs in the very moment of the meeting between the provider and the beneficiary, and the sale of certain public services may be done by order (mail) and the payment by discount, cheques, credit cards etc. As such, the physical circuit in case of public services is limited to the location of the distribution network, the travel of either the provider or the beneficiary and the reception

concomitantly with the consumption of the public service. This renders necessary the physical presence of the beneficiary in order to receive the said service (for instance the patient and the student receive the service in a direct manner. At the same time, we remark an obvious preoccupation for finding the most appropriate ways to place the public services at the customers' disposal, by providing them with a series of facilities.

In conclusion, the public service distribution strategy involves the adoption of decisions regarding: the place and modality of access of the beneficiaries; the moment of access of the beneficiaries to the said services; the customer's waiting time and the waiting and service reception ambient; the choice of the distribution channels and of the priorities based on various criteria; the expenses necessary for allowing the related distribution etc.

The optimisation of the public service distribution allows their effectiveness and even their promotion among citizens and organisations.

Public service promotion

The efficient communication of the public institutions with citizens and organisations is done by the public service promotion, this allowing the target public to get informed on the public institution offer and to understand that accessing public services will bring various advantages.

Until recently, speaking about the public institution promotion, especially by means of publicity, would have looked bizarre, as the communication with the exterior was deemed to be an administrative issue and all people had to comply with the legal provisions in the matter. Today, when the modern society tries to find the most efficient means of communication – in this era when the communication techniques have developed so incredibly – the promotion of an organisation constitutes a modality that offers a large and expressive range of forms and instruments it can successfully use.

The promotion (the promotional sub-mix) plays a very important role in presenting the institution, in communicating certain ideas (proposals, programmes etc.) and in informing the target public and the general public relating to the products and services provided, certainly in order to fulfil its goals under optimum conditions. By promotion, the citizens and organisations are informed, influenced and served, if adequate messages able to provide the desired position and identity are used.

It is important for the public institution promotion policy, in general, and for the public institution communication policy, in particular, to be conceived depending on the institution specificity, considering the three significant issues of the institutional communication:

- experience in the said field of activity – this provides operational communication;
- relationships with the exterior – the public relations is particularly important in relational communication;
- information – for attracting and convincing the beneficiaries, thus ensuring the "notoriety" communication.

Although communicating with public service consumers is not deemed to be essentially important for a public institution, as it is for an economic organisation, lately, in most of the countries, there is a clear concern to regulate the institutional communication, establishing the special rules able to ensure the desired administrative transparency (i.e. in France the following laws have been adopted: Law regarding the access to administrative documents, in 1987, Law for justifying the administrative decisions, in 1979, Law of administrative computer science, in 1978). They should create an adequate framework able to allow and to force the public administrations to give answers to any request for information coming from citizens and organisations, considering the information accessibility principles. In our country, in 2001 has been adopted the Law no. 544

regarding the free access to public interest information, according to which the public interest information is communicated ex officio or on demand by the specialised compartment of information and public relations or by related persons in charge.

An efficient promotion of the public institution involves the use of an integrated communication strategy, concerning:

- the ***messages*** sent to the target public, reflecting what it is desired for this public to know, to believe and to do. In order to be efficient, the message should be simple, clear, understood, perceived and followed by the potential consumer of public services. Also, the message should focus on the benefits provided to citizens in order to convince them to make use of it.
- the ***message intermediaries*** are those who effectively transmit the message, such as: representatives, activity partners, sponsors appearing as sellers of the said public. They usually identify with the name or logo of the public institution frequently appearing on the printed symbols and promotional materials. The message intermediaries perceived by the public as charismatic, experienced and credible are the most successful ones.
- the ***communication channels*** are not to be confounded with the distribution channels. They refer to the place and time of the message occurrence; the customer makes the transaction or benefits from the public service even by the participation to certain programmes.

It is particularly important to choose these channels depending on what has to be communicated and is thus stated to be the communication goal. The selection of channels should also be made depending on the available budget and on the behaviour and particularities of the target public. An integrated strategy of communication will allow the selection of the most adequate communication means in compliance with the nature of the related activity and depending on the level of agglomeration of the communication channels.

The public institutions should provide information relating to the public services placed at the beneficiaries' disposal and even to their performances, in order to reach the main objectives well synthesised by L. Matei:

- the increase of the democratic legitimacy;
- the possibility granted to customers to assert their rights;
- the modelling of the customers' expectations as for the level and quality of services;
- the facilitation and the creation of adequate conditions for options;
- the imposition of the providers' performance;
- the restoration of the customers' trust into the public sector and its agencies.

Often, the information supplied about the public services serves various purposes and hence it is necessary to control the administrative jurisdiction, and also to intervene, by means of a mediator, for the amiable settlement of any litigation that may occur between the administration and the beneficiary.

In order to prevent them, the public institutions should explain to its customers the quality of the provided services, by publicity materials (papers, brochures, magazines, radio-TV transmissions, CD-ROM etc.).

The important national and local public institutions have already specialised departments acting so as to maintain the public image by using various modalities of formal and informal changes with the potential consumers, with partners etc.

We could say we deal in the public sector with a structure of communication where the strategic dimension becomes increasingly obvious, it being particularly related to the achievement of certain goals.

The promotional mix of the public institution is a combination of several elements, an important role coming to the publicity and public relations, to which, depending on the public institution specificity can be added the following: sales promotion (especially if the object of activity is represented by material goods), sale forces (personal sale), promotional events, brand promotion etc.

The **publicity** becomes the promotional form increasingly used by the public institutions, even if they are in a monopole position, when they do feel threatened by the competition of the „alternative products". It has a series of particularities, as follows:

- it has no commercial purpose;
- the main purpose is to inform the potential customers, even if there are no competitors for the said public sector;
- it is complementary to regulations; hence, it is highly important to combine the two elements, as risks or abuses relating to the marketing use may occur either by the diffusion of erroneous information or by political propaganda;
- the choice of the publicity forms and instruments should consider the field of activity of the public institution. The most frequently used are the following: TV, radio, posters, boards, sending of publicity materials by mail, artistic and sportive representations;
- it involves more imaginative efforts than in case of economic organisations;
- it occurs prior to the launching of various programmes;
- it benefits from much lower budgets as compared to the economic organisations;
- it is the most largely used form, besides the public relations, but the organisation of the publicity campaigns is the most efficient form of promotion as it is persuasive or informative, creative etc.;
- its impact starts to preoccupy the public institutions, as especially the inappropriate advertising may affect their credibility;
- the publicity announces concern the large mediation of various strategic and administrative issues that may be addressed to certain categories of specialists or to the civil society in general.

The use of the written press or of the pilot agents willing to freely distribute necessary informative materials, deserves a special attention as it drives the essence of the civil society: freedom, creativity, gratuity.

The **public relations** constitutes, besides publicity, the most largely used means of communication of the public institution with citizens, other organisations, local communities, mass – media etc. They are represented by all the activities used for the creation, maintenance and influence of a favourable attitude towards the public institution. Information is transmitted by representatives, press conferences, publicity materials, special events. This form of promotion is informative, customised and adequate, transmitting a unique and credible message. It involves the dialogue and succeeds in reaching persons or organisations that reject publicity. It creates a climate of understanding and trust, gaining the sympathy of the public opinion or of certain groups. But the life of the message is limited, the effect is not controllable and often it involves a third party as intermediary, such as: the journalist, the event and an institution.

In the public institution, according to art. 17 of Law 544/2001, a representative organising at least once a month a press conference in order to inform the public is a must.

In order to be successful, the promotion strategies should consider the target public profile and characteristics, depending on which the issues to be communicated and the most adequate means to be used for this purpose are established. The choice of the most adequate promotional strategy should start from the targeted goals and hence a global image strategy or a strategy for the exclusive promotion of a public service or for the extension of the public institution image should

be conceived. Usually, a promotional activity strategy is drawn up, but also an intermittent promotional strategy (by campaigns of promotion of a new public service for instance) can be used. Also, the promotion can be achieved by one's own forced or by specialised organisations. The marketing specialists will propose to the managerial team, for each stage, the use of the most adequate promotional strategies answering the best to the fulfilment of the said public institution goals.

The tariff - price

In the public institutions, the notion of price, in the classical sense, has a limited applicability due, on one hand, to the difficulties relating to the quantification of the provided service value and, on the other hand, to the gratuity of many public services. But, there are a series of public services for which the consumers pay a tariff, so that it would be more correctly to use the term of „tariff-related policy" of the public institutions.

In the marketing mix of the public institution, the apparent price (tariff) is a less important variable (as many public services are freely provided), but in reality, it should not only not to be ignored, but also to be analysed as it presents a series of particularities to be considered in the marketing activity. Hence, in most public institutions, the establishment of the marketing sub-mix substantially differs from the one performed in economic organisations.

The tariff (price) of the public service is a marketing instrument used for achieving strategic objectives that are highly variate but which, generally, concern the partial or total recovery of costs, the obtaining of subventions, the modification of the consumers' behaviour by financial and non-financial stimulants etc.

In the contemporary society, the tendency is to establish public service tariffs based rather on political than on technical and economic principles. Normally, the price is based on the following principle: how much the consumer is willing to pay for a public service or good. The public service tariff takes in discussion the beneficiary's accessibility to that service, the producer's costs being subsequently covered by state subventions. Such tariffs are in fact non-financial prices not being relevant and inducing ambiguities in assessing the behavioural performances of the public institutions.

For certain public services, the price does not influence the consumption, the demand is inelastic, the price is fixed, it cannot be negotiated, and the said need should be satisfied (for instance the obtaining of a construction permit, of a passport etc.).

The public sector prices do not mean just fees paid for the used public services, but they are also reflected in the pecuniary means used for the discouragement of certain citizenship behaviours legally sanctioned by the society by fines and penalties, and in financial and non-financial stimulants practiced by granted deductions (for instance for the anticipated payment of certain taxes and fees).

Generally, the beneficiary pays the marginal cost (cost of the additional unit), representing the financial participation of the user to the compensation of the expenses made for that service provision. Thus, equal chances of access to public services are offered to all consumers, but this frequently limits the possibilities of tariff discrimination (i.e. the tariff for a letter is the same irrespective of the country destination place).

When establishing the public service tariffs, the demand-offer ratio, its perception by the beneficiary and its role as for the said service distribution and promotion should be considered. Therefore, the tariff can „render tangible" the service, thus providing information about quality. For instance, if the tariff is too low or symbolic, the consumer can perceive it as being of low quality, and if it is too high, many citizens will not afford to buy it. Also, the tariffs practised for

services can reduce their variability, can diminish the effects of perishability and inseparability. As regards low complexity services, the tariffs play an important promotional role.

The public institution price strategies can successfully make use of certain types of prices practised by the producers of material goods, such as: promotional price for encouraging the price collection, psychological price by painful fines for environmental protection, discounted price for encouraging the use of the common transportation means, differentiated price, by population segments etc.

Although, within the overall marketing policy of the public institution, the tariff-related policy is quite ignored, as it is concretely reflected by the level of differentiation, flexibility, temporary variation etc., it is necessary to consider, when grounding the tariffs (prices): the demand, offer, competition, costs and its perception by the consumer. Also, marketing researches are necessary in order to concretely determine the categories of services the public is willing to pay and the level it is able to bear.

Conclusions

It is particularly important to understand the particularities of the public institution marketing mix, considering that the public institution is undergoing, at this millennium beginning, a transforming process by the implementation of pertinent strategies meant for the improvement of the provided services.

The particularities of the public institution marketing mix are the resultant of the action of important factors, such as:

- the characteristics of the public institutions determined by the object, scope and field of activity, as well as the functions it accomplishes in the contemporary society;
- the essential differences existing between the public institution and the economic organisation (firm, enterprise) expressed in the mission and fundamental purpose, objectives, role, resource provision, interests etc.;
- the implementation of the New Public Management requiring the use of marketing as a highly important instrument in establishing and accomplishing the development strategy of the public institution;
- the approach of the public institution activity from the marketing perspective involves the conception of an adequate marketing strategy, but also of an efficient marketing mix by which the strategy can be successfully applied.

The systematisation of the particularities of the public institution marketing mix has concerned the four classical marketing sub-mixes, the so-called „the 4 P", namely: product – public service, price – public service tariff, placement – public service distribution and promotion – communication with the public service beneficiaries.

The product sub-mix holds a central place within the marketing mix, as the public service, which may take the form of material goods and, most often, of intangible services, expresses the essential finality of the public institution activity.

There is a large range of public services, as the general social needs are heterogeneous and under continuous change, due to the technical and scientific progress and to the increase of the material and spiritual civilisation level. The essential attribute of the public service is represented by its quality, by which the public institution performances are also appreciated. Its impact on the beneficiaries occurs by: punctuality, accuracy, accessibility, material advantages, availability, continuity, simplicity, agreeability, correctitude, confidentiality etc. Hence, a preoccupation for the increase of the public service quality should be oriented towards the discovery of new solutions adequate for each type of public service.

The price sub-mix is apparently less important, as many public services are provided for free, because, beside non-financial prices, tariffs are also used, these ones being often established based rather on political than on technical and economic principles, as the aim is to provide the accessibility of the beneficiary to the public service.

The public service distribution sub-mix does not look very important at first sight. But, considering that distribution means direction and transmission of public service flows from the public institution to the beneficiary, under maximum efficiency conditions, the optic changes. As the public service distribution concerns the distribution network and channel, but also the meeting with the beneficiary, the decisions regarding the place, the moment and the modality by which the citizen or the organisations may benefit by the public service are very important.

The promotional sub-mix has a particularly important role in the public institution marketing policy as it is the instruments by which it communicates, quickly and efficiently, with the public to which it sends the most important information, especially by publicity and public relations, but also by other means and forms of promotion.

The delimitation of the four forms of marketing sub-mixes is very important both at theoretical and at practical level, for the transposition into practice of the public institution strategic objectives, fit for leading to performance and competitiveness in the public sector and, on this grounds, to the possibility of meeting a larger range of social services, and also for improving the serving and satisfaction of the customers, of the public service beneficiaries.

Our study will continue with the analysis of the specific characteristics relating to the organisation of the marketing activity in the public institution, to the control and assessment of the marketing activity in different types of public institutions. Thus, we want to bring our contribution to the discovery of new efficient solutions, allowing the implementation of marketing in the whole public sector, rendering it more efficient and more active within the framework of the contemporary society development.

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SPECIFICUL FUNDAMENTĂRII ŞI IMPLEMENTĂRII MIXULUI DE MARKETING ÎN INSTITUȚIILE PUBLICE

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Abstract

Instrumentul esențial al implementării marketingului în sectorul public îl reprezintă mixul de marketing. Lucrarea evidențiază specificul conceperii, elaborării şi aplicării mixului de marketing în instituțiile publice. Particularitățile mixului de marketing utilizat în instituțiile publice sunt impuse, pe de o parte, de rolul şi locul pe care instituția publică îl are în societatea contemporană şi, pe de altă parte, de obiectivele definite de strategia de marketing a acesteia. Tactica prin care se înfăptuieşte strategia de marketing impune realizarea unei combinații optime a cel puțin patru variabile controlabile (serviciul/produsul, tariful/prețul, distribuția şi promovarea) de către instituția publică. Analiza componentelor mixului de marketing clasic utilizate în instituția publică permite sublinierea aspectelor semnificative care contribuie la îmbunătățirea activității instituției publice şi a imaginii acesteia în perspectivă.

Cuvinte cheie: *mix de marketing, instituții publice, sector public, strategie de marketing, variabile controlabile.*

Introducere

În societatea contemporană, instituția publică este organizația prin care statul îşi transpune în practică politicile publice concepute, elaborate şi acceptate pentru fiecare etapă a evoluției oricărei țări. Instituția publică ca suport al exercitării puterii politice prin activitatea desfăşurată oferă serviciile publice necesare satisfacerii acelor nevoi sociale pe care puterea publică le apreciază ca fiind de interes public la un moment dat. Nevoile sociale în continuă creştere şi diversificare la acest început de mileniu, ca urmare a progresului tehnico – ştiințific, a sporirii nivelului de cultură şi civilizației conferă instituției publice un rol tot mai important în prezent dar şi în viitorul apropiat şi îndepărtat. De aceea pentru fiecare instituție publică alegerea celei mai potrivite strategii de dezvoltare, prin care să-şi delimiteze obiectivele pe termen scurt, mediu şi lung este o necesitate stringentă.

Noul Management Public, ca model de conducere a instituției publice, fundamentează desfăşurarea activității acesteia pe combinarea abordării politice, legale şi manageriale, dar şi a orientării către piața administrației publice şi a guvernării antreprenoriale. Aceasta presupune studierea anticipată a nevoilor sociale precum şi ierarhizarea lor pentru ca în condițiile creşterii nelimitate, în timp ce resursele societății sunt limitate, să poată fi satisfăcute mai bine şi în timp cât mai scurt, tot mai multe.

Implementarea marketingului în instituțiile publice, în acest context, este singura soluție viabilă care asigură utilizarea cu maximă eficiență a resurselor puse la dispoziție de societate pentru a satisface binele public atât pentru cetățeni, cât şi pentru administrația de stat mediul natural. Transformarea şi aplicarea serviciilor de marketing în sectorul public, după cum preciza marele specialist american Ph. Kotler presupune: concentrarea asupra clientului, segmentarea şi

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alegerea pieţelor ţintă, identificarea concurenţilor, folosirea tuturor celor patru instrumente ale mixului de marketing, precum şi urmărirea, controlul activităţii şi efectuarea ajustărilor care se impun.

În lucrarea de faţă ne propunem să evidenţiem maniera specifică de elaborare şi aplicare a strategiei de marketing în instituţia publică şi mai ales a mixului de marketing, ca principal instrument al tacticii de marketing, a particularităţilor celor patru variabile tradiţionale ce definesc mixul de marketing şi în instituţia publică. Sintetizarea particularităţilor mixului de marketing în instituţia publică are importanţă atât în plan teoretic, cât şi practic – aplicativ. Pentru teoria marketingului, evidenţierea specificului mixului de marketing al instituţiei publice reprezintă argumente în susţinerea acestei noi specializări a marketingului. Pentru activitatea practică a instituţiilor publice cunoaşterea ş înţelegerea trăsăturilor mixului de marketing al instituţiilor publice permite specialiştilor să adopte cele mai bune strategii şi tactici pentru a-şi îndeplini misiunea. Evidenţierea particularităţilor utilizării mixului de marketing în instituţia publică o vom realiza prin examinarea celor patru „componente clasice" ale mixului de marketing, ceea ce va facilita implementarea marketingului în toate tipurile de instituţii publice, în funcţie de domeniul de activitate sub deviza „satisfacţie şi valoare pentru cetăţean".

Literatura ultimului deceniu referitoare la managementul instituţiilor publice şi marketingul serviciilor face tot mai frecvent referiri la necesitatea şi posibilitatea aplicării marketingului şi în instituţiile publice, exprimând idei interesante cu privire la unele aspecte specifice ale marketingului în instituţia publică, care vizează: piaţa, comportamentul consumatorului, serviciul public şi preţul acestuia, maniera de distribuţie şi mai ales de promovare prin publicitate.

Pornind de la opiniile exprimate în studiile publicate în reviste de specialitate din domeniul marketingului, în cele câteva capitole ale unor lucrări publicate în ţara noastră şi în străinătate, în interesanta lucrare a specialistului în marketing Ph. Kotler, publicată în colaborare cu H. Lee în 2007 „Marketing în sectorul public", tradusă şi în limba română în 2008, ne propunem în acest studiu să prezentăm sintetic şi structurat specificul mixului de marketing în instituţia publică contemporană. Continuând astfel analiza întreprinsă în ultimii ani în acest domeniu, ale cărei rezultate au fost publicate în revista noastră.

Oportunitatea cunoaşterii şi utilizării mixului de marketing în instituţiile publice

Ca în orice organizaţie şi în instituţia publică o strategie de marketing, oricât de riguros ar fi fundamentată sub aspect teoretic, nu poate duce la rezultatele scontate fără folosirea unor tactici adecvate, corespunzătoare situaţiei specifice a organizaţiei din momentul respectiv.

Principalul instrument al tacticii d marketing utilizat cu succes în toate tipurile de organizaţii este mixul de marketing.

Mixul de marketing reuneşte variabilele controlabile pe care instituţia publică le combină cu scopul de a influenţa piaţa pentru a-şi asigura o eficienţă economico – socială cât mai mare. El vizează o anumită structură a eforturilor de marketing, o îmbinare, proiectare şi integrare în diverse proporţii într-un program de marketing a celor patru elemente: serviciul public şi tariful acestuia, promovarea şi distribuirea lui în scopul dobândirii eficacităţii necesare realizării obiectivelor strategice într-o perioadă determinată. Cele patru componente tradiţionale ale mixului de marketing cunoscut şi sub denumirea de „cei 4 P" (produs – serviciu public, preţ – tariful serviciului public, plasare – distribuţie şi promovare - comunicare) constituie cheia prin care instituţia publică poate acţiona în vederea obţinerii impactului maxim asupra pieţei şi a consumatorului, reflectând modul în care sunt antrenate diferite componente ale resurselor de care dispune pentru obţinerea efectelor scontate.

Mixul de marketing ca rezultat al îmbinării ingredientelor, al dozării lor şi al resurselor de care acestea au nevoie, oferă posibilitatea cunoaşterii variantei de răspuns a instituţiei publice la cerinţele şi exigenţele societăţii. El se constituie în orice moment ca rezultat al acţiunii unor factori de o complexitate şi eterogenitate extremă, atât de natură endogenă cât şi exogenă. Teoretic, componentele mixului de marketing pot fi combinate într-un număr infinit, dar în practică nu orice combinaţie are acest statut, ci doar aceea care, alcătuită în mod conştient pe baza legăturilor funcţionale dintre obiectivele propuse şi mijloacele folosite conduce la obţinerea unei eficienţe maxime, asigurându-i echilibrul necesar desfăşurării unei activităţi normale.

În conceperea mixului de marketing se au în vedere natura şi numărul variabilelor utilizate la un moment dat, modul de dozare al acestora pentru atingerea scopului propus, relaţiile ce apar între organizaţie şi macromediu, reacţia întârziată a acţiunilor de marketing, solicitările pieţei, posibilităţile instituţiei publice etc. astfel încât să se poată atinge obiectivul stabilit conform viziunii acesteia.

Elaborarea mixului de marketing este un proces amplu ce se desfăşoară în mai multe etape.

În prima etapă se identifică şi se aleg variabilele de marketing prin integrarea informaţiilor privitoare la piaţă şi în concordanţă cu particularităţile strategiei şi ale implementării mixului. În orice combinaţie, se impune prezenţa simultană a celor patru variabile clasice, deşi importanţa pe care o are fiecare diferă în funcţie de obiectivele instituţiei publice şi de maniera în care este manipulată combinaţia în raport cu scopul urmărit. De aceea se elaborează mai multe variante. Alegerea mixului de marketing optim presupune raportarea la criterii de evaluare, impuse de obiectivele strategice şi tactice prin care se realizează acestea.

În a doua etapă se integrează în cele mai bune condiţii combinaţia de mix considerată optimă pentru perioada respectivă, care se înscrie în programul de marketing şi se aplică prin utilizarea unor practici operaţionale. Pentru a obţine maximum de impact pe piaţă, trebuie respectate anumite principii prin care se asigură nu numai buna dozare ci şi coerenţa acţiunilor de marketing.

În a treia etapă are loc evaluarea cantitativă şi calitativă a variantei optime de mix. Aceasta permite aprecierea măsurii în care au fost realizate obiectivele strategice fixate, descoperirea disfuncţionalităţilor, oferind şi sugestii pentru o nouă combinare mai eficientă a ingredientelor mixului de marketing.

Calitatea mixului de marketing reflectă capacitatea decidenţilor de adaptare la modificările mediului şi la previzionarea acestora.

În practică, mixul de marketing joacă un rol esenţial, întrucât el creează pe de o parte diferenţiere în percepţia consumatorului, iar pe de altă parte, creează instrumentele specifice înfăptuirii obiectivelor strategice ce se conturează în „cei 4 P", care la rândul lor, fiecare în parte constituie un submix de marketing ce reprezintă un joc de strategii şi combinaţii de variabile.

Între cele patru submixuri există o interdependenţă, o intercondiţionare reciprocă pe car o vom şi prezenta în capitolele următoare.

Mixul de marketing cu cele patru submixuri reprezintă optica ofertantului de servicii publice, a instituţiei publice, mijlocul de a facilita şi influenţa schimbul eficient de activităţi cu clientul consumator. Nu trebuie însă neglijată în activitatea de marketing nici optica consumatorului, a beneficiarului de servicii publice pentru care: produsul – serviciul public reprezintă soluţia de satisfacere a nevoilor sociale, preţul – tariful este costul pe care el trebuie să – l plătească pentru a beneficia de serviciul respectiv, plasarea – distribuţia asigură uşurinţa accesării serviciului respectiv, iar promovarea constituie modul concret de comunicare cu ofertantul de serviciu public.

În capitolele următoare vom evidenţia specificul fiecărui submix de marketing din cadrul instituţiei publice.

Serviciul public – „Produsul" instituției publice

Componenta fundamentală a mixului de marketing o constituie produsul care în instituția publică poartă denumirea generică de serviciu public care reprezintă activitatea organizată şi reglementată de o autoritate a administrației publice în vederea satisfacerii unei nevoi sociale de interes public.

În sectorul public termenul de produs, după cum sublinia Ph. Kotler nu este familiar, deoarece produsul este de regulă asociat în societate cu forma bunurilor materiale. De aceea trebuie să precizăm că în accepțiunea d marketing, serviciul public este o noțiune complexă care vizează:

- bunuri materiale – timbre poştale;
- servicii – educaționale, medicale;
- organizații – Institutul Național de Meteorologie;
- idei – proiecte de raționalizare a consumului;
- locuri – Palatul Parlamentului;
- informații – Protecție în caz de calamități naturale.

Astfel spus, serviciul public se prezintă sub multiple şi reprezentări de activitate ce se oferă de către o instituție publică, finalitatea esențială a acesteia.

El reflectă o realitate social – politică dinamică ocupând o poziție structurală în societate, care îşi schimbă frecvent forma deoarece nevoile sociale cu caracter general se modifică rapid mai ales în ultimele decenii.

Întrucât serviciul public vizează doar activitățile necesare satisfacerii unor nevoi sociale apreciate de către puterea politică, ca fiind de interes public, ele este supus regimului juridic reglementat de principii de drept public într-un cadru legislativ corespunzător de care trebuie ținut seama în activitatea de marketing. De aceea pentru activitatea de marketing este importantă delimitarea celor trei categorii de servicii publice, în funcție de maniera în care ele contribuie la satisfacerea interesului public.

1. servicii publice la realizarea cărora nu sunt implicate persoane din afară şi au ca scop satisfacerea în mod direct a intereselor la nivel de persoană care are calitatea de beneficiar sau client.
2. servicii publice la realizarea cărora participă şi alte persoane indirect, iar clientul este doar utilizator nu şi beneficiar (ex. întreținerea rețelei de drumuri).
3. servicii publice la realizarea cărora participă unii cetățeni, sunt destinate întregii colectivități, fără ca persoanele să cunoască în mod individual rezultatul (ex. apărare națională, diplomație).

Paleta largă a domeniilor în care îşi desfăşoară activitatea instituția publică face ca serviciul public să îmbrace o mare diversitate de forme concrete, ceea ce provoacă dificultăți în activitatea de marketing. De aceea prezintă interes deosebit clasificarea serviciilor publice în funcție de prezența şi natura relațiilor de piață (practicată de către organismele internaționale precum: O.N.U., U.E., O.C.D.E.) care delimitează:

- **servicii market** – obținute prin procesul de vânzare-cumpărare;
- **servicii nonmarket** - care sunt distribuite prin alte mecanisme decât cele ale pieței şi care sunt oferite de către organismele guvernamentale; Ele pot fi:
  - **servicii publice colective**, ce se asigură în beneficiul general al colectivității precum: justiție, armată, poliție, etc.; dar şi:
  - **servicii publice individuale**, de care beneficiază direct cetățenii: învățământ, asistență medicală, sociale etc. pe care le consumă aproape obligatoriu.

În activitatea de marketing a instituției publice trebuie să se țină seama de caracteristicile serviciilor în general, care vizează evident şi serviciile publice precum: cele furnizate de industriile în rețea (distribuția apei potabile, energiei electrice, termice, gazelor naturale, canalizare, transporturi şi telecomunicații, servicii poştale etc.) precum şi alte activități economice supune obligațiilor de serviciul public (iluminat public, cadastru imobiliar, construcția de locuințe sociale, etc). Aceste caracteristici ale serviciilor, precum şi specificul realizărilor în instituțiile publice face ca în politica de „produs" să apară o serie de particularități.

Cercetarea de marketing are ca obiectiv cunoaşterea nevoilor publice pe care instituțiile publice urmează să le satisfacă, dar aceasta nu urmăreşte cu predilecție determinarea formelor pe care să le îmbrace serviciile publice ci satisfacerea unui număr cât mai mare de cetățeni, care evident vor fi satisfăcuți la niveluri destul de diferite, întrucât pretențiile lor sunt variate şi instituțiile publice nu-şi pot permite să răspundă acestora datorită resurselor limitate. Marketingul instituțiile publice trebuie să contribuie la definirea diferitelor tipuri de servicii ce vor fi oferite la anumite standarde.

Deja în țările europene dezvoltate s-au conturat strategii de implementare a standardelor serviciilor publice ce vizează **modelul**:

- **central** – care impune stabilirea unor standarde publicate şi raportate la nivelul administrației centrale (ex. Marea Britanie);
- **standard** – adecvat strategiei de piață, ceea ce facilitează opțiunea clientului şi competiția între instituții;
- **contextual** – se potriveşte strategiei de creştere a receptivității sectorului public.
- **descentralizat** – se pretează în țările în care sectorul public este descentralizat, deoarece facilitează acumularea experienței ce stă la baza deciziilor, contribuind la creşterea responsabilității şi la diminuarea birocrației. El impune adaptarea unui cod etic al instituțiilor publice care să permită transparența şi receptivitatea funcționarilor publice şi standardizarea unor servicii publice.

În cazul în care serviciile publice sunt oferite gratuit, fără a se încălca principiul egalității, marketingul trebuie să urmărească adaptarea acestuia la diferitele tipuri de public pentru a fi eficient, iar în cazul unor discriminări, acestea trebuie făcute pe criterii obiectiv acceptate de întregul public.

Atributul esențial al serviciului public de care trebuie să se țină seama în politica de marketing a instituțiilor publice este **calitatea** acestuia prin care se apreciază performanțele instituțiilor publice, care se defineşte prin **oportunitate** sau caracter adecvat ce implică recunoaşterea diferențierii nevoilor şi a aprecierii importanței aspectelor serviciilor. Impactul serviciului asupra clientului se apreciază prin **calitatea prestării serviciului** ce vizează mai ales: punctualitate; acuratețe; accesibilitate sau avantaje materiale ale serviciului; disponibilitatea; continuitatea; frecvența; siguranța; simplitatea; agreabilitatea; corectitudinea; confidențialitatea; neutralitatea; egalitatea etc;

În funcție de tipul de serviciului public fiecare instituție publică trebuie să-şi stabilească în cadrul sistemului de obiective şi pe cel ce vizează creşterea calității serviciului public şi să delimiteze principalele căi de realizare a acestuia.

Desigur, în funcție de specificul serviciului public trebuie avute în vedere şi celelalte elemente definitorii ale produsului cum ar fi: denumirea, care poate face atractiv sau nu serviciul respectiv, designul, modul de „ambalare", aspecte ergonomice cum ar fi confortul scaunelor din bibliotecă, iluminatul, ambientul în general pentru un teatru, muzeu etc.

Depinde de arta specialistului de marketing, de talentul acestuia în adaptarea fiecărui element al,politicii de produs la specificul serviciului public respectiv.

Distribuţia serviciului public

Politica de distribuţie sau plasare a serviciilor publice, la prima vedere pare să nu prezinte prea mare importanţă în cadrul mix-ului de marketing al instituţiei publice. Ea însă nu poate fi ignorată deoarece desemnează totalitatea proceselor economice şi tehnico-organizatorice de dirijare şi transmitere a fluxurilor de servicii oferite de la prestator la beneficiar în condiţii de maximă eficienţă. Dar maniera de înfăptuire a întâlnirii dintre prestatorul şi consumatorul de servicii publice respectiv instituţia publică şi cetăţeanul sau alte organizaţii este diferită de ceea ce se întâmplă în cazul distribuţiei bunurilor materiale, datorită pe de-o parte unor caracteristici ale serviciilor publice precum: intangibilitatea, perisabilitatea şi inseparabilitatea, iar pe de altă parte datorită conţinutului şi structurii distribuţiei lor.

Distribuţia serviciilor publice include ansamblul activităţilor desfăşurate în spaţiul şi timpul ce separă instituţia publică de beneficiarul serviciilor publice şi vizează:

1. reţeaua de distribuţie – reprezentată prin locaţiile clădirilor şi echipamentelor în care se realizează întâlnirea cu consumatorul de servicii publice. Este important pentru beneficiar ca localizarea să îi permită accesul cât mai ieftin şi rapid. De aceea mai ales pentru administraţiile publice locale, amplasarea serviciilor publice se face şi pe criterii politice care să le permită funcţionarilor publici aleşi să le utilizeze ca argumente în campanie electorală. Când reţeaua de distribuţie îl defavorizează pe consumatorul de servicii publice, acesta poate renunţa, la consumul lor, de exemplu folosirea bibliotecii, a locurilor de agrement etc. chiar dacă sunt gratuite, iar pentru cele plătite poate găsi alternative private mai avantajoase. De aceea, este important plasamentul instituţiei publice în teritoriu şi al reţelei, care poate fi:

- descentralizată – cu multe locuri dar număr limitat de servicii sau cu multe servicii;
- concentrată – în puţine locuri de prestare a unui număr mare de servicii.

2. canalul de distribuţie – concretizat în traseul pe care „oferta de servicii" îl urmează până la beneficiar, care în cele mai multe cazuri este direct, fără intermediari, ceea ce îl avantajează pe consumator, deoarece economiseşte timp şi cheltuielile de intermediere. Deoarece canalul de distribuţie este mijlocul de a pune la dispoziţie beneficiarului serviciul public oferit, trebuie adoptate cele mai bune decizii cu privire la locul, modul şi momentul în care acesta are acces în vederea reducerii efortului de client. Experienţa arată că adesea uşurinţa accesului este cea mai importantă când clienţii au de ales. De aceea contează amplasarea instituţiei publice şi programul de lucru care să-i permită utilizarea, timpul de aşteptare, locul de parcare, ambianţa în care se desfăşoară activitatea respectivă.

3. întâlnirea cu beneficiarul – presupune deplasarea ori a prestatorului ori a beneficiarului de servicii. Mijloacele de comunicaţie permit tot mai mult ca prezenţa fizică să nu mai fie necesară, economisindu-se astfel mai ales timp. Folosirea Internetului devine tot mai frecventă şi eficientă, ca şi a telefonului, faxului, mai ales pentru comenzi sau transmiterea documentelor.

Specific distribuţiei serviciilor publice este faptul că ea nu implică cu predilecţie o mişcare fizică de bunuri materiale, ci mai ales o comunicare adecvată a ideilor şi de aceea se realizează chiar în momentul întâlnirii ofertantului cu beneficiarul, iar vânzarea unor servicii publice se poate face prin comandă (corespondenţa) şi plata prin decontare, cecuri, cărţi de credit etc. Ca urmare, circuitul fizic în cazul serviciilor publice este limitat la amplasarea reţelei de distribuţie, deplasarea fie a prestatorului fie a beneficiarului şi recepţionarea concomitent cu consumul serviciului public. Aceasta face necesară prezenţa fizică a beneficiarului pentru a primi serviciul respectiv de exemplu: pacientul, studentul, elevul primesc direct serviciul. În acelaşi timp se remarcă preocuparea pentru a găsii cele mai potrivite căi de punerea la dispoziţia clienţilor a serviciilor publice asigurându-le acestora o serie de facilităţi.

În concluzie, strategia de distribuție a serviciilor publice implică adoptarea deciziilor cu privire la:locul şi modalitatea de acces a beneficiarilor; momentul în care aceştia au acces la serviciile respective; timpul de aşteptare al clientului şi ambianța în care aşteaptă şi primeşte serviciul; alegerea canalelor de distribuție şi a priorităților pe baza unor criterii; cheltuielile necesare asigurării distribuției etc.

Optimizarea distribuției serviciilor publice permite eficientizarea acestora şi chiar promovarea lor în rândul cetățenilor şi organizațiilor.

Promovarea serviciilor publice

Comunicarea eficientă a instituțiilor publice cu cetățenii şi organizațiile se realizează prin promovarea serviciilor publice, care permite ca publicul țintă să fie informat despre oferta instituției publice şi să creadă că va obține avantaje dacă va accesa servicii publice.

Până nu demult, să pui problema promovării instituției publice, mai ales prin publicitate ar fi părut o nerozie deoarece se considera că problema comunicării cu exteriorul era de ordin administrativ şi toată lumea trebuie să respecte prevederile legale în domeniu. Astăzi, când societatea modernă îşi pune cu acuitate problema găsirii celor mai eficiente mijloace de comunicare – culmea în epoca în care s-a diversificat atât de mult, sau poate tocmai de aceea, tehnica de comunicații – promovarea unei organizații constituie o modalitate ce oferă o paletă largă şi expresivă de forme şi instrumente pe care le poate utiliza cu succes.

Promovarea (submixul promoțional) joacă un rol foarte important în prezentarea instituției, în comunicarea unor idei (propuneri, programe etc.), în informarea publicului țintă şi a publicului general în legătură cu serviciile şi produsele oferite, bineînțeles, cu scopul de a-şi îndeplini cât mai bine obiectivele stabilite. Prin promovare cetățenii şi organizațiile sunt informați, influențați şi serviți, dacă se foloseşte mesajul potrivit care să asigure poziția şi identitatea dorită.

Este important ca politica de promovare a instituțiilor publice în special, cea de comunicare în general, să fie concepută în funcție de specificul instituției, ținând seamă de cele trei aspecte semnificative ale comunicării instituționale:

- experiența în activitatea desfăşurată, care asigură comunicare operațională;
- existența relațiilor cu exteriorul - relațiile publice ocupă un loc deosebit în comunicarea relațională;
- informarea - pentru atragerea şi convingerea beneficiarilor, care asigură comunicarea de „notorietate”.

Deşi se consideră că pentru instituția publică, a comunica cu consumatorii de servicii publice nu este o necesitate vitală, ca în cazul organizațiilor economice, în ultima vreme în mai toate țările există preocuparea de a reglementa comunicarea instituțională, stabilind regulile speciale care să asigure transparența administrativă (ex. în Franța s-au adoptat: Legea accesului la documentele administrative în 1987, Legea motivării deciziilor administrative în 1979, Legea informaticii administrative din 1978). Ele trebuie să creeze cadrul propriu care să permită şi să oblige administrațiile publice să răspundă la cererile de informații ale cetățenilor şi organizațiilor şi să reformuleze deciziile administrative ținând seamă de principiile accesibilității informațiilor. În țara noastră în 2001 a fost adoptată Legea nr. 544 privind liberul acces la informațiile de interes public, conform căreia informațiile de interes public se comunică din oficiu sau la cerere prin compartimentul specializat de informații şi relații publice sau prin persoane cu atribuții în acest domeniu.

O promovare eficientă a instituției publice implică utilizarea unei strategii de comunicare integrate, care vizează:

- ***mesajele*** transmise publicului ţintă care exprimă ceea ce se doreşte ca acesta să ştie, să creadă şi să facă. Pentru a fi eficient, mesajul trebuie să fie simplu pentru a fi clar şi înţeles, reţinut şi urmat de către potenţialul consumator de servicii publice. De asemenea mesajul trebuie să se concentreze asupra beneficiilor oferite cetăţenilor pentru a-i convinge să le utilizeze.
- ***mesagerii*** sunt cei care transmit efectiv mesajul şi sunt întruchipaţi de: purtătorul de cuvânt, partenerii de activitate, sponsorii ce apar ca vânzători ai serviciului public respectiv. De obicei se identifică cu numele sau logoul instituţiei publice care adesea apar pe simbolurile şi materialele promoţionale tipărite. Au succes mesagerii care sunt percepuţi de către public cu carismă, experienţă, credibilitate.
- ***canalele de comunicare*** nu se confundă cu canalele de distribuţie, sunt de fapt tipuri de mijloace de comunicare. Ele vizează locul şi momentul în care apar mesajele şi clientul efectuează tranzacţia sau beneficiază de serviciul public chiar şi prin participarea la unele programe.

Deosebită importanţă are alegerea lor în funcţie de ceea ce trebuie comunicat şi s-a stabilit astfel ca obiectiv al comunicării. Canalele alese trebuie să fie cele mai potrivite şi în funcţie de bugetul disponibil, dar şi în funcţie de comportamentul şi particularităţile publicului ţintă. O strategie integrată a comunicării va permite alegerea celor mai potrivite mijloace de comunicare în concordanţă cu natura activităţii respective, dar şi cu gradul de aglomerare a canalelor de comunicare.

Instituţiile publice trebuie să asigure informarea despre serviciile publice pe care le pun la dispoziţia beneficiarilor şi chiar despre performanţele acestora în vederea atingerii principalelor obiective bine sintetizate de către L. Matei:

- creşterea legitimităţii democratice;
- acordarea posibilităţii clienţilor de a-şi solicita drepturile;
- modelarea aşteptărilor clienţilor cu privire la nivelul şi calitatea serviciilor;
- facilitarea şi crearea condiţiilor pentru opţiuni;
- impunerea performanţei din partea prestatorilor;
- reinstaurarea încrederii clienţilor în sectorul public şi agenţiile sale.

Adesea informaţiile despre serviciile publice asigură realizarea unor scopuri multiple şi de aceea este necesar controlul jurisdicţiei administrative, dar şi intervenţia mediatorului în soluţionarea amiabilă a litigiilor ce pot apărea între administraţie şi beneficiar.

Pentru prevenirea apariţiei acestora, instituţiile publice trebuie să explice clienţilor calităţile funcţionării serviciilor oferite prin materiale publicitare (pliante, broşuri, reviste, emisiuni de radio-TV, CD-ROM etc.).

Deja instituţiile publice importante atât de nivel naţional cât şi local au departamentele specializate ce acţionează pentru menţinerea imaginii publice prin utilizarea diverselor modalităţi de schimburi formale şi informale cu potenţialii consumatori, cu partenerii etc.

Se poate spune că asistăm la o structură a comunicării în sectorul public, în care dimensiunea strategică devine tot mai evidentă, ea fiind legată în mod special de înfăptuirea unor obiective.

Mixul promoţional al instituţiei publice este o combinare a câtorva elemente, în care rol important îl joacă publicitatea şi relaţiile publice, dar lor li se adaugă în funcţie de specificul instituţiei publice: promovarea vânzărilor (mai ales dacă obiectul de activitate sunt bunuri materiale), forţele de vânzare (vânzarea personală), manifestări promoţionale, promovarea mărcilor etc.

Publicitatea devine forma promoţională tot mai mult utilizată de către instituţiile publice, chiar şi în cazul în care ele se află în situaţia de monopol, când se simt ameninţate de concurenţa „produselor alternative". Ea cunoaşte o serie de particularităţi:

- nu are scop comercial;
- scopul major îl reprezintă informarea potențialilor consumatori, chiar dacă nu există concurenți pentru serviciul public respectiv;
- este complementară reglementărilor, de aceea are mare importanță combinarea cele două elemente întrucât pot apare riscuri sau abuzuri în utilizarea marketingului fie prin difuzarea unor informații eronate, fie prin propagandă politică.;
- alegerea formelor şi instrumentelor de publicitate trebuie să țină seama de domeniul care funcționează instituția publică. Cele mai utilizate sunt: TV, radio, afişe, panouri, trimiterea materialelor publicitare prin poştă, manifestări artistice şi sportive.;
- implică mai multe eforturi imaginative decât în cazul organizațiilor economice;
- premerge lansarea unor programe;
- dispune de bugete mult mai reduse decât organizațiile economice;
- este cea mai utilizată formă, alături de relațiile publice, dar organizarea companiilor publicitare este cea mai eficientă formă de promovare deoarece are caracter persuasiv sau informativ, creativ etc;
- impactul ei începe să preocupe instituțiile publice, pentru că mai ales reclamele proaste pot deteriora credibilitatea lor;
- anunțurile publicitare vizează mediatizarea largă a unor aspecte strategice şi administrative ce se pot adresa unor categorii de specialişti sau societății civile în general.

Folosirea presei scrise sau a agențiilor pilot care să distribuie gratuit materialele informative necesare, merită atenție deosebită deoarece propulsează esența societății civile: libertate, creativitate, gratuitate.

Relațiile publice constituie alături de publicitate forma cea mai utilizată de comunicare a instituției publice cu cetățenii, alte organizații, comunități locale, mass – media etc. Sunt reprezentate de ansamblul activităților utilizate pentru crearea, menținerea şi influențarea unei atitudini favorabile față de instituția publică. Se vehiculează informații prin purtătorul de cuvânt, conferințe de presă, materiale publicitare, evenimente speciale. Această formă de promovare are caracter informativ, este personalizată şi potrivită cu un mesaj unic şi credibil. Implică dialogul şi reuşeşte să ajungă şi la persoane sau organizații care resping publicitatea. Creează un climat de înțelegere şi încredere, câştigând simpatia opiniei publice sau a unor grupuri. Dar viața mesajului este limitată, nu este controlabil efectul şi de multe ori implică şi o a treia parte ca intermediar cum ar fi: ziaristul, evenimentul şi o instituție.

În instituția publică, conform art. 17 din Legea 544/2001 trebuie să existe un purtător de cuvânt care organizează lunar cel puțin o conferință de presă pentru a informa publicul.

Pentru a avea succes, strategiile de promovare trebuie să țină seama de profilul şi caracteristicile publicului țintă în funcție de care se stabileşte ce trebuie să comunici şi care sunt cele mai potrivite mijloace pe care le poți utiliza. Alegerea celei mai potrivite strategii promoționale trebuie să pornească de la obiectivele urmărite şi de aceea se va elabora o strategie a imaginii globale sau a o promovării exclusive a unui serviciu public sau a extinderii imaginii instituției publice. De obicei se elaborează o strategie a activității promoționale, dar poate fi folosită şi o strategie promoțională intermitentă (prim campanii de promovare a unui nou serviciu public de exemplu). De asemenea, promovarea se poate realiza cu forțe proprii sau cu organizații specializate. Specialiştii în domeniul marketingului vor propune echipei manageriale în fiecare etapă utilizarea celor mai potrivite strategii promoționale, pe care le apreciază că răspund cel mai bine înfăptuirii obiectivelor instituției publice respective.

Tariful – Preţul

În instituţiile publice noţiunea de preţ în sensul clasic are o aplicabilitate redusă, pe de-o parte datorită dificultăţilor de cuantificare a valorii serviciului oferit, iar pe de alta, datorită gratuităţii multor servicii publice. Dar, sunt o serie de servicii publice pentru care consumatorii plătesc un tarif, aşa încât corect ar fi să folosim termenul de „politică de tarifare" a instituţiilor publice.

În mixul de marketing a instituţiile publice preţul (tariful) aparent este o variabilă mai puţin importantă (dacă multe servicii publice se oferă gratis), dar în realitate, el nu numai că nu trebuie ignorat, dar trebuie analizat întrucât prezintă o serie de particularităţi ce ar trebui să fie avute în vedere în activitatea de marketing. De aceea în majoritatea instituţiilor publice stabilirea submixului de preţ diferă substanţial faţă de organizaţiile economice.

Tariful (preţul) serviciului public este un instrument de marketing utilizat pentru atingerea obiectivelor strategice care sunt foarte diferenţiate, dar care în genere vizează recuperarea parţială sau totală a costurilor, obţinerea de subvenţii, schimbarea comportamentului cetăţenilor prin stimulente financiare şi non – financiare etc.

Se remarcă în societatea contemporană că tarifele pentru serviciile publice se stabilesc mai mult pe principii politice decât tehnico-economice. În mod normal preţul se bazează pe principiul cât este dispus cumpărătorul să plătească pentru un bun sau serviciul public. Tariful pentru serviciul public pune problema accesibilităţii beneficiarului la acest serviciul, costurile producătorului urmând să fie acoperite prin subvenţii de la stat. Asemenea tarife sunt de fapt preţuri non-financiare care nu au relevanţă şi induc ambiguităţi în evaluarea performanţelor comportamentale ale instituţiei publice.

Pentru unele servicii publice, preţul nu influenţează consumul, cererea este inelastică, preţul este fix, nu poate fi negociat, iar nevoia respectivă trebuie satisfăcută (de exemplu obţinerea unei autorizaţii de construcţie, a unui paşaport etc.).

Preţurile în sectorul public nu înseamnă doar taxe plătite pentru serviciile publice utilizate, ele se reflectă şi în mijloacele băneşti utilizate pentru descurajarea unor comportamente cetăţeneşti sancţionate legal de societate, cum ar fi amenzi şi penalizări, dar şi în stimulentele financiare şi non – financiare practicate prin reducerile acordate (de exemplu pentru plata înainte de termen a unor impozite şi taxe).

În general beneficiarul plăteşte costul marginal (al unităţii suplimentare), care reprezintă participarea financiară a utilizatorului la compensarea cheltuielilor ce se fac pentru a se oferii acel serviciu. În acest fel se încearcă asigurarea de şanse egale de acces la serviciul public pentru toţi consumatorii, dar care adesea limitează posibilităţile de discriminare tarifară (ex. tariful pentru o scrisoare e acelaşi pe întreg teritoriul ţării).

În stabilirea tarifelor pentru serviciile publice trebuie să se ţină seama de modul specific în care se reflectă raportul cerere-ofertă, percepţia sa de către beneficiar şi rolul pe care îl au în distribuţia şi promovarea serviciului respectiv. Astfel, tariful poate „tangibiliza" serviciul oferind semnificaţii despre calitate. De exemplu dacă tariful este prea mic, sau simbolic, consumatorul poate să-l perceapă ca fiind de calitate slabă, iar dacă este prea mare, mulţi cetăţeni nu-şi pot permite să-l achiziţioneze. De asemenea, tarifele practicate pentru servicii pot reduce variabilitatea acestora, pot diminua efectele perisabilităţii şi inseparabilităţii. Pentru serviciile cu grad de complexitate redus tarifele unor servicii publice joacă un rol promoţional deosebit.

Strategiile de preţ ale instituţiei publice pot utiliza cu succes unele tipuri de preţuri practicate de către producătorii de bunuri materiale precum: preţ promoţional pentru încurajarea colectării preţurilor, preţ psihologic prin amenzi usturătoare de protecţie a mediului, preţ redus pentru încurajarea folosirii transportului în comun, preţ diferenţiat pe segmente de populaţie etc.

Deşi în ansamblul politicii de marketing a instituțiilor publice, politica de tarifare ocupă încă un loc modest, deoarece ea se reflectă concret în nivelul, gradul de diferențiere, flexibilitate, variație temporară etc. este necesar ca în fundamentarea tarifelor (prețurilor) să se țină seama de: cerere, ofertă, concurență, cost şi percepția lui de către consumator. De asemenea sunt necesare cercetări de marketing pentru a se determina în mod concret categoriile de servicii pe care publicul este dispus să le plătească şi nivelul pe care l-ar putea suporta.

Concluzii

Cunoaşterea particularităților mixului de marketing în instituțiile publice prezintă un interes deosebit în condițiile în care instituțiile publice se află la acest început de mileniu într-un proces de transformare prin aplicarea unor strategii îndrăznețe de îmbunătățire a serviciilor pe care le oferă.

Particularitățile mixului de marketing în instituția publică sunt efectul acțiunii unor factori importanți, cum ar fi:

- caracteristicile instituției publice determinate de obiectul, sfera şi domeniul de activitate, precum şi funcțiile pe care le îndeplineşte în societatea contemporană;
- deosebirile esențiale existente între instituția publică şi organizația economică (firmă, întreprindere) exprimate în misiunea şi scopul fundamental, obiective, rol, asigurarea resurselor, interese etc.;
- implementarea Noului Management Public care solicită utilizarea marketingului ca instrument deosebit de important în stabilirea şi îndeplinirea strategiei de dezvoltare a instituției publice;
- abordarea activității instituției publice în viziune de marketing presupune elaborarea unei strategii de marketing corespunzătoare, dar şi a unui mix de marketing eficient prin care strategia să poată fi aplicată cu succes.

Sistematizarea particularităților mixului de marketing în instituția publică a vizat cele patru submixuri de marketing clasice aşa numiții „cei 4 P" şi anume: produsul – serviciul public, prețul – tariful serviciului public, plasarea – destinația serviciului public şi promovarea – comunicarea cu beneficiarii serviciilor publice.

Submixul de produs deține rolul esențial în ansamblul mixului de marketing, deoarece serviciul public care poate îmbrăca forma bunurilor materiale şi cel mai adesea al serviciilor intangibile exprimă finalitatea esențială a activității instituției publice.

Serviciile publice cunosc o mare diversitate întrucât nevoile sociale cu caracter general sunt eterogene şi în continuă modificare datorită progresului tehnico – ştiințific şi al creşterii gradului d civilizație materială şi spirituală. Atributul esențial al serviciului public este calitatea lui prin care se apreciază şi performanțele instituției publice, impactul acestuia asupra beneficiarilor se realizează prin: punctualitate, acurațețe, accesibilitate, avantaje materiale, disponibilitate, continuitate, simplitate, agreabilitate, corectitudine, confidențialitate etc. De aceea o preocupare pentru creşterea calității serviciului public trebuie să sporească şi să vizeze găsirea de noi soluții adecvate fiecărui tip de serviciu public.

Submixul de preț aparent este mai puțin important, întrucât multe servicii publice se oferă gratuit, deoarece se utilizează alături de prețuri non – financiare şi tarife care adesea se stabilesc mai mult pe principii politice decât tehnico – economice deoarece se urmăreşte accesibilitatea beneficiarului la serviciul public.

Submixul de distribuție sau plasare a serviciului public la prima vedere nu ar prezenta prea mare interes. Dar dacă avem în vedere că plasarea înseamnă dirijarea şi transmiterea fluxurilor de servicii publice de la instituția publică la beneficiar în condiții de maximă eficiență, optica se modifică. Deoarece distribuția serviciului public vizează rețeaua şi canalul de distribuție dar şi

întâlnirea cu beneficiarul, deciziile cu privire la: locul, modul şi momentul în care cetăţeanul sau organizaţiile pot beneficia de serviciul public sunt foarte importante.

Submixul promoţional are un rol deosebit de important în politica de marketing a instituţiei publice deoarece este instrumentul prin care aceasta comunică rapid şi eficient cu publicul căruia îi transmite cele mai importante informaţii mai ales prin publicitate şi relaţii publice, dar şi prin alte mijloace şi forme de promovare.

Delimitarea particularităţilor celor patru forme de submixuri de marketing prezintă un interes deosebit atât teoretic cât şi practic pentru transpunerea în practică a obiectivelor strategice ale instituţiei publice, care să asigure performanţă şi competitivitate în sectorul public şi pe această bază posibilităţile satisfacerii unei game mai largi de nevoi sociale, dar şi a îmbunătăţirii servirii şi satisfacţiei clienţilor, a beneficiarilor de servicii publice.

Studiul nostru va continua cu analiza specificului organizării activităţii de marketing în instituţia publică, a controlului şi evaluării activităţii de marketing în diverse tipuri de instituţii publice. În acest fel, ne dorim să contribuim la găsirea de soluţii eficiente care să conducă la implementarea marketingului în ansamblul sectorului public care să devină mai eficient şi mai activ în dezvoltarea societăţii contemporane.

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THIRD WORLD STATES: BUILDING POLITICAL INSTITUTIONS ON A DIFFERENT GROUND

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Abstract

This study follows two main explicative models regarding Third World states - the one originating with political economy (the modernization and dependency theories) and the one belonging to the political development (especially bound to the comparative politics), attempting at identifying the problems of state edification in third world countries.

Keywords: *Third World, Modernization Theory, Comparative Politics, Political Development, Fragile States.*

Introduction

In this paper I try to explore the main theoretical approaches concerning third world state problems, following the two traditional discourses: one originated in political economy and the other in comparative politics. I argue that both of these theories have limited explanative power, due to several causes. One of those causes is to be found in the assumption that western models (economic, political, historical, etc) are not only superior, but that they must represent a desirable standard to be achieved by third world societies. As a result, by relying on such standards, the analysis of those societies itself becomes biased, by assuming implicitly the existence of a set of goals for the third world countries, thus failing to produce valid explanations to the variety of issues present in the third world. The relevance of such an inquiry is to be found especially in the fact that, although after September 11 2001 the main fronts of the war on terror are in third world countries (as is the case of Afghanistan, Iraq or Pakistan), the western efforts to deepen our knowledge of third world societies in order to improve the political outputs towards (e.g.) democratization of those countries is minimal. In my paper I suggest that knowing more about the history of these societies (especially about certain aspects related to their political history) may provide not only researchers with a better understanding of the political processes taking place in the third world, but also may offer politicians the necessary tools so badly needed in elaborating policies regarding these countries.

My approach is methodologically traditionalist and theoretically critical. I intend to look critically at third world state edification from both theoretical and historical perspective, in order to mark the limits of current theoretical explanation and to identify those characteristics which are seemingly left out. Finally, I try to introduce a new criterion in third world states analysis – a political-historical one.

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I. Defining the problem

The concept of "Third World" appears in 1952, created by the demographer Alfred Sauvy, who was thereby comparing the global situation of the ex-colonies to that of the "third estate" from during the French Revolution: just as the "third estate", the Third World is nothing but "wants to be something"[1]. Sauvy separates the main characteristics specific with the Third World according to three criteria: the demographic, the economical and the civil-political criteria. As such, Sauvy listed a set of ten criteria by which the underdeveloped countries can be identified: high mortality rate, high reproduction rate (without drawbacks during maternity); physiologically insufficient alimentation; rudimentary hygiene; inferior condition of the women; use of children labor; poor development of the education system; preeminent assignment of the work able to the agrarian sector; poorly developed middle class; lack of free universal voting[2]. The researcher is faced from the very beginning with a vast field of research, marked by various issues, which only illustrate the huge heterogeneity of the Third World states. In fact, three years later, the political reality has confirmed, with the Bandung Convention, the unsurpassable divergences resulting from the political and cultural diversity and the conflict of interests still characteristic to the Third World states[3]. In fact, the only point on which all the attendants seemed to agree was the "rejection of any form of colonialism", phrase that each of the delegates interpreted in his/her own way[4]. In effect, the only heading on which the Third World states seemed to come to terms during this initial period was the desire to safeguard their independence[5].

As of 1961, after the Cairo and Belgrade Conferences the Third World becomes associated with the concept of *nonalignment*, referring to the political and military positioning of these states outside of the areas of influence of the two blocks of superpowers involved in the Cold War[6]. After the Cairo Conference of the states in the Nonalignment Movement (June, 1961), the purposes of the movement could be traced on four different directions: 1. preserving international peace and security; 2. real and effective international cooperation; 3. peoples' independence; 4. the peoples of the ex-colonies claim their right to a development able to insure them a happier, better future[7]. In fact, all along this period the Third World represents the actual battleground for the two superpowers, as here are directed the political efforts for the counteracting of the spreading of the

[1] In Veron, Jacques, „L'INED et le Tiers Monde", in *Population (French Edition)*, 50e Année, No. 6, Cinquante années de „Population" (Nov. – Dec., 1995), p. 1565. The paternity of the concept is also claimed by Dag Hammarskjöld who, consciously drawing inspiration from the antonyms Old World/New World, concocted the notion Third World to designate the poor countries in Africa and South America (See Calvocoressi, Peter, *Politica mondială după 1945*, (*World Politics after 1945*), Bucharest: All, Publishing 2000, p. 163).

[2] *Idem*, p. 1567.

[3] Kumar, Satish, „Nonaligment: International Goals and National Interests", in *Asian Survey*, Vol. 23, No. 4 (Apr., 1983), p. 445.

[4] See Fitzgerald, C.P., „East Asia after Bandung", in *Far Eastern Survey*, Vol. 24, No. 8 (Aug., 1955), pp. 113-119;

[5] Kumar, Satish, quoted article., pp. 446 and the following.

[6] See *The Declaration by the Heads of State and Government of the Nonaligned States*, p. 7, document accessed with http://www.namegypt.org/Relevant%20Documents/01st%20Summit%20of%20the%20Non-aligned%20Movement%20-%20Final%20Document%20(Belgrade_Declaration).pdf , on 27.01.10. See also Choucri, Nazli, „The Perceptual Base of Nonaligment", in *The Journal of Conflict Resolution*, Vol. 13, No. 1 (Mar., 1969), p. 57.

[7] Kumar, Satish, quoted article., p. 446. See also ***, „Cairo Conference of Nonaligned Nations", in *International Organization*, Vol. 19, No. 4 (Autumn, 1965), pp. 1065-1070.

influence of one, or the other of the two blocks[8], and the "by proxy" wars, a defining element of the Cold War[9].

At the same time, the UN becomes the main platform and political assertion ground for the Third World countries. As such, in 1960, the General Assembly votes the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, that, on article 6, condemns any attempt at the partial or total destruction of the national unity and territorial integrity of a Third World state, qualifying such actions as incompatible with the principles of the Chart of the United Nations[10].

After the end of the Cold War, the concept of Third World was replaced, in the specialized literature, by the phrase "Countries under development", this area representing, up to the present, the area with the highest conflict risk and instability rate on world level. After 10.11.2001 this characteristic becomes very apparent, the military operation stages of the war against terrorism being located entirely in the Third World[11].

The main common characteristics of the third world states: dysfunctional, dependent economies, relying on the production of raw materials for the developed countries and operating as commodity markets for their processed products; traditional societies, mostly rural; a high rate of population growth and generalized poverty; absence or poor development of the democratic political institutions and of a pluralist political culture resulted in the creation of an apparently coherent image, at least with respect to the main problems that the Third World faces. At the same time, the generalizations regarding it suggest a *non-existing unity*: including the majority of the world states and a huge number of different peoples and countries, the third world is characterized by an astounding economical, political, social and cultural diversity that practically defies generalization.

II. State development and building in Thirld World states- from the economical to the political

Despite their specific diversity, Third World states seem to have as common feature the underdevelopment[12], but also the massive failure in eliminating it. The end of the Cold War generated a massive wave of optimism, which can be summed up by the conviction that, politically, Third World states will be able to solve their problems by adopting a development course towards a liberal-democratic future. This new course was supposed to bring about a set of

[8] Choucri, Nazli, „The Nonaligment of Afro-Asian States: Policy, Perception and Behaviour", in *Canadian Journal of Political Science*, Vol. 2, No. 1 (Mar., 1969), p. 2.

[9] Miroiu, Andrei, Ungureanu, Radu-Sebastian (Coordinators), *Manual de Relaţii internaţionale* (*Manual of International Relations*- Iaşi: Polirom, 2006), p. 34.

[10] McWhinney, Edward, „Declaration on the Granting of Independence to Colonial Countries and Peoples", document accessed on http://untreaty.un.org/cod/avl/pdf/ha/dicc/dicc_e.pdf. On the documentation of the respective meeting see Audiovisual Library of International Law on http://untreaty.un.org/cod/avl/ha/dicc/dicc_video.html. The document of the Declaration can be accessed on: http://www.un-documents.net/a15r1514.htm.

[11] I will continue using in this paper the phrase Third World, thereby acknowledging the validity of the arguments supporting the utility and validity of this concept in today's uni-multipolar world. See Grant, Cedric, „Equity in International Relations: A Third World Perspective", in *International Affairs (Royal Institute of International Affairs 1944-)*, Vol. 71, No. 3, Ethics, The Environment and the Changing International Order (Jul., 1995), pp. 567-587.

[12] By development I understand "the process […] by which the resources (natural, technological, capital and labor related etc.) are employed in such a manner as for certain optimality criteria to be met: individual and collective prosperity, social participation, institutional performances etc. (Vlasceanu Lazăr, *Politică şi dezvoltare. România încotro?- Politics and development. Romania, where to?* – Bucharest: Trei Publishing, 2001), p.21.

reforms for the adoption of the market economy, the dispensing with the socialists views, which were typical until then to this area (and mostly ideologically inspired by the Chinese model), the creation of some effective representative political institutions[13]. However, this special situation at the end of the Cold War, as it was subsequently proven, did not save the Third World from all the avatars entailed by their dependency state (not only economical[14], but political as well; more than once did the ex-colony states, on international level, appeal to the military support by the former imperial metropolises.) One could say that the contemporary times, fundamentally dominated by the globalization phenomenon and its effects[15], seems to only have sharpened the inequalities on international level, thereby adding new dimensions to the economical, political and cultural subordination[16]. In this context, the theoretical answers the states of the Third World must provide to the challenges they face are multiple, but mostly addressing the same two old dimensions- economical and political. More precisely, a development gap between the Third World countries and the great economical powers of the world is found and then explanations and solutions for the surpassing of this development gap are sought.

The most employed and therefore widespread explanations with respect to the development issues, originate with the liberal and the Marxist theories, the latter being seen as a reaction to the former.[17]

Perhaps the most influential liberal theory is the one formulated by Walt Whitman Rostow at the beginning of the 60's (20th century) in his work, *The Stages of Economic Growth*, proposing solutions based on the economic growth founded on the principles of the 19th century economic liberalism, solutions that subsequently reflected in international institutions, such as the World Bank or the International Monetary Fund. In Rostow's Europe-centered perspective the only real way of overcoming the development problems of the Third World states consisted in them repeating, on another level, the Western history, which would insure the passing from the traditional (agrarian, non-scientific and economically unproductive) society to the modern (industrial, scientific, consumerism bound) one, while the main strategy consisted in a mobilization of the internal and international economies for economical growth investment[18]. Rostow's theory generated an entire wave of contributions with respect to the Third World, reunited under the phrase "modernization theories"[19]. For them, *both the model and the sources for the development are exterior to the countries under development: external help and reproducing the already proven model would generate internal transformation by way of development*[20].

Although the tradition of the development theories has represented an apparently successful path- generating the appearance of the "Asian tigers"- the structural crises, the sharpening of the underdevelopment, as poverty grew, together with the inability by the local political class to lead to the formation and development of solid internal infrastructure tend to infirm the supremacy of this approach. At the same time, especially in the African countries, the problems of

[13] Duffield, Mark, *Global Governance and the New Wars*, (London&New York: Zed Books, 2001), p. 161.

[14] See Galtung, Johan, „A Structural Theory of Imperialism", in *Journal of Peace Research*, Vol. 8, No. 2 (1971), pp. 81-117.

[15] Miroiu, Andrei, Ungureanu, Radu-Sebastian, quoted work, pp. 304-306

[16] Little, Richard; Smith, Michael (Ed.), *Perspectives on World Politics*, 3rd Edition (London&New York: Routledge, 2006), p. 255.

[17] Jackson, Robert; Sørensen, Georg, *Introduction to International Relations* (Oxford&New York: Oxford University Press, 1999), p. 198.

[18] Rostow, W.W., *Les Étapes de la croissance économique*, (Paris: Éd. Du Seuil, 1963), pp. 16-31.

[19] Jackson, Robert; Sørensen, Georg, idem. Vezi şi Craig, David; Porter, Doug, *Development Beyond Neoliberalism? Governance, Poverty Reduction and Political Economy*, (New York: Routledge, 2006), especially pp. 31-62.

[20] Vlăsceanu, Lazăr, quoted work., p. 36.

underdevelopment and poverty in their turn, along with the ones already discussed, count among the main instability and conflict factors, even generating the emergence of a new category, entitled "The Fourth World", mainly made up of quasi-states, or failed states, such as Somalia or Afghanistan.

Though the creation of institutions able to offer an alternative to the modernization theories view was attempted, this was done however by appealing, in the good liberal tradition, to the free market mechanisms and to the structuring of the economic relationships of the Third World States in a system consistent with their interests – the United Nations Conference on Trade and Development (UNACTAD)- all such projects proved essentially dysfunctional, facing the lack of real cooperation by the countries under development[21]. At the same time, the thesis claimed by the liberal modernization theorists by which the international free market would lead to technological gains by the Third World states pursuant to the investments made by the great Western corporations proved wrong as well, the relation between the frail Third World economies and the great corporations producing monopoly situations, generating dependency and underdevelopment[22].

Last but least, the trust granted by various international financial bodies to some of the Third World states proved to be ungrounded as well. The IMF and the World Bank negotiate with state actors, taken as sovereign, in Western terms, and, therefore, capable of independently assuming public projects and policies on the internal level. However, more than once, the aforementioned institutions have to face the pre-westfalian reality[23] of some of the states in this area, especially the African, that prove incapable of implementing the negotiated agreements or, as in the case of Tanzania and Julius Nyerere, regular international funds "black holes", in their attempt at implementing unrealistic projects, more related to the consolidation of the personal authority[24].

The main theoretical reaction to the liberal view of modernization is represented by the radical, or neo-Marxist one, reuniting a manifold of approaches under the generic title of "dependency theories"[25]. While liberal tradition found free market to be one of the key elements of the Third World states overcoming their underdevelopment, here is where the dependency theorists found the very roots of the evil[26]. Unlike the actual Marxist view, the dependency theory does not claim that the capitalist production mode will also emerge in the Third World States, as the historical materialism prescribed, they claim that underdevelopment is a state specific only to this part of the world. It does not originate, as claimed by the modernization theories, with the traditional structure in the respective countries, but is in fact the product of a process to which the Third World states were subjected within the global capitalist system: underdevelopment emerges as a marginal and intentional product of the development of the Western states[27]: "underdevelopment represents a process by which the capitalist forces spread in order to submit and pauperize the Third World".[28]

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[21] Chishti, Sumitra, „Globalization, International Economic Relations and the Developing Countries", in *International Studies*, 39, 3 (2002), p. 231.

[22] Jackson, Robert; Sørensen, Georg, p. 200.

[23] Biró, Daniel, „The Unbearable Lightness of...Violence: Organised Violence and Governance building in Westfalian Periphery", quoted in Miroiu, Andrei, Ungureanu, Radu-Sebastian, mentioned work, p. 317.

[24] Schneider, Leander, „Freedom and Unfreedom in Rural Development: Julius Nyerere, Ujamaa Vijijni and Villagization", in *Canadian Journal of African Studies*, Vol. 38, No. 2, (2004), pp. 344-392.

[25] Payne, Anthony (Ed.), *Key Debates in New Political Economy* (New York: Routledge, 2006), p. 5.

[26] Amir, Samir, „The Crisis, the Third World, and North-South, East-West Relations", in Resnick, Stephen;

[27] Jackson, Robert; Sørensen, Georg, idem.

[28] *Idem*. Also see Amin, Samir, *The Liberal Virus. Permanent War and the Americanization of the World* (New York: Monthly Review Press, 2004), pp. 87-112.

By this logic, the economical aspect explains, at least partially, the deficiencies of on the political level: the weakness of some of the Third World states are explainable in terms of a dissonance between the interests of the population and those of the ruling class, the latter being much closer, in this respect, to the interests of the great Western capitalists. However, the dependency theory, with its stressing of the underdevelopment originated stagnation, did not manage to provide the answers needed for the overcoming of the problems faced by the Third World states. The emergence of the "Asian Tigers" in the 90s infirmed the prediction by which the Third World countries were destined to a future of economic stagnation and poverty[29].

III. Overlapping worlds: Western institutional models and local political cultures

Approaching the problem of the Third World states from the economizing perspective of the developmentalist view represents, in my opinion, only one side of the matter, requiring the addition of a complementary approach, implying an examination of the relationship between the political institutional models found in this area and the 'in situ' realities of the respective political cultures. As such, this section of the paper has two main concerns: the first related to the problem of the dominant explicative model regarding the problems of the Third World states and the second, setting out from the observation of the existing conflict between the imported institutional models and the realities of the local political cultures, supporting the introduction of a new, historical-political, analysis criterion.

The comparative politics researches inaugurated half a century ago by Almond and Verba proceed, in great extent, from an assumption similar to the one made by Rostow, restricted however to the civil-political dimension: non-European societies, that generally gained their self-determination right after the decolonization process, must necessarily take the steps required for reaching a Western type democracy by an emulation of the historical processes leading to the emergence of this initial political model, in Western Europe and the United States[30].Therefore, the political development is subjected to an unidirectional understanding, as an axis if you will, with the parochial political cultures on one end, and the polyarchyes on the other, implicitly excluding or neglecting those realities which are contrary to this claim and therefore offering rather recipes than explanations with regard to the political and economical problems of the Third World countries[31]. The key concept in this case is modernization, be it economical, or political, both approaches being tributary to a Western model- more precisely it is set out from the assumption that societies are "in the process of becoming modern rational entities in which efficiency and scientific logic replace traditional values and belief systems"[32].

[29] *Idem*.

[30] See Verba, Sidney; Almond, Gabriel A., *The Civic Culture. Political Attitudes and Democracy in Five Nations*, Sage Publications, 1989, p. 5. Also we can find a similar attitude in Samuel Huntington's *Political Order in Changing Societies* (*Ordinea politică a societăţilor in schimbare*- Iaşi: Polirom, 1999), pp. 11-15 where he speaks of „reducing the political gap" between the Third World and the western states, implicitly thereby assuming the superiority and also the desirability of the western political model.

[31] Even in Richard Higgot's understanding, who notices that, within the general frame of the development theories, ideas were considered to be determinant with respect to the historical direction of the Third World states, the general claim being that the solution to the problems of the Third World resides in "directly applying theoretical constructs derived from the study of the historical evolution of the West."– in Higgott, Richard, A., *Political Development Theory. The Contemporary Debate*, (London: Croom Helm, 1983), p. 1.

[32] Naomi Chazan, P. Lewis, R. Mortimer, D. Rothschild, and S. J. Stedman*, Politics and Society in Contemporary Africa* (Boulder, CO: Lynne Rienner, 3rd ed., 1999), p. 15.

The U.S. example, in extremis, can be taken as a certain kind of ideal, the perfect example of "good practice" of democratization and institutional consolidation of the state in a post-colonial society. But, just as the conditions specific with the American society (cultural, religious, economical etc.) led to a particular understanding of politics and the relationship between state and individual, similarly the conditions specific with the post-colonial societies of the Third World led to the emergence of some particular forms of state structures. The great problem that such an approach to the Third World political processes and institutions faces is represented by the universalizing tendency with respect to the validity of the conceptual analysis framework, as well as to the direction which the analyzed societies can or should bestow upon their political institutions. In other words, it is an, implicit or explicit, form of conceptual and epistemic hegemony we are dealing here with, with respect to the analyses of the Third World and that, in my opinion, negatively contribute to the production of explanations for the political problems in this area.[33] At the same time, beyond the objections that can be made against the various researches regarding state building and democracy consolidation with the Third World states, the "in situ" reality defies theories: though a relatively recent idea, the quasi-state represents an ever more globally present reality. According to the World Bank, in 2006 no less than 26 states in the world were on the brink of collapse, representing about 10% of all the states in the world, broader estimations showing that the number of states than can be set in the LICUS (Low-Income Countries Under Stress) category or *fragile states* amounts to 39[34]. An extremely relevant element, to which I will return in the following sections is represented by the fact that, out of the 26 alleged *core* states, respectively *severe* LICUS, 15 of them, i.e. more than half[35], are African. Moreover, it is not only the explicative models for the political development of the Third World states that prove to be fallacious, but the very institutional model of the nation state itself, which was important in this area after decolonization[36].

However, as mentioned in the first section of this paper, the astounding diversity characteristic to the Third World apparently does not allow for a generalization with respect to the state-society relationship, given the fact that state frailty does not represent an overall characteristic of all the states in this area: India, China and South Africa, for example, do not face the same degree of political instability as Somalia, Sudan, Haiti or Vanuatu. However, the characteristics of the *failed states* phenomenon- the absence of the civil society in its Western meaning; the existence of deep ethno-religious cleavages subjacent to the political life, or of parallel, informal (net like) models for the managing of the political issues, that are ethno-tribally or religiously founded[37] - suggest the possibility for the existence of a more profound level on

[33] Despite the warnings made by authors such as Franz Fanon or Léopold Sedar-Senghor ever since the Cold War. Even if the two aforementioned authors resorted to a „tiermondist" socialist discourse, considered as proper (by its critic perspective) to the realities of the post-colonial world, I find them to be relevant especially with respect to the identification of a specific dimension of the indigenous societies as against the colonizing ones, that is also being reflected in the (in)compatibility between the local institutional forms of regulation of the political field and the importations from the imperial metropolis. The most obtrusive is the indigenous organization model presented by Senghor in Senegal and that, among other distinctive features, also states non-territoriality, unlike the similar Western political constructions. For a better clarification see Rabaka, Reiland, *Africana Critical Theory. Reconstructing the Black Radical Tradition, from W.E.B. Du Bois and C.L.R. James to Franz Fanon and Amilcar Cabral* (Lanham: Lexington Books, 2009), especially Chap. 4 şi 5; also see wa Muiu, Mueni; Martin, Guy, *A NewParadigm of the African State. Fundi wa Afrika* (New York: Palgrave MacMillan, 2009), especially chap. 2.

[34] World Bank. *Engaging with Fragile States*, (Washington, DC, 2006), pp 83-84

[35] *Idem*.

[36] Rothemund, Dietmar *The Routledge Companion to Decolonization*, (London&New York: p. 243.Routledge, 2006),

[37] also see Boadi-Gymah, E., „Societatea civilă in Africa" ("The Civil Society in Africa"), in Larry Diamond, Yun-han Chu, Marc F. Plattner, Hung-mao Tien (Editori), *Cum se consolidează democraţia* (*How to Consolidate Democracy*) (Iaşi: Polirom, 2004), pp. 291-303

which the reality of the Third World state could be researched, which I would call politico-historical. It originates with the observation of the fact that all the political characteristics comprised with the definition of the frail or failed states amount to one, which is considered to be fundamental: the lack, with the societies in cause, of an agreement with respect to the fundamental rules of solving and regulating the socio-political conflicts[38] that thereby transform the respective states in mere institutional structures void of content. Such a state of facts is conducive to civil war (and not to dialogue or civic-political participation), as main means of solving political problems in the frail states of the Third World[39]. The existence or non-existence of such a formal case is not and cannot be the result of the short colonial history, but must represent a historical feature of the respective political communities, prior to the European presence, and thereby noticeable by an independent researcher. At the same time, this feature must not necessarily follow a pre-established, European model, thereby being of a possible religious or bureaucratic nature, specific with every particular society. The existence of this agreement is reflected, on the observable level, upon the formation of several state-like entities prior to the colonial period- such as the Mughal Empire in India or the Chinese Empire in the Far East, structures upon which the colonial domination imposed itself[40] and that, once the colonial presence driven away, constitute the layer the European state model, assumed after decolonization[41], overlaps.

Conclusions

The examination of the economical dimension of the problems facing the Third World leads to the conclusion that the approach presented by the political economics offers only partial explanations, which are limited by the very original assumption, namely that economical realities could offer pertinent explanations for the political problems. The economical aspect can provide explanations of the huge problems faced by the Third World only up to a certain point, but the causes for the underdevelopment reside, at many times, on another level, the political one. With the third section of the paper I attempt at providing a complementary approach, from a political perspective, of the same issues, seeking to trace the limits of the explicative discourses as against the realities on site.

The specialized literature has correctly identified the political features that define the general problems facing the Third World, but fails at correctly identifying their causes, adopting the aforementioned position of the "political development gap", by this implicit valorization of the European model pushing the Third World states to a form of neo-barbarism, outside the "civilized world". On the other side, the explanations originating with the researchers in the Third World, though rather coherent with the Gramscian reaction to the Western hegemony, they are flawed, as

[38] An extended discussion over the relevance of this criterion with respect to any political society in general and to the European society in particular, presents us Giovanni Sartori in his work, *Pluralism, Multiculturalism and Foreigners: an Essay on Multiethnic Society* (*Ce facem cu străinii? Pluralism vs multiculturalism. Eseu despre societatea multietnică*, Bucharest: Humanitas, 2007), espacially pp. 13-48;

[39] I must undeline here the fact that that I do not attempt here to reduce all causes for civil conflict to this single criterion, on the contrary I try to introduce it in the analyses of the complex and particular frame that defines any society of the type discussed so far. At the same time, I also must underline the fact that many of the civil conflicts of the Third World originate with the inheritance, by the ex-colony states of the borders from the imperial period, that din not follow the national or ethnical boundaries, but the administrative ones.

[41] Rothemund, Dietmar, mentioned work p 243.

[41] However, the mere existence of a prior political structure is not sufficient- it has to be constant in time, thereby insuring the continuation of the respective institutional model. Therefore, political structures such as the Khmer Empire in Cambodia, the existence of which between the 9th and the 13th centuries A.D. has not been passed on by other political state structures are to be excluded, as its influence on the contemporary Cambodian society is null.

they are subjective, or assume certain ideological positions deriving from the same Western source. Therefore, the quality of the analytic instrument must be carefully reexamined, a first step being the introduction of a new analysis criterion, originating with the historical experience of the non-European societies in the Third World.

First and foremost, I find that the importance of using a politico-historical criterion for state continuity in the analysis of the Third World, resides in the fact that it causes the researcher to direct attention to the understanding of the actual conditions not by appealing to a theoretical model with which these conditions should be consistent, but on the basis of the realities specific with the respective societies. Secondly, this criterion is relevant not only with the research of the frail or failed states, but also with the ones not having to cope with such problems, thereby offering a new perspective on the adaptation of non-European societies to the realities of the European institutional model.

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SPIRITUALITY AND GLOBALIZATION: A MULTI-LEVEL EQUATION

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Abstract

The article focuses on the dynamics of human life patterns in order to underline the complexity of the issues of spirituality and globalization. It is a must of individual and social balance to bring forth the most challenging aspects of a universal transition towards a global society in order to positively interfere into the continuous polemics regarding the real nature of the human being and to decipher through communication its stable characteristics destined to evidence the unity present into diversity and to support spiritual life beyond the reductive tendency of ephemeral secular powers. It is essential to prepare our mind to go beyond apparent antagonisms, to pursue our self-achievement through the use of diversity and to understand that only a spiritualized globalization can fulfill us as human beings.

Keywords: *spirituality, globalization, human nature, development, self-achievement*

A. COMPULSORY REMARKS

1. Introduction

A scientific approach engages important principles in order to configure a strong and solid argumentation. In the present context, when we are analyzing the complex relations between spirituality and globalization, we need to imply two aspects - first the fact that any actual social process is a re-actualization of older ones ("there is nothing new under the sun"); secondly we have to recognize spirituality as a major constitutive element of the human being. From this point of view our investigation states firmly the repetability of the social processes and the inner being of human spirituality. These principles, as they reveal themselves in the particular areas of research – study of religions, history, politics, sociology and education, psychology, economy and medicine - can be considered as having an objective existence which has to be taken into account.

2. Defining notions

Spirituality can be defined as the totality of human (both inner and exterior) activities which are associated with the person's need of achieving the absolute understanding of his existence and purpouse of life, beyond physical space and time.

Globalization is, in fact, a historical process of communicating by any means, between human cultural paradigms, usually defined by the presence of at least two partners: the dominante element - as a stronger or higher paradigm; the dominated element - the weaker or the lower paradigm (not always the dominated element is a lower paradigm, from the contrary, but from the historical point of view, the military foreign power becomes prominent over it for a certain period of time). Always the weaker paradigm received influences and was modified by the stronger one (or vice versa the "weaker" military, economically paradigm transforms gradually its "occupant" because it is, in fact, older and stronger). It is a natural process of human expansibility that

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involves a cross-interaction of different levels of existence: spiritual, intelectual, moral, psychological, sociological, economic and physical ones. Usually, the expanding of a paradigm is realized on interest grounds being associated with globalization. The entire history of mankind is a permanent process of globalization between territorial structures or inside them.

As we have just defined the two notions, we can notice that, practically, the social structure is always forced to support globalization as a process of permanent transformation of values as they are accepted as "the new laws". „The new laws" are always a result of globalization. Nobody says that they are better but they are newer and perhaps, more effective, in the vision of the dominante power.

2.a Social levels of spiritual activity

We can divide the spiritual life in a scheme which is connected to the concrete reality of human behavior:

(a) Inner life - is the psychological self-representation of spirituality and the inner call of our own conscience, activity that appears as a response to life and existence and goes beyond them;

(b) Family group - is the first associative spiritual congregation based on a blood relationship;

(c) Social group - is the common and general place of incounter between individuals.

These levels are placed in an organised religious, ritual or social scheme associated to a certain cult or movement. These are the levels in which the exponents of a certain spiritual doctrine are congregated in a social structure.

2.b Levels of globalization

Even if the globalization process affects in the same way the social structures there being no differences in its mechanism, it takes different forms correlatively with its manifestation level. In a spiritual form, we see it as syncretism which mixes different and heterogenous values in a "mixtum compositum". From the moral point of view, it represents a liberalization or an open mind perspective applied in social decisions. Sexually, globalization brings the liberty of sex and liberty of transsexual relations, adoption of children by gay families, etc., moment in which we enter into controversial areas. It reveals itself in the economic processes as an international corporatism or off-shored companies and can have the form of an intellectual process of standardizing individuality towards a homogenous conception about life and existence. It brings also a massive fracture inside families whose members have to stay apart in different foreign countries to get more money for supporting their home relatives. Globalization is also a process of doubling the quantity of information at every five years. And the examples can continue.

From these mentioned above, we can notice that globalization is a paradoxical double faced phenomenon. On one side, peoples can communicate better, can come into a closer contact by improving their styles of life; but on the other side, peoples are facing a survival problem being absorbed into the globalization dynamics. Complex questions regarding the development, the regression, the degeneration or alienation of the human species can be put here. In another words we can say that globalization can be simply reduced to globalize or be globalized in the process.

2.c Novelty and efficiency

The main cause of globalization is the power achieved by a state or a nation which becomes bigger than the power of another state or nation. Becoming stronger, a nation tends to extend its interests over the weaker geographical areas in the purpose of controlling more territories. The "civilization" process which is by itself a controversial issue can be extended by globalization in the conditions in which the new "civilized" ones keep their originary identity and do not loose it

becoming a prospective image of the globalizing nation – just an island of the mother state/region. Another explanation of globalization can refere to the effectiveness of the mother-state or regional organization, to a better organization of its human and natural resources or to a political and economic expanding need in order to pursue self-supporting activities (getting more oil, timber or any types of primary resources) through methods of peaceful economic "war".

The novelty is based usually on an ideological or political, even religious framework designated to be the cover-front of the expansion. Any expansion needs a moral cover and usually there are always present arguments like poorness, starvation, tyranic leaderships or anything else, which must be eliminated for the "general benefit". In the last thousands of years of known history, no state or power was interested in fortifying its oponents but in weakening them in a process entitled "making of sattelite nations" or "boarder nations" designed to protect the center of the "imperium".

On the other hand, we have to understand that there is no good or bad globalization. The only element of objective judgement is the real fulfillment of the individual or social needs on a five level pyramid of values (physiological needs, security, social adherence, professional fulfillment and self-fulfillment). Unfortunately the most prominent aspect of globalization is represented by the economic side which becomes stronger and stronger everyday. Capitals become more important than people and people's needs becom lesser interesting for the corporative international societies. It is the place and time to say that globalization must be an achievement of better solutions in solving peoples' problems not in creating new ones like the new type of social free will "deportation", this time based on economic grounds in which people are obliged to leave their own land from economic reasons to prospect new alternatives in other geographical areas.

3. Power and submission

Both spirituality and globalization are connected to the notion of power.

In this context, we can say that spirituality has two facets – one oriented vertically as a natural process of developing human being towards higher levels of self-achievement – comprehension realized in a community of communion; the other facet is negatively oriented towards opportunism, mass controlling, ideological uniformity and towards inhancing mediocrity as a mean of maintaining the control over the social structures.

Globalization is present in both situations fact which implies a connection with the spiritual structures of the power. Any power needs to claim its authority from a representative structure to obtain its "blessing" in order to gain access in controlling the social subconsciousness. In this process we can observe on one hand, the refined relationship between power and politics and, on the other hand, between power and spirituality which, having a supernatural attribute, tends to contribute to the enhancement of the ruling structures in the eyes of masses. A decadent spiritual structure will always be associated to the political one and vice versa the political structure needs to be "blessed" by a spiritual structure even if that is moral or not. It is the unfortunate fracture between spirituality and religion that occurs during this process, the first one becoming gradually denied and the second one transforming itself into a simple philosophy of life with no possible social implication. In this vacuum of social direction, the political power will minimize them completely till their total annihilation. From the contrary, the individual and the social groups need a vertical relationship with politics mediated by spirituality because only from it they can resurrect their life motivations and avoid total nihilism.

3.a Fundamentalism and globalization

A normal society (there are also alienated societies beheaded of representative exponents and values) rejects any exterior pressure exercised on it in the absence of a certain lucid dialogue

of values. Fundamentalism appears as a natural reaction to protect the old values of society affected by globalization. We can observe two types of fundamentalism:

(a) a positive type – which enables people to create a proper answer to the challenges of globalization; we have to have some fundamental values to appreciate; what kind of dialogue is that in which nobody expresses anything and we have to make changes that are obviously erroneous?

(b) a negative type – which blocks any chance of dialogue and creates aggressive reactions of defense as terrorism and social dysfunctions.

3.b Continuity and changing tendencies

Every nation has to perform certain attributes to develop and expand its specific in order to join the table of dialogue with the other nations. It cannot overcome its own history excepting through a permanent learning process. So we can say that, if a change occurs, the learning process can be accelerated or stopped. This has effects on the continuity of spiritual and social development by consolidating or by dizolving the content of the existential meaning of life. Individuals are put in difficult situations and their lives are at stake because many of them have no educated ability or financial support to adapt themselves to the changes of the new system (the social effects are diseases, unemployment, violence, suicide, crime, etc.).

B. Acting in the new reality

1. Spiritual globalization

In the perspective of a global spiritual communion, we have to accept the fact that every person is a human being who can define his own interest for spirituality. So we can observe the pre-existence of a positive direction taking the form of unity in diversity. Being a person is a concept that implies a cultural paradigm built around a specific spiritual horizon. The communication between such paradigms increases the possibility of improving your own paradigm or discovering new aspects of it. Anyway, the chase for discovering himself has driven man to a series of unexpected spiritual experiences which are worthy to be shared. The benefit of spiritual globalization consists in the possibility of seeing yourself from different potential angles, thing which is extremely difficult of being achieved through the use of a singular spiritual paradigm.

The variety of human believes can be associated with the new type of psychological expectations of social and individual reality seen as a multidimensional change. Being put into the dialogue position with another paradigm, we are obliged to know ourselves better, to obtain the power of expresing ourselves, of becoming understood by others who do not know us and themselves from the new side presented by us.

The spiritual globalization means above all the effort of communion into differences, an effort made by people who have different views about life and society but share the same goals (happiness, welfare, self-accomplishment).

We must fight for expressing better our own visions, for becoming more aware of our values and for living them at their real intensity and depth. Probably, this universal effort will bring us together at the table of common values in a real discusion about our global destiny. Nowadays it is clear for every serious researcher no matter his field of interest, that only a spiritual approach that would counter-balance the present economic and financial pressure can open new horizons of global social development.

2. Historical globalization

As we said before, all the human history is a permanent process of globalization but this process has got new particularities nowadays. There has never been a time like this when on one side, civilization, culture and science would be so developed, and on the other side, the level of spiritual individual development would be so low. Now the time of emergence between nations in the purpose of a global solution to our problems has come. Our historical experience contains many positive and also dark episodes (more than 40, 000 wars in 6,000 years) but we have to make an effort to overcome the bad side of history and to build a common future based on the respect of the positive experiencies and on the global need for elevation from the social misery. We have to operate with the values recognised as universal and to extend their action into our lives in order to obtain a better satisfaction of our human needs that are, by definition, extremely complex. We have to make a true and sincere analysis of the deep mechanisms that can better our life and to eliminate the negative aspects derived from national egoism, destructive individualism or corporative imperialism.

As the facts show, history can go both directions: forward or bachward; if we agree to continue in a common positive attitude of social and international development, we can obtain solutions to many global problems; if we do not agree to continue our fight for a better social and individual life, than we are condamned to a continuous suffering and to a return to a new era of technological dark age. Paradoxically, the greatest things discovered by science are still used to build guns instead of building cities for happier people.

We can observe that, even if the so called "cold war" is over, we assist to a new era of war – "post-cold war" – a more dangerous and dreadful time of underground conflicts developed on the territories of "boarder states", supported by highly developed technology such as UAV (Unmanned Aerial Vehicles), intelligence satellites and information aggressions. The presence of this new type of war denotes the fact that politics has not understood yet that only by solving problems we can obtain peace and balance and not by supporting different wars to keep the world divided.

Another problem is that related to the enormous discrepancy between developed countries, countries in the development process and the so called countries from the third world, discrepancy that becomes a major cause of an international wave of unsecurity which puts in danger the entire unstable balance of the international political and economic centers, simultaneously with the strong economic regression felt by all the world.

3. Political globalization

To unify the national powers in a continental or global center of power is a must in the perspective of an allied community based on common grounds. The problem which stands up is that related to the different views over the future destiny as it is seen by the different nations. Some groups agree to have a common future, some groups do not agree considering themselves potentially endangered or future centres of power.

A nation has to defend its interests according to the interests of its members. That is why the politicians must be elected on nominal lists in order to assure the access to the power of decission only for those fitted and tested to serve the social structure and solve its contemporary problems (but this means in the same time to have competent voters which is very difficult).

A continental political structure has to be built on a scale of social needs in order to present the common problems on the discussion table. The purpose consists in the prevailing of the best solution which has to be agreed upon accordingly after a thorough scientific investigation, the political aspect coming at last (but this means to respect the points of view elaborated by national specialists who really know the characteristics of their people).

A global political structure has the duty of comparing and making associations between nations in the purpose of solving conflicts and their effects as soon as possible because the major discrepancies involved by the different levels of national development are causes of new conflicts and without visible solutions, the international tensions tend to reappear. Another duty of the global political structure is to support the efforts of the local or regional researchers destined to present a deeper image of the social realities and to offer viable solutions to the aspects of social crises. As difficult as it would seem, international cooperation is the only key to solve the complex problems which affect our planet. Every nation is responsible for the life of itself and for the life of the others. Why? Because the technology is so developed that, on one hand, it has the role of improving all our work methods, and, on the other hand, a mistake of a nation can destroy the existence of many other nations (if we talk only about the nuclear experiences, to say nothing about the biological or electromagnetic warfare).

4. Juridical globalization

Every national juridical system has to adapt itself to the international changes determined by the new laws of cooperation. In the implementing perspective of the new European Constitution, all the fundamental laws have to be changed and after them, the entire set of organic and ordinary laws.

The process has to conserve the most important and effective behaviours which have been proven to be worthy and to change the absolite ones which are overcome by time and social new developments.

Invariably, the Constitution of a country containes the main values defended and publicly expressed by a nation. As the main values are internationally protected and recognised, we can put a good basis on the new European Constitution which is derived from secular experience proved as effective and complete with the condition that it would take into consideration the spirituality of man.

The only fear we must accept is that related to the manner in which the authorities of every state understand to apply the new Constitution. The European partners have to be sure that the conditions of application are equal and non-discriminatory by eliminating the social discrepancies presently existing between the western and eastern societies and nations.

The globalization of laws has to assure and make easier the commercial and civil circuits for improving the merchandise exchanges associated – I do have to underline this aspect – to social development.

The penal laws have to be improved in order to reintegrate into the work cycle persons who were sanctioned and to tranform the execution sanctions into something fruitful both for those affected by them and for society.

5. Sociological and educational globalization

Young people have the opportunity to know themselves better by meeting new people, new mentalities. They are obliged to consolidate their identity by expressing better their ideas and ideals. A new type of learning process appears – an interactive dialogue based on cultural and spiritual resemblances or differences.

To achieve a better education in a globalized collectivity, young people have to improve constantly their perspective regarding life and its meanings. A new factor is added – the need for spiritual improvement as a means of continuing the social creative development. As the rationalizing process in society achieves its climax, the motion of spiritual reneval is a must. The most important fact is the new orientation towards inner experiences and inner development of the individual as a psychological response to the permanent exterior changes.

The first steps towards a better education are the improvement of the self-image and the completion of the world image by a multi-cultural dialogue. Any young person must benefit from the great scientific and social discoveries and also from the important cultural re-lightening of the old traditions and movements which enable him/her to have a wider perspective and a stronger sense of reality as means of improving himself and as an alternative to the simple consummation of his time and life.

New social perspectives are expected to appear as soon as young people join the experts in the effort of debating and fighting for a new social Europe concerned about the benefits and wellbeing of its members.

6. Psychological globalization

In the process of globalization, the individual is put under a lot of stress by the permanent changes. Globalization seems to be a certain type of social revolution but differently expressed by outside forces which are not interested in peoples and in the existence of nations (seeing diversity as a spiritual plus is something valuable, but seeing it as a further step of division and alienation can create many social adversities), but in power and capitals. There is a paradox – an international corporative economy destroys the old structures and mixes up the national society and even if it does not follow a positive benefit for the national society, it gives a free way to new potential benefits. In this fight with an unequal enemy, the national social group has the opportunity to strenghten its powers by giving a proper defence response to the globalization. This response consists in strenghtening individuality and in perfectioning the specilities of its members. If the national society is ignorant and corrupt, the globalization process will dissolve it and transform it into in a homogenous suburb.

It is difficult to observe how a state gets weaker and its power transformed into ashes but it is healthier in the sense that we are no loger living with the myth of an almighty State which is taking care of us. The demystification takes place simultaneously with the disappearance of the old myths related to the power of State and its rulers. The State becomes just an administrative tool and the social structures have now the opportunity to express themselves better than ever (with the condition that they have something important and concrete to bring into the public attention) and if they loose the moment, they will be condemned to silence, the possibility of expressing global viable values with national source being lost.

7. Economic globalization

The globalization process has to change its coordinates when it reaches the economic area. Why? Because poorness and unemployment are too expensive to continue, if the human being still has a value anymore, and we think it has. To keep a high rate of profits, a corporative firm has to offer new jobs and to support the development of complex economic infrastructures in order to maintain a fluid cycle of money. Otherwise, the profits will go down, unemployment will rise and if nobody works, who will pay and buy all the merchandises?!? To cut the national concurence is one step for an international company, unorthodox but real an effective, but to maintain people out of jobs it is a policy that can ruin an entire global economy.

If technology can produce more with smaller costs, why people who where initially involved in the work process are threwn into unemployment and are not redistribuited towards areas where technology is not capable of making a difference (such as creative areas) and why the prices continue to get higher and higher if the declared intention is to sell more? Because there is no plausible explanation for the permanent growing of their capitals and profits from the point of view of social general benefit; this reveals that the international corporative firms are exclusevely interested in the growing of their capitals and profits, putting peoples at work without solving their

real problems. This is the logical explanation for the fact that even if a person lives in a civilised country she has to work three or four times more for the same amount of money.

Economy has to realise that intellectual mediocrity will have terrible consequences in the work process because without ideas and ideals, who will continue to work if unemployment can be a payable offer?

The disappearance of the middle classes in the Western Europe and in the most important countries which is near a global motion nowadays, must be an alarm sign that the discrepancies between wealthy people and strong nations, on one hand, and poor people and nations, on the other hand, are not only unsolved but they also tend to aggravate. Supposing that technology will replace completely man's work, what will man do? The only alternative is creativity and culture as means of maintaining the functions of man upgraded to the social needs.

Economy has to sustain culture and science in order to ensure its own future existence. Only if culture sustains man's interest for his existence, economy will be able to maintain a higher rate of selling. Other problems are those regarding the necessity of production and its quality. It is cheaper to use chemicals instead of natural ingredients but if people get sick and die, who will buy anymore? As corporative firms are interested in profits, they have also to be interested in the quality, with a closer interest in food quality which is the basis of a healthy consumer who can consume for a long time only if he is healthy (the expected food lack is caused by the underused potentials of local agricultural areas).

8. Medical globalization

The biological factors are extremely important in the motion of renewing a society. Thus, education has to be oriented to a global improvement of health. Europe, confronted now with sterility, aging, physical decrepitude, decay of the birth rate, has to impose a new orientation by protecting life. Life can be protected by being associated to the spiritual renewal of inner and communion life, in a strong social preventive discipline. We have to cultivate health and we can use globalization to do it by implementing the best and the most effective health habits revealed in the international dialogue.

Two types of medicine have to emerge: (1) a self-educated medicine by the means of science, culture and spirituality; (2) a general medicine applied and popularised by specialists united in an international dialogue, to pursue the most important gift – human life. The globalization has to point out the most important and healthy behaviours in order to be implemented by everybody.

Conclusions

As we have seen, globalization and spirituality can be fruitfully associated to accomplish a better life for people. Also we have learned that globalization is not good or bad. Its status and effects depend only on our courage and self-commitment to react being prepared with proper answers to its challenges.

For an individual and a society well prepared (well informed and educated) and well defined as spiritual and cultural identities, globalization has to prove itself beneficial driving us towards new accomplishments. For an individual and a society not properly prepared, globalization brings uncertitude, instability and more discrepancies than ever, creating a deforming pressure in the already degenerated social structure.

We do not have to be stronger than globalization, we only have to be wise and take from it only the elements that are proper to us and which enable us to reach new points of development. We need spirituality to help us inforce and filter the effective aspects of globalization, in other

terms we have to decide how and till where we are globalized. For these aspects, we have to be prepared with arguments and social experiences in such a way that we would absorb the significant parts of globalization as means of developing our own competent inner and social structure without being simultaneously standardized into its global mass.

Expressing our identity and developing its multi-faceted dimensions through globalization: this is the key towards a balanced attitude in a matter of so much complexity. For this, we are obliged to reconsider our standards, to be better, to be more expressive and inspired than ever and to work hard to regain a profound and universal dimension of Christianity capable of administering the religious diversity and able to gradually decrease the effects of the unstable waves inevitably produced by the dynamic changes.

In the dynamics of globalization, we have to underline the dignity and uniqueness of all human beings, supporting the idea of creative diversity as emerging from that of powerful unity of the human species.

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THE REVOLUTION AND THE MILITARY. AN ANALYSIS OF THE EGYPTIAN AND IRAQI REVOLUTIONS

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Abstract

The paper tries to assess the role the military plays in revolutions. The first part of the study focuses on the manner in which the competing theories of revolutions try to explain and accommodate the military's participation in revolutions, attempting to show that the limits of these theoretical enterprises call for a renewed research into the subject at hand. The second part of the paper tries to build a conceptual model, starting from the hypotheses of Charles Tilly, Samuel Huntington and Mehran Kamrava, tested on two particular cases – that of the 1958 Egyptian Revolution and that of the 1958 Iraqi Revolution that can better account for the military's participation in revolutions and explain when does the military become a revolutionary force and what are the characteristics of revolutions in which the military plays a key-role.

Keywords: *theories of revolution, military, Egyptian Revolution, Iraqi Revolution*

Introduction

Theories of revolution have looked over time at different aspects of this particular political phenomenon. Be it the characteristics that may make the revolutionary dynamic similar to natural occurring phenomena (such as disease or storms and hurricanes), the powerful, violent and sudden overthrow of an existing political structure and its replacement with a new regime, the all-encompassing transformations of social and political structures, most theories of revolutions have very little to say about the military's involvement in these events. Most theories regard the military's participation as only one of the multiple elements that enforce and make possible the revolutionary conjecture, whereas other theories limit themselves to noticing the empiric-derived presence of the military (or of military representatives) in the core of the revolutionary dynamic, without attempting to find an explanation for these occurrences or to conceptualize the participation of the military to revolutions.

The paper looks present theoretical outlook on this matter and underscores the limits of explanations provided by theories of revolution on the involvement of military in the revolutionary dynamic, especially in terms of explanatory power. Debating the most important theories of revolutions (and especially the outreach of the few ones that do try to tackle the problem of military involvement), I am trying to ascertain whether the military can be a leading revolutionary force (1), and if so, identify under which conditions can the military set out on a revolutionary path (2) and underline the main characteristics of these events (3), by looking at the Egyptian Revolution of 1956 and the Iraqi Revolution of 1958. Furthermore, I am trying to underline which of the hypotheses of revolutionary theory can be tested against these two cases and to what extent can we build upon these previous findings in order to develop a conceptual model of the military's

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involvement in revolutions (4). The result should be hopefully a more accurate explanation of the relation between the military and revolutions.

Theories of revolution and the military

In discussing the relation and debates between different theories of revolution I follow the order used by Jack A. Goldstone[1] and John Foran[2], which analyzes theories of revolution from a combined chronological and methodological perspective. The earliest remarks about the role the military may play during revolutions are made by the first generation of revolution theorists, the "natural history[3]" school, best represented by the works of Lyfford P. Edwards and Crane Brinton. The "natural history" of revolutions is the first attempt to study the field of revolution in a scientific manner, trying to free the analysis of the phenomenon from the inherent moral or ideological influences of previous undertakings (be they Marxist or, on the contrary, conservative writings). It is the firm belief of the theorists of the "natural history" school that revolutions can be studied in a quasi-natural scientific manner, by means of comparing the most important cases (generally, the study is confined to the American, French, English and Russian Revolutions) and theorizing on the repeated empiric occurrences identified as a result of the comparative undertaking.

The "natural history" theories of revolution seem to be the first attempt of explaining the phenomenon in social sciences (formulating a comprehensive research program, Brinton, for example emphasizes the need of applying natural scientific methods to the study of revolutions[4]). However, "natural history" theories remain within the field of understanding[5] (there are several underlying assumptions about the nature of revolution – its similarity to natural phenomena, the natural tendency of social systems to regain their balance, the phased dynamic of the revolution etc.)

The role of the military in revolutions is not particularly an important one, from the point of view of the "natural history" theorists. Not only isn't the military discussed as an institution *per se* (the only remarks in regard to the military concern the military defeat suffered by the Old Regime as one of the probable multiple causes of revolution[6]), but the "natural history" theories concern themselves mostly with identifying political regularities, in order to enforce their view of revolutions as a naturally occurring phenomenon and as a dynamic that, while following its own internal conditions has a virtually preset course. The other reference to the military's involvement is also indirect: according to Brinton and Edwards[7], the conflict between the radical and moderate revolutionary factions opens the possibility for a military's accession to power, which ends the radical overtone of the revolution and leads the New Regime through a period of pragmatic and status-quo accommodating period.

A somewhat different theoretical account of revolution is given by Louis Gottschalk[8], who compares the revolutionary process with the change of goods and commodities in capitalist

[1] Jack A. Goldstone, "The Comparative and Historical Study of Revolutions," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 2-4

[2] John Foran, "Theories of Revolution Revisited: Toward a Fourth Generation," *Sociological Theory*, 11, no. 1(1993): 1

[3] Goldstone, *Revolutions*, 2

[4] Crane Brinton, *The Anatomy of Revolution (Vintage Edition)*, (New York: Random House, 1968), 8-13

[5] Martin Hollis, Steve Smith, *Explaining and Understanding International Relations*, (Oxford: Clarendon Press, 1990), 1-5

[6] Goldstone, *Revolutions*, 3

[7] Goldstone, *Revolutions*, 4

[8] Louis Gottschalk, "The Causes of Revolution", *The American Journal of Sociology*, 50, no.1 (1944): 1-3

economies. The essential elements of this model are the "revolutionary demand" (seen as the existence of several "challenges", political or social problems that require a swift solution, of whom the public opinion is aware), the "revolutionary offer" (the existence of a political revolutionary problem and of possible revolutionary leaders) and the weakness of the counter-revolutionary forces. In opposition to the conceptual scheme of Brinton and Edwards, Gottschalk's arrangement can eventually accommodate the military's involvement, but has very little to say about their specific participation to revolutions.

Summarizing, the "natural history" theories encounter serious problems in regards to their explanatory power and their generalizing capacity. The comparative undertakings are based on only a handful of exceptional cases and the attempts of building categories lead only to an oversimplified division between "popular" or "democratic" revolutions, "rightist" revolutions, "territorial-nationalist" revolutions and "abortive revolutions"[9]. In regards to the military's role in revolutions, the "natural history" theories ascertain only the possible ascension to power in the late phases of the Revolution of a leader with military background, who moderates the states policy and ends the revolutionary radicalism.

For the two selected cases, not only do the theories fail to accurately explain the role of the military, but there are also problems in regards to the predictions that can be drawn from Brinton's or Edwards' conclusions. In both cases, the military is the critical military actor, who manages to perform a successful takeover of power and implements the essentially revolutionary policies. The moderate "finale" of the revolution, under a military's leadership predicted by Brinton can be accounted for, but the dynamic in both the Egyptian and Iraqi case is totally different from the natural course the revolution was supposed to take.

The relation between the moderate and radical revolutionary factions, as set out by the "natural history" theories is partly inconclusive. There are several tensions between the revolutionary factions, but the leading actors (be they moderate or radical) are part of the military. Even if we attempt to divide the revolutionary leaders into factions (such as the conflict between the more radical Nasserite group against the rather moderate faction led by Neguib in Egypt or the more radical view on revolution of Qasim confronted with the radical pan-arabic projects of the Arif brothers in Iraq), Brinton's conclusion (the accession to power of a soldier) is misleading, as the most important conflicts that concern maintaining or gaining political leadership are all between military (in the Egyptian case, the feeble attempts of the Liberal Wafd party or of the Muslim Brotherhood to gain power are easily thwarted, whereas in Iraq the Ba'th led challenge is successful only on the long run, after a decade of political struggle). Moreover, for a considerate period, it is the radicals, not the moderate military who hold the upper hand and shape the institutions and policies of the New Regime. In addition to that, the particularities of the Iraqi case make the radical-moderate divide extremely superficial – the confrontation between the nationalism of Qasim, the Socialism orientation supported by the Ba'th party and the adherence of several key-figures to the Nasserite model make the labelling process an extremely subjective undertaking.

Summarizing, while the "natural history" hypotheses can explain for the moderate and pragmatic nature of the revolutionary state, the theories cannot explain why is the military the main (and to a certain point, the only) revolutionary actor and why the conflict between moderates and radicals (if we assume there is such a manifest divide in the Egyptian and Iraqi cases) is limited solely to actors coming from the military ranks. Furthermore, the moderate's eventual win, the onset of the Thermidorian reaction or the "convalescence" Brinton is talking about[10] can be

[9] Brinton, *Anatomy*, 21
[10] Brinton, *Anatomy*, 205-7

accounted for only if we make concessions to the temporal frame (in the case of Iraq, the period may be shorter, the radicalism waning by 1963, when the Ba'th-ists eventually gain power, but in the case of Egypt, only the 6-Days War may mark the conventional end of the revolutionary entanglements[11]).

The second "generation" of revolutionary theorists[12] tries to explain the revolutionary phenomenon focussing on a thorough identification of its causes and on the relations between the birth of modern states and processes of political violence[13]. The underlying assumption is that revolutions (and many other violent political conflicts) stem from the increased dissatisfaction of an increasingly share of the population of the current state of affairs (reflected in sudden economic and/ or political downturns). The "second generation" category is nevertheless a very ambiguous label (Goldstone and Foran, the main proponents of this taxonomy disagree over several writer's inclusion into this category, Charles Tilly's works being one of the most relevant cases for the problems encountered when talking about the precise temporal and methodological limits of the second generation[14]). Moreover, Goldstone's own view towards the matter seem to have changed (in his 1982 article he considered the second generation one concerned with the task of elaborating "general theories of revolution", whereas in his 2008 revised version of the study he considered the second school to be one developing the "theories of collective violence").

Several theories that fall into this category have little to say about the military's role in revolutions, although, by expanding the field of research (no more are only the "great revolutions" the main field of study, rebellions, revolts and coups become a legitimate focus of attention for the scholar) and by undertaking a more thorough look at the causes of such phenomena, develop several instrument of studying revolutions.

James C Davies' theory of "relative deprivation"[15] explains revolutions (and the Egyptian Revolution in particular) as the result of a gap between expectations and actual popular satisfaction. The ever-existent gap between needs and their satisfaction only becomes revolutionary when its sudden increase comes after a period of marking improvements in the standards of living (after a period in which the gap has decreased). The main conditions are therefore (in resonance with de Toqueville's findings about the French Revolution) the sudden overthrow (1) of a rather positive trend (2).

Davies' theory is questionable however on several levels. On the one hand, identifying the exact indicators of deprivation is an almost insurmountable task – GNP, unemployment (in the case of a rural agricultural society as that of Egypt and Iraq) are hardly the adequate tools to prove the exact level of deprivation a group can withhold (the challenge is to explain why other Middle-Eastern countries that experienced the same decrease in GNP, or rise in unemployment). Furthermore, the period of time covered by Davies in both the Iraqi and the Egyptian case questions his assumption of a "sudden" drop in estimated general satisfaction (the foreign policy of Egypt, considered a serious reason for dissatisfaction is scrutinized over a period of more than a decade). Last, but not least, Davies does not discuss the role of the military (contrary to his

[11] Mark N. Cooper, "The Demilitarization of the Egyptian Cabinet," *International Journal of Middle-East Studies,* 1, no. 2 (1983), 203-6

[12] Foran, *Sociological theory*, 2

[13] Jack A. Goldstone, "The Comparative and Historical Study of Revolution,", *Annual Review of Sociology*, 8 (1982): 190

[14] Foran criticizes Goldstone over TIlly's inclusion in the second generation, considering the latter to belong to the structuralist wave by "both period and perspective". In spite of the problems with the classification system, I used it because of its widespread use in theory of revolution studies and in order to assure a greater degree of coherence in discussing competing theories of revolution.

[15] James C. Davies, "Toward a Theory of Revolution," *American Sociological Review*, 27, no. 1 (1962): 17-9

intentions, he does not dwell on the dissatisfaction or resentment of the military towards the political establishment).

Similarly, Neil Smelser's and Chalmer Johnson's theories point to a downshift, in terms not of popular discontent, but of social institutions development[16]. Both consider that revolutions are the likely outcome of an imbalance between different societal subsystems and a catastrophic economic or political event. Neither Smelser's, nor Johnson's account, tries however to explain the military's participation in revolutions.

Samuel Huntington tries to build a synthesis[17] of the two previous directions of research (the relative deprivation and systemic imbalance theories). Defining revolution as a "rapid, fundamental, and violent domestic change in the dominant values and myths of a society, in its political institutions, social structure, leadership and government activity and policies"[18], Huntington sees the revolution as a modern phenomenon. Its political character resides in the inability of existing political structures and institutions to assimilate the participation in the political arena of newly mobilized groups. In discussing different types of revolutions, Huntington manages to set out an explanation for the military's involvement in revolutions.

Huntington proposes several kinds of divisions between revolutions. First, he argues that modern revolutions fall into two different categories (each following a different pattern of events). Therefore, we encounter "Western" revolutions (in which a traditional regime, dominated by a landed aristocracy is confronted with fiscal and financial problems and is the subject of critics of the intellectual elite, eventually succumbing on an institutional level, being unable to institutionalize the participation of new groups to political life) and "Eastern" revolutions (where a partially modernized regime coexists with a new set of political institutions, specifically designed to accommodate the participation of new groups to policy, the struggle between the two forms of organization ending with the victory of the challenger, who eventually manages to extend the scope of the new institutions to the entire society).

Furthermore, Huntington divides political conflicts into four different categories[19], based on their duration, the mass participation they involve, the intentions of the revolutionary leaders and the domestic violence the conflict spurs: internal war (the attempt of both political and social structures), the revolutionary coup (which generates important political changes and possible social structure changes), the palace coup (whose essence lies only within the plotter's desire of leading the executive institutions) and the reformatory coup (whose objectives are the modification of political structures).

At the same time, Huntington also focuses on the political transformations of the regimes, following political conflicts. Keeping true to his modernization theory, Huntington considers that considering the degree of political participation (setting out three possible categories – medium, superior and inferior political participation) and the degree of institutionalization of the regime, we can identify six different types of polities – praetorian regimes (mass regimes and participative regimes), civic regimes (liberal and radical) and traditional regimes (oligarchic and organic regimes)[20].

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[16] Jack A. Goldstone, "The Comparative and Historical Study of Revolutions," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 5

[17] Goldstone, *Revolutions*, 5

[18] Samuel A. Huntington, "Revolution and Political Order," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 37

[19] Raymond Tanter, Manus Midlarski, "A Theory of Revolution,", *The Journal of Conflict Resolution*, 11, no. 3 (1976): 265-6

[20] Samuel P. Huntington, *Ordinea politica a societatilor in schimbare,* (Iaşi: Polirom, 1999), 70-9

Huntington tries to explain the causes and the effects of the military's involvement in the Egyptian Revolution, attempting to identify the causes and the particular characteristics of the process. His theoretic undertaking remains fluid mainly because the military's role is not the focus of Huntington's attention (the references to the military are basically scattered throughout the *Political Order*, a book that remains dedicated in the end to theorizing the relation between modernization and political change). Huntington considers that the military's revolutionary role is limited solely to societies on the verge of modernization – in complex, modern societies, the military tends to play a more conservative part. The cause of the appearance of numerous praetorian regimes in the Arab world is, for Huntington, the direct result of Ottoman conquest and rule. The military is more adept at gaining power simply because in these countries (and in Egypt in particular) the military is the only political competitor able to build governments and to enforce a certain political and societal order (students, monks, nascent political parties can challenge the political establishment quite successfully, but cannot build governments). The new regime manages to move away from the praetorian sphere, but remains within the confines of the radical civic regime, because the military is incapable of creating new political institutions (their attempts of building parties fail, resulting most of the times in a single-party political system)[21]

Huntington's analysis explains, at least partially, several outcomes of the Iraqi and Egyptian Revolutions. The military revolutionary leaders, while the most capable political competitors in the two countries (the religious challenge of the Muslim Brotherhood in Egypt or the communist challenge in Iraq are easily thwarted in the early stages of the revolution) are unsuccessful at creating new political institutions in the post-revolutionary period. Huntington's insight, as to the artificial character of the political parties created by the regime seems to be vindicated by the empiric evidence – most mass political organization both in Iraq and in Egypt have a superficial nature, counting little towards the institutionalization standards Huntington emphasizes.

Several arguments have to be made about Huntington's theory of political modernization. First, we can argue that the theory, as Charles Tilly puts it, remains one that emphasizes a gap (no longer a psychological one, but still a powerful imbalance)[22], which opens the gate for all the criticism directed at the second generation theories – the utmost impossible task of adequately measuring the main indicators (in this particular case, modernization) and the circular logic behind the model (basically, Huntington's theory predicts that all successful political conflicts account for an imbalance between political mobilization and political institutionalization, whereas the lack of such conflicts is explained by the inexistence of such an imbalance).

Furthermore, Huntington's explanations as to the nature of military involvement in revolutions are superficial – he merely sets out a number of conditions for the military participation, insufficiently defined however (the nature of the Old Regime is not thoroughly explored, as is the nature of the revolutionary one; the "regime complexity" variable that can set the difference between the "conservative" military and the revolutionary one is another element that can only explain difference is outcome but not the internal logic of military enacted revolutions). There is no indication whether the few conditions he emphasizes are necessary or sufficient conditions for the military's involvement in revolutions.

Summarizing, the second generation theories have little to say, with the notable exception of Huntington, on the role of the military in revolutions. The military is merely a part of the conjectures that may make a revolution probable (military defeat remains an underlying, but not necessary and neither sufficient cause of revolution). Huntington's insight on the military focuses

[21] Huntington, *Ordinea politica,* 218

[22] Charles Tilly, "Does Modernization Breed Revolution," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 48-9

mainly on the capacity of military-enacted revolutions to transform political regimes, albeit in a limited manner, based on their superior capacity of competing in a political arena.

As a precursor of the "structuralist wave", Barrington Moore also chooses to focus on the process of modernization, considering however that the essential relations that determine a country's historical path towards democratic development or dictatorship is shaped by the economic relations between the landed aristocracy and the peasantry. The shaping of a balance between the nascent bourgeoisie and the landed upper classes, the lack of a reactionary alliance between the bourgeoisie and the aristocracy and the development of commercial agriculture account, in Moore's opinion, for France's, England's and the US' transition towards democracy. In Moore's words, "no bourgeoisie, no democracy"[23].

The development path of Japan and Germany however shows a different story. The existence of a powerful landed aristocracy (and of bureaucratic statist elites) prevents the nascent bourgeoisie of asserting its role. The landed aristocracy and state bureaucracy alliance manages at the same time to strike a bargain with the bourgeoisie (by which the latter forfeits its political rights in exchange to the right to make money[24]), prevent the occurrence of peasant and bourgeois revolts or rebellions (by means of a powerful coercive instrument) and incorporate the anti-capitalist claims of low-level military officers with a possible rural background (or sympathetic to rural anti-capitalist claims) in the form of a renewed emphasis on traditional hierarchy and social organization. Revolutions from above, such as these, Moore considers, enact only political changes envisioned envisioned by a part of the landed aristocracy and bureaucratic elites against their most reactionary counterparts.

In Moore's account, the military plays a dual role. On the one hand, the leaders of the military are part of the bureaucratic elite that forges the new political institutions of a society in which the bourgeoisie is a reliable albeit politically limited actor. Junior officers, sympathetic to rural claims are played by the dominant alliance in furnishing a renewed symbolic emphasis on traditional forms of authority (their initial objective – a dismantlement of the emerging commercial capitalist structures – remaining elusive).

Another structuralist explanation of the revolution is the one given by Charles Tilly. His initial account of the revolutionary process is built in marked opposition to Huntington's theory on modernization. Consequently, Tilly stresses the fact that revolution is first of all a political phenomenon[25]. Considering that a key factor in his analysis is the breaking of the unitary conceptual frame of revolution (i.e., in order to better explain revolutionary dynamic and outcomes, one need to stop looking at the revolution as a unitary phenomenon), Tilly initially considers that revolutions occur whenever a government initially controlled by a single polity (defined as a set of contenders that "regularly lay successful claims on the government") becomes the object of mutually exclusive competition between different polities[26]. The revolution ends when the government is once again the object of a single polity. Tilly underscores the fact that the essential element of his model is the capacity of different competitors of mobilizing resources (gaining and maintaining membership inside a polity depends on passing several membership tests, all of which are basically tests of a competitor's capacity to mobilize resources).

In a later development of his theory[27], Tilly considers that the defining character of revolution is given by the relation between *revolutionary situations* and *revolutionary*

[23] Barrington Moore Jr., *The Social Origins of Dictatorship and Democracy*, (Boston: Beacon Press, 1993), 418

[24] Moore, *Social Origins,* 437

[25] Tilly, *Revolutions*, 48

[26] Tilly, *Revolutions*, 49

[27] Charles Tilly, *Revoluţiile europene (1492-1992)*, (Iaşi: Polirom, 2002), 26-32

consequences. The revolutionary situation occurs whenever a coalition of political contenders formulates demands of state control unacceptable for the existing political leadership (1), a significant part of the population supportsthe contesting coalition's claims (2) and the political leading elite is incapable of effectively repressing the contesting coalition (3). Tilly also identifies two facilitating conditions – the adherence of a part of the leading political elite to the contesting coalition (1) and the leading elite's loss of control over the military instrument (2). The essence of the revolutionary situation is however the question of multiple sovereignty, a concept which Tilly takes from Brinton, who considers that dual sovereignty appears whenever "within the same society, two sets of institutions, leaders and laws demanding obedience, not in one single respect but in the whole interwoven series of actions which make up life for the average man"[28].

The *revolutionary consequences* are an expression of political and not social change: the structure of power, the meaning of justice, the legitimacy of the state, the way in which the state engages in international warfare[29].

There are two important findings of Tilly in regard to the military's participation in revolutions: first, we have the first formulation of the military's role as one of the facilitating conditions of a successful revolution (a position also supported by Goldstone[30]. Secondly, we have the first discussion about the military officer's relative advantage in the political struggle, given the military's better capacity of mobilizing the resources demanded by the political struggle during the revolutionary situation. On the other hand, looking at both the Iraqi and the Egyptian case, we encounter several problems in regards to the theory's explanatory capacities. Even if Tilly tries to build a model that can successfully accommodate proximate forms of political conflict[31], both the multiple sovereignty and the contesting coalition concepts require a considerately larger time frame, than that of the Iraqi and Egyptian revolutions. Secondly, if we look at both the Iraqi and Egyptian case, we note the total lack of a contesting coalition – all revolutionary leaders stem and remain an active part of the military for a considerable period.

A different explanation of revolutions is that given by other structuralist theories. Their common starting point is a series of assumption about the nature of the state, as scored by Goldstone[32]: all states are organizations tasked with extracting resources (1); there is a permanent competition between states (2); some states fare badly under these circomstances and experience political crises (3).

Eisenstadt, for example sees the military as one of the contending forces in a neopatrimonial state[33] - a state with seemingly modern bureaucracy and institutions, but in which political leadership is exercised through a network of patronage by the leader. His inability to cope with economic or political challenges and his lack of success in playing the military leadership, the bureaucratic elites and the traditional aristocracy against each other accounts for the revolution. Eisenstadt's and Goldstone's is however a highly contextual model (there is no way to evaluate the scope and extent of the patronage network except as the highly subjective interpretation of a series of budgetary allocating decisions), in which the military plays no determining role.

Ellen Kay Trimberger's account of revolutions understresses the inability of civil elites leading the states to enact the necessary measures in order to increase its competivity in the international arena. The necessary reforms are to be implemented by a group of officers if two

[28] Crane Brinton, *Anatomy*, 133
[29] Foran, *Sociological Theory*, 4
[30] Goldstone, *Annual Review of Sociology*, 190
[31] Tilly, *Revoluţiile europene*, 26-9
[32] Goldstone, *Revolutions,* 7
[33] Jack A. Goldstone, "Revolutions in Modern Dictatorships," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 70-3

conditions are met: a significant group of officers is "independent of the classes in control of the means of production" and there is a significant cohesion between the members of this group[34]. Postulating relative state autonomy to class relations and conflicts (an element Trimberger shares, as we will see, with Theda Skocpol), Trimberger however is challenged by the somewhat inconsistent selection of case-studies. As Quee-Young Kim accurately show, Trimberger fail to accurately define the process of "revolution from above" and fails to take into consideration cases such as Nazi Germany and Fascist Italy. All in all, Trimberger deals with states where the military's intervention in political affairs plays the role of catalyst of identification and mobilization along national lines. Peru, Japan and Turkey may all face different international challenges, but in all the three studied cases the military's resort to nationalism is radically different from the case of unstable and radically divided states, where state-building is the main priority of government.

In a later attempt[35] to look at the military's role in Latin America, Trimberger considers that in states unable to enact economic and political development, the military comes to play the role of the main initiator of development measures. The conditions under which the military can become such a force are identified by Trimberger: the military are not recruited from the dominant "landed, commercial or industrial dominant class" and they "do not have vested interests in the dominant means of production" (1); and these bureaucrats aren't controlled by an institution representing vested interests of the dominant class (2)[36].

Once in power, the military can set on a course of economic development that can follow three paths – *state initiated national capitalist development* (military and civil bureaucrats gain power, enact a nationalization program, but allow small external financial investments, destroying at the same time the landed class' economic power), *state initiated dependent capitalist development* (different from the first path by the fact that the civil bureaucrats foster those sectors of the bourgeoisie tied to international capital) and *state directed socialist development* (in which autonomous civil and military bureaucrats who gain power after a mass revolution set out to nationalize all foreign investments, the state becoming the sole promoter of economic change and development).

Although Trimberger's is the main account that is fully dedicated to the role of the military in revolutions there are several issues concerning its validity. First of all, the case of both Iraq and Egypt follow more likely the third path, that of *state directed socialist development* (perhaps more evident in the case of Egypt). The problem is that there is no coalition of civil and military bureaucrats taking power in either country. In the case of Egypt, directly emulated by that of Iraq, it is the military that decides to take power and enact the necessary reforms. Furthermore,

Secondly, both the Iraqi and Egyptian cases are instances of revolution from above and not of mass-mobilizing revolutions. The new leader's accession to power is swift and is not the result of a prolonged social and political struggle that extends beyond the rank of the military. In addition to that, Trimberger's path-oriented model cannot account for Egypt's and Iraq's subsequent development – although the landed class's influence and economic power is seriously hampered, the relation to foreign capital in the initial phase of the revolution is virtually non-existent (In Egypt, it begins only as a result of Sadat's 1970's policy[37] of opening up the economy to foreign

[34] Quee-Young Kim, review of *Revolution From Above: Military Bureaucrats and Development in Japan Turkey and Peru*, by Ellen Kay Trimberger, *Social Forces,* 60, no.4, June 1982, 1201

[35] Irving Louis Horowitz and Ellen Kay Trimberger, "State Power and Military Nationalism in Latin America," in *Comparative Politics,* January 1976, 223-5

[36] Horowitz, Trimberger, *Comparative Politics,* 226

[37] Alain Rousillon, "Republican Egypt interpreted: revolution and Beyond," in *The Cambridge History of Egypt*, ed. Martin W. Daly, (Cambridge: Cambridge University Press, 1999), vol 2, 334

investments, whereas in Iraq signs of the reversal of nationalizing policies emerged only after the Ba'th-ist coup of 1968[38]).

Theda Skocpol's explanation of revolutions is perhaps the most influential theory in the structuralist category. However, we must observe that the theory initially proposed by Skocpol has undergone several changes. The model, elaborated initially with Ellen Kay Trimberger tries to build on several Marxist hypotheses: Marxist theory is not generally relevant, but relevant only to specific circumstances and specific societies (1); successful revolutionary movements exist only in objective revolutionary situations (2); the class domination concept remains a valid instrument of social structure analysis(3)[39].

Revolution is under these conditions a complex relation between three important sets of variables, the first being the "non-reductionist"[40] view of the state (in spite of influences from the dominant class, the state maintains its own logic as an organization that extracts and distributes resources in order to maintain internal order and cope with external pressure). The second variable is the relations between the peasantry and the landed classes; whereas the third variable is the intense military and commercial competition between states integrated in a world-wide economic system (Skocpol and Trimberger's view is based on Immanuel Wallerstein world-system theory)[41].

Skocpol further elaborates the theory in her influential 1979 *States and Social Revolutions*. According to her refined theory, revolution occurs whenever two conditions are simultaneously met: a political crisis (set in movement by the incapacity of a monarchy or dominant class to deal with the challenges of a predominantly agricultural economy and the pressure of the international competitive environment) and a peasant rebellion (Skcopol draws on the research of Eric Wolf about causes and conditions for rural rebellion[42] in discussing this element). The result of the revolution is a state more powerful in weberian terms, capable of undertaking economic enterprises, which uses political mobilization in order to better fight its foreign and internal enemies[43].

The applicability of Skocpol's theory to the Egyptian and Iraqi cases shows the limits of this particular structuralist outlook. While revolutionary regimes are decidedly more centralized and more bureaucratized than their Old Regime counterparts (with a possible exception in the case of Iraq, where the struggle for power inaugurated by the 1958 Revolution lasts for nearly a decade), there is no adequate instrument to measure their performance in regards to their external or internal coercive performance (in the case of Egypt, the proximate conflict, that with Israel, will see the Egyptian army time and again defeated by the Israeli forces, whereas in the Iraqi case the only important military involvement – the Iraq-Iran War – leaves open the question of the regime's new found military prowess).

Furthermore, even if we consider the revolutionary outcome to be true, in Skocpol's terms, both the Iraqi and Egyptian revolutions do not follow the causal pattern laid by the aforementioned scholar. Both revolutions are top-down movements. Furthermore, there are no serious signs of a state breakdown neither in Egypt, nor in Irak. The military's accession to power is surprising and the most important aspect is that systemic conditions, for both states (as for most Middle Eastern states) are roughly the same – the end of the colonial age and the opening stages of the Cold War.

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[38] Charles Tripp, *A History of Iraq*, (Cambridge: Cambridge University Press), 207

[39] Ellen Kay Trimberger and Theda Skocpol, "Revolutions: A Structural Analysis." in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 64

[40] Trimberger, Skocpol, *Revolutions*, 66-7

[41] Trimberger, Skocpol, *Revolutions*, 68

[42] Eric R. Wolf, " Peasants and Revolutions," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 55

[43] Theda Skocpol, *States and Social Revolutions. A Comparative Analysis of France, Russia and China, (Cambridge: Cambridge University Press, 2006), 4*

From Skocpol's point of view, the challenge is not necessarily to question why did the Iraqi or Egyptian revolutions occur, but why similar movements were not a common occurrence in the 50's all over the Middle East. Moreover, both states are rather functional up to the point of the revolution and neither experience peasant rebellions (although he conditions for such movements – the existence of a powerful landed class and its tense relations with the peasantry did exist: in Egypt the landed classes and the monarchy are the owners of roughly 40% of arable land, whereas in Iraq, 95.8% of the arable surface is the property of the top 18% owners[44]).

In addition to that, there is also the problem of the military background of the officers. Skocpol asserts that whenever the military that do take power have rural backgrounds; their immediate objective is not the enactment of far-reaching reforms but cementing their hold on power[45].

A reviewed view[46] on the link between revolution and mass mobilization (and in an attempt to bridghe the differences between her own theory and Huntington's hypotheses), Skocpol concedes that there is an element of democracy in the development of revolutions, namely the increase of popular participation in political life. Skocpol concludes that while the economic success of the revolutionary regimes may still be a matter of debate, their ability to motivate the populace to undergo excruciating sacrifices in times of war is certain. The revolutionary elites, considers Skocpol, were able to build (in all the three cases studied in *States and Social Revolutions*) the strongest states in those countries facing the most dire geopolitical situations or which demanded the waging of humanly costly and prolonged international wars.

All in all, Skocpol's attempt to refine its previous theory, while making important steps from the Wallersteinian-like image of international relations (the addition of geopolitical concepts or the discussion about hegemonic power[47]) becomes a rather confusing picture of revolutions. She does not discuss the sometimes different and mutually exclusive underlying assumption of realism or geopolitical thinking. Furthermore, her exploration of mass military mobilization is merely an acknowledgement of a known fact (the revolutionary's regime ability to tap into new resources, based on the cunning use of ideology) that is not positively linked with her previous structuralist model she continues to uphold. Moreover, the ascertainment that revolutionary regimes fare better in strenuous circumstances is really a matter of debate – fact is military revolution is difficult to export and the cases of revolutions that succumbed under the material pressure of Old Regimes are quite numerous[48]. All in all, Skocpol's late attempt to improve her theory tries to make way in for the influence of ideologies and a more subtle picture of the international environment.

A different conceptual scheme for the analysis of revolution is presented by Mehran Kamrava[49]. He tries to move away from the agent-structure debate that has been renewed in the wake of the Iranian Revolution and the East European Revolutionary wave[50]. Contesting Skocpol's neglect of the ideological factor in revolutions, Kamrava sets out to build a new classification of revolutions. He distinguishes between spontaneous, planned and negotiated revolutions. Structural forces are predominant in structural revolutions, whereas the agent's action

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[44] Hanna Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq*, (London: Saqi, 2008), 55

[45] Skocpol, *States and Social Revolutions*, 290

[46] Theda Skocpol, "Social Revolutions and Mass Military Mobilization," in *Social Revolutions in the Modern World*, Theda Skocpol, ed. (Cambridge: Cambridge University Press, 1997), 279-280

[47] Skocpol, *Social Revolutions in the Modern World*, 288

[48] Stephen M. Walt, *Revolution and War*, (Ithaca and London: Cornell University Press, 1996), 330-5

[49] Mehran Kamrava, "Revolution Revisited. The Structuralist-Voluntarist Debate," in *Canadian Journal of Political Science*, 32, no, 2, 317

[50] Said Amir Arjomand, "Plea for an Alternative View of Revolution," in *Debating Revolutions*, Nikki R. Keddie, ed. (New York and London: New York University Press, 1995), 144

is the main characteristic of the planned type of revolutions. Negotiated revolutions lie in between the two other categories.

Planned revolutions can be further divided into two different categories – those that result after a prolonged guerrilla struggle and those performed by superior military officers. Not all coups can be classified as revolutions, Kamrava argues, the difference between them being the objective of the military leaders (enacting a change in the social or political structures of the state contrary to the preservation of the same factors in the case of a coup without any revolutionary impact)[51].

Furthermore, there are other criteria which set the two types of planned revolutions apart: the background of the military leaders (middle class educated leaders in the case of guerrilla movements; peasants or petty burgeois in the case of the superior officers that take power); their ideological objectives (the sudden change in resource extraction and distribution in the case of the guerrilla movements versus the nationalist overtones of the second case); the phases of the revolution (guerrilla movements need to encompass rural areas, in order to build up their legitimacy and resource poll, whereas superior-officer led revolutions are largely confined to urban areas.

Trying to draw a conclusion from the analysis of the structuralist theories, we must conclude that in spite of the numerous controversies and debates that regard the role of the military, the structuralist school offers the most detailed account of the military's involvement or participation in revolutions. In some cases (most notably Moore and Tilly), the military's participation is rather a secondary, more likely facilitating cause of succesfull revolutions (in particular Goldstone and TIlly emphasize the need of the political leadership to maintain control of the military in order to prevent the contesting coalition's claim to political power). There is also a debate as to the influence of the background of the military officers – whereas Moore sees junior officers as mere pawns in the schemes of high level bureaucrats, providing the regime with a renewed ideological vigour, Skcopol denies their ideological commitment. On the whole however, the most important aspect is the debate as to whether the military can play a leading role in revolutions, Trimberger offering the only positive answer to this question.

Discussing military revolutions

In discussing the nature of the military's involvement in revolution I propose a conceptual model composed of four elements: the internal structural conditions of the revolution (mainly those discussed by Trimberger and Skocpol), the particular elements of the military ethos and organization, the facilitating factors of revolution and the international systemic conditions.

In terms of the aforementioned *structural conditions*, we notice that both regimes correspond to the template set by Skocpol and Trimberger. Both Egypt and Irak are exclusivist and somewhat repressive regimes; with an economic structure based primarily on agriculture (oil revenue in the case of Iraq is not yet an important part of the national budget). State bureaucracy is underdeveloped (a somewhat expected occurrence, since both independent Egypt and independent Iraq are fairly recent creations). Whereas in the case of Egypt one can argue about its semi-autonomous existence during the latter period of the Ottoman Empire, Iraq is a state created from scratch in the aftermath of the First World War, from the administrative divisions of the defunct Ottoman Empire.

Essentially, state-building and nation building in both cases is one of the utmost imperative of both governments. The question of national identity is at the same time paramount – in the case

[51] Kamrava, *Canadian Journal of Political Science*, 334-5

of Egypt, particularly because of its recently gained independence (and because the Sudan problem – its union with Egypt or its independence – is a fresh wound) and one of the most important problems in the case of Iraq, a deeply ethnically and religiously divided society, in which the underlying Sunni and Arab domination is a cause of many manifest conflicts. Moreover, in the case of Iraq, there is also the problem of powerful and autonomous tribal structures (reinforced by the land distribution, as a consequence of Ottoman reforms in the mid 19th century[52]) and the question of parallel religious structures manifest in Shia communities.

We noticed earlier that neither regime breakdown, nor peasant uprisings precede the military's accession to power – there are however cases in both countries of urban unrest in the years preceding the revolutions. One has to note that, ironically, the revolutionary regimes undertake agrarian reforms: the more radical Egyptioan take on the situation (several wave of nationalization and dividing state and private-own arable land to landless peasants) results a transfer of almost 42,000 hectares in favour of almost 300,000 families[53]; in Iraq there is only one attempt of enacting these reforms, however the land distribution figures indicate a major shift in the land owning patter (in 1973, the top 18% of land owners' quota has shrinked from 95% to 34.9% of arable land)[54].

On an international level, we notice that the largest claim for both countries is the alleviation or diminishment of British influence. However, we must observe that there is no recent occurrence in the international arena that can signal the intensification of pressures on the two states in the period immediately preceding the revolution – British influence is not increasing (on the contrary, British military requirements are largely symbolic, except for the Suez Canal Status in the Egyptian case, which, however, is almost a decade old problem) and military defeats (if we consider the 1948-1949 Arab Israeli War a relevant military undertaking in the case of Iraq) are also relevant only as a vivid recollection for the military.

The most important structural factor remains the absence of a politically motivated bourgeoisie. Neither in Iraq, nor in Egypt, does the bourgeoisie strike the bargain Trimberger talks about or resign itself to the position of economic actor devoid of political stakes Moore insists upon. Furthermore, in Trimberger's defense we must add that in neither country the bourgeoisie manages to become a promoter of economic development (the ups and downs of the Egyptian economy and the steadily increasing oil revenue flows in Iraq are a proof of the bourgeoisie's inability to foster development).

Summing up, the most important structural conditions in regard to both cases are different than those set by Skocpol or Trimberger. There is no considerable international pressure (or the kind of international pressure leading to regime breakdown) and this condition is not accompanied by the peasant rebellion factor Skocpol underlined in *States and Social Revolutions*. As to the bourgeoisie, neither in Iraq, nor in Egypt, do we encounter the typical bourgeois alignment indicated by either Moore or Trimberger and certainly not the politically motivated bourgeoisie whose role is essential for evolution towards democracy. However, one has to notice that both pre-revolutionary Iraq and Egypt are weak, unstable and recent states, marked not only by underdevelopment but by divisive ethnic and religious conflicts, in which the search answers to questions such as the role of the nation-state remain elusive.

The military's own organization and position within the state remains a key element of the analysis and it can explain why the Iraqi and Egyptian military became an effective revolutionary force. On the one hand, their success is also a measure of their possible competitor's inability to

[52] Charles Tripp, *A History of Iraq*, 13-6
[53] Alain Rousillon, *The Cambridge History of Egypt*, 346
[54] Hanna Batatu, *The Old Social Classes,* 1117

gain power. In Egypt, the "liberal" Wafd party is discredited by its cooperation with British authorities during the Second World War, whereas the Muslim Brotherhood and the Egyptian Communist party, although can develop a quite extend base of followers are unable to lay claims on the government (in Tilly's terms, both never manage to pass the resource mobilization test). In Iraq, the military's advantage is also a reflection of the same factors: the Ba'th is a reluctant partner of the military who eventually manages to gain power after almost a decade of subversive and political manoeuvres (basically learning to mobilizing resources and to contend political power), whereas the communists (the only mass-based political organization) is hindered by two factors: widespread hostility of many actors towards communist ideology and the parties favourable attitude to minorities in a country deeply divided along ethnic and religious lines.

On the other hand, there are several key rules that define the military profession which, under certain conditions, allow the military to perform a revolutionary role. Samuel Huntington stresses the divide between civilians (defined as groups or institutions that concentrate sufficient power in order to establish the objectives of the military) and the military (defined as members of a profession that involves the state's legitimate use of armed force)[55]. Members of a profession are linked by three elements – *expertise* (the continuous gaining of skills and knowledge, which serves as an objective base of the membership and as a standard of evaluation within the profession), the *responsibility* of the profession (the military performs an essential role for the functioning of the state) and the *corporate spirit* of the profession (the solidarity among the ranks of the profession and the acute awareness of the differences between the member of the profession and the "outsiders"). Moreover, the military is both a bureaucratized profession and an organized bureaucracy – the military consists of a very solid hierarchy of ranks (which are supposed to denote their holder's competence).

The military profession's scope and use remains a state monopoly. Although all citizens are ultimately responsible for a state's security, it is only the military that are held to this obligation. Consequently, the military is loyal not to the political leader who draws his objectives but to the state/ society he is obliged to serve and to protect.

In the Iraqi and Egyptian case several arguments have to be made about the military. First, of all the state institutions, it is the only highly bureaucratized one. In comparison to the feeble education, healthcare systems or the inadequate legislatures (which express only the contextual results of a highly pernicious electoral system in both countries and are unable to curb the power of the Executive), the military is probably the only functioning institution. The example of pre-revolutionary Iraq is perhaps the most relevant – the state's only attempt to enforce its monopoly over traditional power structures is the forceful imposition of conscription. Military expertise also explains why the military fares better in comparison to civilian contenders of political power – they are better adept at preparing and using violence.

Secondly, another reason for which the military becomes engaged in political undertakings is the evolution of their relations with the civilian government. Normally, the military are trained to respect this division – the formulation of political objectives and the dual nature of warfare (both military and political) is deep instilled through a process of military education. However, the military can pass this threshold. The reason for this encroachment into political space is precisely the social responsibility of the military profession. Ultimately, the civilian authority becomes a largely contextual representative of the society or the state. The military does not regularly question whether this authority (be it a parliament or a monarch) is legitimate and is not concerned whether the authority is autocratic or democratic. As long as the political objectives set for the military are attainable, there is no need to investigate the nature of the relationship.

[55] Samuel P. Huntington, *The Soldier and the State*, (Cambridge: Bellknap, 2008), 8-10

When military failures occur (such as the loss of the 1948-1949 Arab Israeli War) in a situation where winning was highly probable or whenever they are pitted against largely superior forces, the military seeks to identify the causes of failure (and the meddling of both monarchs into the affairs of the military, their dependence on foreign assistance, their inconsistent and highly unpopular promotions at the top of the army can all be considered among the ranks probable causes of the defeat). Moreover, these lines of questioning of the political authority's role, coupled with the fact that the military perceives its own failure as the inability to perform the function it was created to perform open the way to questioning the political authority's legitimacy.

Some authors have asserted that the military's intervention in the political arena depends on the influence Western education had in the training of the military[56]. The Egyptian and Iraqi record is contradictory – while initial military schools designed to train the military were established by the British (in 1881 in Egypt and in the 1920s in Iraq) and a increasing number of higher officers received education in British military academies, almost all the participant at the revolutions were the products of national military schools and academies (with the single notable exception of a Iraqi military leader[57], graduate of the London Engineering School).

Third, the military in pre-revolutionary Iraq and Egypt is one of the few (if not the only) meritocratic institutions. The army is a mean of social ascent in both societies (not only are children from modest backgrounds exempt from paying tuition fees, but in Egypt there is a 10% admission quota dedicated to children of peasant origins). Nearly all the Egyptian leaders have humble origins and are the product of such a policy[58]. This factor can account for both their receptivity to problems related with land distribution and the revolutionary role the military plays (in spite of Moore's or Skocpol's considerations about the limits of the middle officers' role in revolutions).

The success of a revolution accomplished by military leaders is also the result of several contextually favourable conditions. In the case of both Iraq and Egypt, recent military defeat plays this role – but not in the way Charles Tilly and Jack Goldstone emphasize (military defeat produces a large number of disaffected men with military training, who can be mobilized by contending coalitions). As I showed earlier, the role of defeat is not a leading factor that contributes to state breakdown, but a cause of the military's questioning of the legitimacy of the precise keeper of civilian authority.

Another favourable factor is the revolution itself. Mark Katz conclusively shows that the most dangerous type of revolution is not that spread with military means, but the one who risks to occur independently (without foreign direct intervention) in other countries as well[59]. The fact that the Iraqi revolutionary leaders emulated their Egyptian counterparts in all aspects (even the name of the conspiratorial cell, the "Free Officers" is common to both groups) is certain. Although it is difficult to speak of a revolutionary wave (as Katz does) in the Middle East, the influence of the Egyptian military on their Iraqi counterparts is eloquent.

In terms of Mehran Kamrava's concept of planned revolutions accomplished by military officers, both the Egyptian and Iraqi revolutions confirm his hypotheses. The July 1956 taking of power comes as the result of the military's careful planning of the event, whereas the Iraqi Free Officers show a slighter decreased degree of coordination (but manage nevertheless to assume

[56] William E. Odom, *On Internal War. American and Soviet Approaches to Third World Clients and Insurgents*, (Durham and London: Duke University Press), 132

[57] Hanna Batatu, *The Old Social Classes*, 778-81

[58] Afaf Lutfi al-Sayyid Marsot, *A History of Egypt. From the Arab Conquest to the Present*, (Cambridge: Cambridge University Press, 2007), 117

[59] Mark N. Katz, "The Diffusion of Revolutionary Waves," in *Revolutions, Theoretical, Comparative and Historical Studies,* Jack A. Goldstone ed. (Wadsworth Cengage Learning, 2008), 150

power in the same way). Both regimes enact nationalisation policies and shifts in foreign policy by following a rather similar program that encompasses the elimination of feudalism[60], elimination of foreign dominance, increased Arab cooperation[61] etc.

The role of ideology cannot be totally neglected. After all, Nasser's pan-Arabic nationalism forces him to pursue regional designs such as the United Arab Republic or the United Arab States. But there is a powerful instrumental value of ideology in both states – its role is at the same time one of legitimising the new government and outplaying the political opponents (either by discrediting them, as is the case of Egyptian liberals and communists in both countries, either by outbidding their political project – such as the case of the Muslim Brotherhood). The fact that the nationalism of the two revolutionary regimes is an eclectic combination of socialist ideas (the references to the "feudal" character of the Old regime, the condemnation of external "imperialism"), Arab, and Iraqi or Egyptian nationalism respectively partially contradicts Kamrava's conclusions. The military is by virtue of its organization a conservative institution. Its focus in both revolutions is therefore conservative, but not in a classical manner. Careful not to crush traditional structures (both regimes are careful around religious figures and organizations), the military embarks on a project of reforms meant to strengthen the state, offer a plausible definition of the nation, but maintain social order in a legitimate regime. The military's intervention in internal politics is first of all a move meant to strengthen order and legitimacy.

Last, but not least, one must also look at the *international systemic conditions*. Both revolutions occur during a period marked by the end of the colonial rule and the outset of the Cold War. The inability of the former colonial powers to intervene both before the revolution and against the revolutionary regimes offers the military an increased freedom of action. The decisive Suez episode only reinforces this argument (the US and the USSR are unwilling to tolerate the colonial convulsions of either France or Great Britain).

At the same time, the Cold War also enhances the military's freedom of action. Seeing the competition between them as a zero-sum game, both superpowers challenge each other over the acquiring of regional allies, in the hope of tipping the scales of the balance of power. Consequently, both try to court revolutionary regimes, in the hope of gaining an advantage that may prove decisive on the long run. In this context, the both superpowers are able to tolerate the excesses of the revolutionary regimes and to rein in on their allies who have direct interests in the region, hoping to gain the revolutionary's regime trust.

Conclusions

In discussing competing theories of revolution, I have tried to prove that while there are possible explanations for the military's involvement; neither is conclusive when tested against the Iraqi and the Egyptian case. While my endeavour certainly doesn't affect their general predictability and explanatory powers, I consider there are strong reasons for looking further into the matter.

The military's participation in revolutions is not a contextual or conjectural factor leading to revolution occurrence. On the contrary, the Iraqi and Egyptian case most definitely prove the existence of revolutions accomplished by the military. The conditions I have tried to set forth for their successful occurrence are neither those of political break-downs of the state or peasant uprising, nor that of a certain dynamic between the political establishment and the influential bourgeoisie. Other structuralist assumptions (particularly those in regard to the influence of the military's background) are also disproved for the cases here.

[60] Arthur Goldschmidt Jr., *A brief History of Egypt*, (New York: Facts on File, 2008), 144
[61] Phebe Marr, *The History of Modern Iraq,* (Cambridge: Westview Press, 2004), 84

More likely, if the Egyptian and Iraqi cases tell us anything, is that the military sets out on a revolutionary path in weak, internally divided states, where the army is the most bureaucratized and functional institution. The reason for such behaviour is determined by both the position of the military in that particular society (an outlet of social ascension and meritocratic organization) and internal organizational norms and values (their capacity of questioning the legitimacy of political rule when confronted with failures and their desire of a more legitimate state). Several contextual factors (military defeats and the example set forth by other successful revolutions) play an important part. In addition to that, international systemic conditions (in the two cases, the disintegration of colonial empires and the advent of the Cold War) can seriously increase the military's freedom of movement.

Military revolutions are planned revolutions from above, during which class and social relations change as a result of state-implemented policies. The ideological factor plays a secondary role (mainly that of legitimising the regime), but, on the long run there are moments when policy is directed under the sway of ideological constraints.

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THE ANALYSIS OF CORRUPTION IN PUBLIC ADMINISTRATION - A QUANTITATIVE METHOD

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Abstract

This paper aims to examine, starting from Romania case, the degree in which decentralization process and improvement of local governance contributes to reduction of corruption on short and medium term. Through the used methodology, the paper is in line with the international trend that aims to analyze the impact of corruption on economical and social processes at the local level. For corruption analysis we used a simple dichotomist logistical model. From the obtained results, at one hand – descriptive analysis, on the other hand – the logistical model, there are some action to be undertaken for reduction the corruption level at local public administration like intensifying the reform process at local public administration level on three important components regarding civil service, decentralization process and improving the public policy formulation process, elaborating a long term strategy and a specific law on civil servant payment system, intensifying the continuous training courses for local electives, fluctuation reduction of technical apparatus from city halls as result of political changes, continuous training courses for mayors.

Keywords: *public administration, econometric models, corruption, logistical model, local governance*

1. Introduction

This paper aims to examine, starting from the Romanian case, the degree of which decentralization process and improvement of local governance contributes to the reduction of the corruption on short and medium term. Through the methodology used here the paper is in line with the international trend that aims to analyze the impact of corruption on economical and social processes at the local level. Furthermore, in the last time, the research on corruption issues are related, mainly on the measurement of the corruption level and on its impact on the growing rate of the GDP (Mauro [1995], Abed and Davoodi), Krueger [1974]), on impact that generates over some of national economical sectors (Tanzi [1998], Shang-Jin Wei [2001]), or on the decentralization processes (Shah [2006]). In Romania, studies were undertaken in order to identify corruption mechanisms at local level or to measure its impact over development of some of national economical sectors (Profiroiu, Andrei [2005], Andrei [2002]). At local level, decentralization process and corruption could generate significant negative impacts in economical and social segments.

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Like in every country that undertakes a transitional process, corruption affected in a large scale the economic performance in Romania. According to Transparency International – Romania, corruption had a high level in the period after the revolution from 1989. The indicator value from that period was in the 2.5 and 3.2 interval.

In 2005 from 159 countries[1] where corruption indicator was calculated, 117 countries scored less than 5, these being the poorest countries in the world. In this hierarchy, Romania scored 3.0, progressing from preceding years when registered 2,8 respectively 2.9. Amongst countries that recently joined European Union, Slovenia and Estonia scored above 5. Hungary scored 5.0, Lithuania 4.8, Czech Republic and Slovakia 4.3. Bulgaria, our eternal comparison term, has a superior score than Romania. A lower score than Romania was registered by Russia, Macedonia, Serbia and Montenegro, Albania, Moldavia, Ukraine and Georgia.

According to European Commission, "in decentralization and local administration domain the warnings from last year Country Report are still actual; the competences transfer to local authorities did not take place in concordance with the resources transfer."[2]

2. Corruption causes

For all countries undertaking transitional process, corruption was one of the phenomena that have negative effects in developing free market. Amongst factors that contributed directly to developing and generating corruption phenomenon can be named: lack of the organizational culture, change resistance from administration apparatus, its dependence on the political changes. An important part of the mayors testified existence of corruption at local public administration level. Therefore, the obtained results from analyzing answers from the question **"Do you consider corruption a real problem of Romanian public administration?"** are presented in the following table:

Table 1

Answer choice	Results (%)
Yes	66,0
No	30,4
No answer	3,6
Total	100,0

A significant part of the mayors considers corruption as being one of the major problems of Romanian public administration. In considering causes of this phenomenon there were taken into account six elements: legal framework (a), civil servants pay system (b), civil servants morality (c), pressure from business sector (d) and politic (e) and citizen behavior (f). For these variables there were defined a scale with five items: 1-do not influence (the corruption from system), 2-influence in a low degree, 3-influence in a moderate degree, 4-influence is important, 5-influence is high. The obtained results from analyzing the answers are presented in the following table:

[1] See www.transparency.org
[2] 2004, Regular Report on Romania's progress towards accession, p 17.

Table 2

Variable	Mean	Std. Deviation
a	3,69	1,150
b	4,62	0,617
c	3,33	1,126
d	3,31	1,150
e	3,37	1,371
f	2,99	1,085

These results are proving the following: 1. Legal framework – still permits in a large degree the apparition and maintaining corruption at public administration level. This aspect recommends expediting the revision of the actual legislation (Law 215/1998, 213/, 326/, OUG 45/2003, etc.) that governs local public administration activities. Moreover, these legislative changes are in line with European Union integration process requirements and World Bank PAL program requirements related to the local public administration; 2. The payment system represents determinant factor in apparition and maintaining corruption in the system, according to respondents' opinion. The mean of this variable is from far the highest (4,62), while the standard deviation is the smallest (0,617), proving a strong convergence of the respondents. This fact is more than obvious while the salaries level is not in concordance with the sector responsibilities and the changes in leading positions at the local public administration level are significant related to the changes of political spectrum. Equally important, this aspect is generated by the lack of sustainable strategy on payment system and developing a unitary payment system; 3. Morality of the civil servants – represents an aspect that has an important role in generating the corruption, according to mayor's opinion. The explanations of this situation can be explained by the following: reduced development of a organizational culture and existence of a behavior that is non conform with the actual society requirements, that is registered at the level of the large scale of employees from the public administration; the payment system from the local and public administration sector; 4. Pressure from the business sector – has an important role in generating corruption. For an economy in transition the business' interest in doing business with the local public administration institutions is immense due to the advantages that are offered: prices that can be advantageous negotiated, permissible contracts, guaranteed market; 5. Pressure from the political system – it is also a determinant factor. Therefore, about 50% from respondents appreciated that the political influence is high and very high in generating corruption. Explanations can be offered by a severe instability of civil service, especially on command positions, on electoral cycles and by operating of political clientele, especially in distributions of the financial resources on local level; 6. Citizens behavior – has a moderate influence comparing with other factors, therefore could be considered rather an effect than a cause for corruption.

3. Corruption and local governance

In analyzing the relationship between local governance, decentralization process and corruption should be considered that a transparent and coherent decentralization process determines corruption decrease and an improvement of public funds use. A World Bank series of studies demonstrates this fact (Olowu [1993], Fiszbein [1997]). Nevertheless, an incorrect decentralization process (conceived and implemented) is a factor that will lead most of the time increasing the corruption level from a country that undertakes a transitional process. In this situation the central weight shifts from central to local level. For reduction corruption level in

the decentralization process a series of components should be introduced for generating transparency in decisional process and participation of citizens in taking the important decisions at the local level.

In this study, starting from registered data from sample level it was noticed that corruption phenomenon was signaled by the mayors which consider that citizens should be directly involved in taking the relevant decisions at community level. Consequently, correlation coefficient Pearson amongst the two variables is 0.315 significant for 1% significant level. This characteristic makes evident a direct cause the apparition and perpetuation of corruption phenomenon, namely the lack of transparency in taking decisions at the institutions of local public administration.

At Romania localities level the proportion of mayors with high school and university education is equal. The distribution of answers for the question regarding corruption at the two respondents categories, education level (high school and university) are relatively the same. Therefore, chi-square value (χ^2) who's value is 34,96 support this statement. *These results prove that corruption phenomenon is perceived in the same measure by the majority of mayors, regardless education level. The problem in combating corruption is not about understanding and perceiving corruption phenomenon, but about efficient methods of combating it.*

Table 3

		Education level			Total
		High school	University studies	No answer	
Corruption is a real problem of the public administration	Yes	64,7	67,9	52,9	65,3
	No	32,8	31,2	17,6	31,0
	No answer	2,5	0,9	29,4	3,7
Total		100,0	100,0	100,0	100,0

Corruption and other factors contribute directly to the poor quality of citizens offered to the citizens by the local public administration. In this study it is defined the following variable *"Measure in which local public administration fulfils its bases functions" (Q5)* is a mean of four variables that define its functions: a) administration and management of goods and public funds at local level (Q1); b) assure the bases services at the local level (health, social assistance, education, culture, defense, aso) (Q2); c) predictions and socio-economical development (Q3) and d) organization (Q4). For quantifying the mayors' opinion reported to the degree in which the local public administration fulfils each single function, a ordinal scale was defined, having the following items: 1-very low degree, 2-low degree, 3-high degree, 4-very high degree. The characteristics of the four primary variables are presented in the following table.

Table 4

Variable	Mean	Std. Deviation	Correlation Matrix on Primary Variables			
			Q1	Q2	Q3	Q4
Q1	2,79	0,701	1	0.549*	0.317*	0.521*
Q2	2,38	0,755		1	0.534*	0.563*
Q3	2,27	0,798			1	0.515*
Q4	2,70	0,779				1
Q5	2,53	0,600	-	-	-	-

* significant value for 1% confidence level

At the actual phase of decentralization, in the vision of mayors, local public administrations could fulfill their bases functions just on a small degree. The most unfavorable situation is the low capacity of prediction and economic-social development at the local level and providing basic public services at localities level. The reduced capacity of local administration in providing basic services is directly determined by inappropriate administration and management of the goods and public funds at the local level (Pearson coefficient is 0.549) and organizational capacity is reduced (0.563). *By implementing the decentralization process on a coherent and transparent manner it is assured the premises of local public administration strengthening in providing its basis functions.*

The public administration reform process, at technical apparatus level, and also at local elected civil servants level is one of the important factors in reduction corruption level. Within present research, this is perceived as a process that did not bring yet the expected transformations. In the questionnaire were inserted three questions for understanding essential aspects of this process: "Do you consider that public administration is undertaking a thorough reform process?" (*QR1*), „To what extent the actual changes on public administration level correspond to your expectations?" (*QR2*), „Do you consider that public administration reform is oriented on right path?" (*QR3*). For the three variables is was defined a scale with 4 response choices: 1- the most unfavorable situation, … 4 – the most favorable situation. After analyzing data there were obtained following synthetic data presented in the below table:

Table 5

	Mean	Standard dev.	QR1	QR2	QR3
QR1	2,5099	0,71610	1.000	0.631*	0417*
QR2	2,4545	0,71472		1.000	0.417*
QR3	3,5640	1,08933			1.000

* Correlation is significant at the 0.01 level (2-tailed)

The comments that are coming from analyzing the answers of the three questions are: half of the mayors have an unfavorable opinion about the changes from public administration; in general, changes in public administration match only in a moderate degree to mayors' expectations; variables interdependences, measured by Pearson coefficient, are significant.

Possible explanations of this situation are: a series of reform measures, in implementing process, do not have yet significant effects at localities level, reform process requiring time; political message at government level is not accompanied by an information campaign and by training for local electives on concrete reform components; in elaborating the strategy or of some basis components of the reform process, there were not enough involved local electives, aso. *We consider that lack of a promotion campaign for reform measures at the local public administration level explain a reduced concordance between mayors' expectations and perceived changes. The lack of a promotion campaign for reform measures at the local level slows down the process of reform implementation.*

Based on the three initial variables it is defined a new variable that quantifies mayors' opinion on reform process at public administration level. This variable is defined based as the mean of 3 initial variables from the questionnaire: $QR = (QR1 + QR2 + QR3)/3$.

4. Utilizing the logistic model for analyzing the corruption

For analyzing corruption it is used a simple dichotomist logistical model. It is considered the probability that a mayor will consider corruption one of the real problems of public administration.

For the dependent variable it is considered a two options variable, which is defined: $y_1 = 1$ in a mayor considers corruption as a real problem for Romanian public administration, and $y_1 = 0$ if mayor is in a complementary situation. Within the model there were considered following independent variables: existence at the city hall level of a person nominated directly to be in charge for implementing reform measures (*PR*), mayor' education level *(NI),* civil servants' pay system *(SS)*, political system pressure *(PP).* The characteristics of the logistic model are presented in the following table:

Table 6

	B	S.E.	Wald	Sig.
PR	0,291	0,158	3,382	0,06
NI	-0,235	0,144	2,676	0,10
SS	-0,989	0,178	30,791	0,00
PP	-0,680	0,172	15,709	0,00
Constant	11,548	1,593	52,576	0,00

The logistical model is defined in this case by the following relationship formula:

$$P(y_i = 1) = \frac{1}{1 + \exp(-(11{,}548 + 0{,}291\text{PR} - 0{,}235\text{NI} - 0{,}989\text{SS} - 0{,}680\text{PP}))}$$

The high statistical score (χ^2) = 253.2 proves that the estimated logistical model is valid. Moreover, the model parameters are significant different from zero. The significant level (α) for each parameter is presented in the above table. The estimation signals that correspond to the independent variables shows to what extent the probability to respond affirmative at the question on corruption is increasing function by a certain variable from the model. Therefore, probability is an increasing function reported to *PR* variable and deacreasing function reported to the mayor' education level *(NI),* civil servants' pay system *(SS)*, political system pressure *(PP).*

5. The regression model

In the economic literature, a special attention is given to the studies related to the measuring of corruption and of its impact on economy as a whole or on some activity sectors in particular. For the analysis of the corruption phenomenon, a series of questions measuring the public administration employees' opinion of the level of corruption, of the factors that generate corruption and of the economic and social consequences of this phenomenon were included in the questionnaire. Three level-three variables were defined using the primary information.

5.1. The level of corruption by activity sector

With a view to assessing the level of corruption, variable C_5 is defined. This variable has a measurement scale whose values range from 1 (corresponding to a low level of corruption) to 5 (for generalised corruption). The public administration employees' opinion of the level of corruption in education, health, politics, local public administration, central public administration and in their own institution is taken into account in defining this variable.

The average level of this characteristic is 3.20 and the standard deviation is 0.80. A transformation of this value on the scale of the TCI index leads to the value 3.6. In other words, relatively similar results are obtained in the two measurements. In general, TCI values are situated between 2.8 and 3.2, which places Romania among the European countries with the highest level of corruption. With a view to making the shift from the measurement scale used in this study for measuring corruption to the TCI scale, the following calculation relation was applied: $(5-3.2)\cdot\frac{10}{5}=3.6.$

5.2. The effect of corruption on the economic and social environment

With a view to measuring the public administration employees' opinion of the negative effect of corruption on the economic and social environment, the questionnaire included questions based on which a series of primary variables were defined. These variables quantify the negative effect of corruption on local development, national development, the quality of education, the public health system, the quality of the political environment, the quality and image of local and central public administration. The variable that measures the effects of corruption is symbolised by C_6 and is calculated on a measurement scale with values ranging from -2, which corresponds to a negative effect of corruption, to 2, for the case in which the respondents consider that the corruption phenomenon has a series of positive effects on the socio-economic environment.

The average level of the aggregate variable (-1.06) shows that corruption has a negative effect on the Romanian economic and social environment. The standard deviation of this variable is 0.91.

5.3. The contribution of some factors to the reduction of corruption

With a view to reducing the level of corruption in a country, the most various strategies can be developed. These strategies have the following aims: creating new institutional structures and improving the legal framework for combating corruption, making the state structures more efficient both by setting up efficient institutions at central and local level and by modernising the civil service, reforming the political class, creating and developing - at the level of civil society - non-governmental institutions meant to support the fight against corruption etc.

An important role in the reduction of corruption is played by the mass media, which usually support the increase in the transparency of decisions at public level. The cultural factors and the mentality of a country's or area's population directly contribute to the constantly high level of corruption. With a view to measuring the influence of some factors on the reduction of corruption, primary variables were defined based on the questionnaire questions. These variables quantify the civil servants' opinion of the influence of mass media, school, church, the central- and local-level political class, the state's representatives/the civil servants who work in central and local public administration and the citizens on the reduction of corruption. For the purpose of measuring the primary variables defined above, a measurement scale with five whole numbers ranging between -2 (corresponding to the case in which the effect of the factor considered does not contribute to the reduction of corruption) and 2 (for the case in which the factor considered greatly contributes to the reduction of corruption) was used. Based on the above-mentioned variables, an aggregate variable (C_8) which measures the influence of the factors considered on the reduction of corruption is defined.

The average level of this characteristic is 0.22, and the standard deviation is 0.82. The average value of this characteristic shows an insignificant influence of the factors that contribute to

the fight against corruption at the level of Romanian society. With regard to the eight factors considered, the following values were calculated for the average level and the mean square error.

Table 7: Characteristics of the factors that contribute to the reduction of corruption

Variable	$Q_{5.61}$	$Q_{5.62}$	$Q_{5.63}$	$Q_{5.64}$	$Q_{5.65}$	$Q_{5.66}$	$Q_{5.67}$	$Q_{5.68}$
Mean	0.89	0.68	0.74	-0.43	-0.29	-0.02	0.13	0.17
Std. deviation	1.072	0.890	0.940	1.356	1.280	1.241	1.191	1.185

A significant positive influence on the reduction of corruption is that of the mass media, while the behaviour of the central-level political class does not encourage the reduction of corruption. Moreover, their behaviour generates and encourages corruption. The behaviour of central and local public administration employees is situated in a neutral area from the point of view of the efforts to reduce corruption.

5.4. General data

Within the analysis, a series of specific characteristics of the persons working in public administration were also taken into account: the gender of the person (C_{10}), the age in completed years (C_{11}), the staff category (managerial staff or non-managerial staff) (C_{12}), the training level (high school studies, post high school studies, college degree, master's, PhD) (C_{13}), the person's religion (C_{14}), the type of institution in which the person works (central public administration, Prefects' Offices, County Councils and decentralised services) (C_{15}).

5.5. Preliminary conclusions

We conclude this part of the paper by drawing some preliminary conclusions based on the descriptive characteristics of the variables presented above. They will help define the econometric models used in the analysis of the four aspects related to public administration (the capacity of public administration to fulfil its basic functions, corruption, transparency and the satisfaction of public administration employees).

(i) For most of the variables used in the study there are significant differences at the level of the four types of public administration institutions. Thus, if we consider the conclusions drawn based on the ANOVA analysis, these differences are obvious for the level-three variables used to analyse the quality of the activities carried out by public administration institutions (variable C_1, for which the significance threshold of the F test is $p < 0.04$), the transparency of public institutions $(C_2', p < 0.04)$, the satisfaction of public administration employees $(C_3, p = 0.00)$, the level of corruption $(C_5, p = 0.00)$ and the perception of the effects of corruption on the social and economic environment $(C_6, p < 0.07)$. This observation recommends that the regression models be defined both for public administration overall and for the four types of public administration institutions.

Table 8. Characteristics of the variables that describe aspects related to the civil service

		C_5	C_6	C_8
Type of institution				
	CPA	3.36(0.82)	−1.08(0.97)	0.22(0.82)
	CC	2.97(0.74)	−0.87(0.95)	0.30(0.75)
	PO	2.98(0.75)	−0.99(0.88)	0.88(0.78)
	DPS	3.19(0.80)	−1.13(0.86)	0.21(0.81)
F statistics and *p* value		4.863 (0.001)	2.241 (0.07)	-
Gender of the person				
	M	3.09(0.74)	−1.04(0.88)	0.25(0.84)
	F	3.24(0.83)	−1.09(0.92)	0.20(0.78)
F statistics and *p* value		3.496 (0.03)	-	-
Staff category				
	NMS	3.22(0.83)	−1.10(0.90)	0.80(0.81)
	MS	3.11(0.74)	−1.02(0.92)	0.27(0.79)
F statistics and *p* value		3.544 (0.06)	-	-
Civil service reform				
	$GR_1 = (3.67 \quad 5.00]$	3.71(0.93)	−1.35(0.99)	0.20(0.73)
	$GR_2 = (2.33 \quad 3.67]$	3.44(0.82)	−1.07(0.95)	0.03(0.80)
	$GR_3 = [1.00 \quad 2.33]$	3.02(0.75)	−1.05(0.88)	0.31(0.79)
F statistics and *p* value		28.107 (0.00)	-	10.062 (0.00)
Transparency in public administration	$GT_1 = [0.00 \quad 1.33]$	3.89(0.63)	−1.38(0.94)	−0.23(0.98)
	$GT_2 = (1.34 \quad 2.67]$	3.47(0.71)	−1.12(0.92)	0.05(0.73)
F statistics and *p value*		41.875 (0.00)	2.470 (0.09)	13.731 (0.00)
For public administration overall		3.172(0.81)	−1.07(0.91)	0.22(0.81)

(ii) The same observation is valid when defining the groups of public administration employees according to gender. Thus, differences appear in the level-two variable used to analyse the budgetary performances of the institution $(X_2, p < 0.01)$, the size of the pressure put on public administration by the political system $(X_6, p < 0.03)$, the transformations in the system due to the political changes that were brought about by local and national elections $(X_7, p < 0.03)$ and the public administration employees' satisfaction resulting from the monthly income obtained by them $(X_9, p = 0.00)$.

(iii) The intensification of the reform process at civil service level leads to the reduction of the level of corruption. The highest level of corruption is recorded for the group of employees that was least affected by the reform process. In fact, among the groups of employees defined in

relation to the size of the impact of the reform process (GR_1, GR_2 and GR_3) there are significant differences in evaluating the level of corruption in the system ($p = 0.00$). The analyses made at administration level reveal the fact that the low salaries, the discretionary regulations for public administration employees and the lack of alternative tools for motivating civil servants are important factors that cause a high level of corruption in the system.

(iv) An important factor that generates corruption in the system is represented by the lack of transparency at the level of public administration institutions. Thus, as the results presented in table 10 show, the greater the transparency of decisions, the lower the level of corruption. The size of corruption is different among the groups of employees defined according to the level of transparency (GT_1, GT_2 and GT_3), case in which the value of the significance threshold is $p = 0.00$. One of the major mid-term objectives set out in the reform strategy was „The improvement of the image of public administration by increasing the transparency of administrative operations and by taking firm anti-corruption measures, which should be visible to the public"[3].

(v) The level of satisfaction of civil servants can be significantly improved by adopting an attractive and stable remuneration system. In fact, of the three dimensions of the degree of satisfaction of the civil servant (salary, respect in the workplace and working conditions), the first has the lowest level. The mean of this variable is only 2.30, while the values recorded for the other two variables are 3.59 and 3.43 respectively.

(vi) The financing system of public administration does not meet the needs of public administration institutions.

5.6. Models for the analysis of the corruption phenomenon

A regression model for the analysis of the level of corruption (C_5) is defined in relation to various influence factors, which are divided (depending on the way in which they influence the level of corruption) into the following three classes: (i) Factors that contribute to an increase in the level of corruption. This category includes committing fraud in competitions for civil servants (C_9) and the pressure put by the political system (X_6). (ii) Factors that contribute to a decrease in the level of corruption, a category which includes: the quality of the activities carried out by public administration institutions (C_1), transparency in public administration (C_2), the degree of satisfaction of public administration employees (C_3), the quality of work relations at the level of public administration institutions (C_4), the current capacity of the company to fulfil its functions (X_8), the capacity of the current system of financing public services ($Q_{3.21}$) and the quality of civil service reform (C_{10}). (iii) Characteristics of the persons who work in public administration. Three of these characteristics (three variables) are included in the models, namely the gender of the person (C_{11}), the staff category to which the person belongs – non-managerial staff or managerial staff (C_{12}) and the person's training level (C_{13}).

The regression model is defined as follows:

$$C_5 = b_0 + b_1C_1 + b_2C_2 + b_3C_3 + b_4C_4 + b_5Q_{3.21} + b_6X_6 + b_7X_8 + b_8C_9 + b_9C_{10} + b_{10}C_{11} + b_{11}C_{13} + b_{12}C_{14} + u_2 \quad [M_3]$$

[3] Updated Government Strategy on the Acceleration of Public Administration Reform 2004-2006, Bucharest, p. 6.

where u_2 is the residual variable that quantifies the influence of other factors (not included in the model) on the level of corruption.

The parameters were estimated at the level of public administration, central public administration, Prefects' Offices, County Councils and decentralised services. The estimation of these parameters only took into account the records (questionnaires) that contained valid answers to all the questions based on which the variables of the above model were defined. The ordinary least squares method was used to estimate the parameters. The results are presented in Table 9.

5.7. Models for the analysis of transparency in public administration institutions

With a view to defining the regression model used to analyse transparency, one of the two variables C_2 or C_2'. can be chosen as an endogenous variable. The explanatory variables used for defining the model are grouped on the following categories: (i) Corruption, which favours the reduction of transparency in public institutions; (ii) Variables directly related to the behaviour of public administration employees, a category which includes the degree of satisfaction of the employees, the quality of work relations and the fairness of the competitions for recruitment or promotion to the civil service. All the three variables quantify factors that are directly correlated to the level of transparency. (iii) Variables that measure aspects of public administration reform. They quantify factors that can have a positive impact on transparency in public institutions if the reform process is felt at the level of the system or a negative impact if the effects are negative or if they are way below the expectations of the employees. (iv) Personal characteristics related to the gender of the person, the position within the institution, the training level etc., which influence people's perception of the transparency of public institutions.

Thus, the regression model for the analysis of transparency at the level of public administration institutions is defined as follows:

$$C_2 = c_0 + c_1C_1 + c_2C_5 + c_3C_3 + c_4C_4 + c_5X_8 + c_6C_{10} + c_7C_{12} + u_3 \qquad [M_4]$$

The estimation of the parameters was made by applying the OLS method, and the results are presented in Table 10. For each type of institution, only the questionnaires that contained valid answers to all the variables included in the regression model were taken into consideration.

Table 9. Model for the analysis of corruption

	PA			CPA			CC		PO	
	Coef. of correla-tion	Para-meters M3.1AP	Para-meters M3.2AP	Coef. of corre-lation	Para-meters M3.1APC	Parameters M3.2APC	Coef. of correlation	Para-meters	Coef. of correlatio n	Parameters M3.1P
Con-stant		3.080* (0.250)	3.621* (0.262)		4.273 * (0.382)	4.485* (0.628)		3.805* (0.508)		3.990* (0.544)
C2	–0.323*		–.166* (0.034)	–0.464*	–0.292* (0.071)				–0.295*	–0.189*** (0.092)
C3	–0.222*	–0.081*** (0.039)							–0.258***	–0.239***** (0.128)
Q3.21	–0.183**	-0.053**** (0.031)		–0.323*	-0.266*** (0.093)	–0.231*** (0.104)				
C4	–0.185*		–0.095* (0.038)	–0.272*		–0.294***** (0.137)	–0.224****	–0.234***** (0.127)		
Q5.22	–0.193*	–0.099* (0.029)	–0.097* (0.028)	–0.317*		–0.146*** (0.087)	–0.164*****	–0.135***** (0.074)	–0.227*	
X6	0.232*	0.095* (0.025)	0.094* (0.024)	0.261*	0.118*** (0.056)	0.123*** (0.060)				

C7	0.277*	0.136* (0.031)	0.113* (0.030)	0.335*		0.156**** (0.081)				
X8	–0.195*	-0.107** (0.044)	–0.094*** (0.042)							
C9	0.257*	0.142* (0.034)	0.111* (0.034)	0.325*	0.162***** (0.089)		0.197*****	0.156***** (0.088)	0.269****	0.206*** (0.101)
C10	0.118*	0.113*** (0.053)	0.103* (0.052)							
R^2		0.438	0.460		0.581	0.528		0.224		0.421
F		21.210	24.721		12.889	7.795		4.96		5.245
Number of valid cases		744	744		105	105		95		76

* differs considerably from zero for a significance threshold of 1%; ** 2%; *** 3%; **** 5%; ***** 6%; ****** 8%.

Table 9 (continued)

	PO			DS			
	Coef. of correlation	Parameters M3.2P	Parameters M3.3P	Coef. of correlation	Parameters M3.1SD	Parameters M3.2SD	Parameters M3.3SD
Constant		3.843* (0.521)	4.747* (0.494)		3.262* (0.261)	3.436* (0.262)	3.254* (0.235)
C2	–0.295*		–0.189* (0.093)	–0.324*	–0.178* (0.044)	–0.188* (0.045)	–0.198* (0.045)
C3	–0.258****	–0.285*** (0.127)	–0.257* (0.129)				
Q5.22	–0.227*	–0.146**** (0.074)	–0.131* (0.075)	–0.142*			–0.069***** (0.038)
X6				0.249*	0.126* (0.031)		
C7				0.304*	0.152* (0.039)	0.157* (0.040)	0.162* (0.039)
X8				–0.197*	–0.114* (0.052)	–0.122** (0.053)	
C9	0.269****	0.223*** (0.100)		0.248*	0.106* (0.043)	0.136* (0.043)	0.137* (0.043)
R^2		0.417	0.407		0.451	0417	0.413
F		5.115	4.826		23.510	24.311	23.723
Number of valid cases		76	76		465	465	465

* differs considerably from zero for a significance threshold of 1%; ** 2%; *** 3%; **** 5%; ***** 6%; ****** 8.

Table 10. Analysis of transparency in public administration

	PA		CPA		CC		PO		DS	
	Coef. of correlation	Parameters	Coef. of correlation	Parameters	Coef. of correlation	Parameters	Coef. of correlation	Parameters	Coef. of correlation	Parameters
Constant		0.414*** (0.218)		0.602 (0.640)		–0.541* (0.358)		0.157* (0.455)		0.555* (0.283)
C1	0.697*	0.703* (0.035)	0.763*	0.729* (0.094)	0.754*	0.723* (0.090)	0.593*	0.697* (0.127)	0.692*	0.669* (0.044)
C3	0.393*	0.124* (0.034)			0.412*	0.214** (0.081)			0.412*	0.141* (0.044)
C4	0.318*	0.106** (0.041)	0.444*	0.231** (0.131)					0.283*	0.083* (0.050)
C5	–0.368*	–0.112* (0.027)	–0.563*	–0.237* (0.084)					–0.360*	–0.107* (0.034)
X8					0.415*	0.216*** (0.095)	0.354*	0.248** (0.141)		
C10	–0.289*	–0.056** (0.021)							–0.356	–0.069**** (0.028)
C11					–0.233*	–0.090** (0.042)				
C12	0.238*	0.108**** (0.042)							0.279*	0.169* (0.054)
R^2		0.736		0.800		0.797		0.614		0.742
F		141.28		50.87		36.96		22.44		86.39
Number of valid cases		725		89		98		76		430

* differs considerably from zero for a significance threshold of 1%; ** 2%; *** 3%; **** 5%; ***** 6%; ****** 8.

Conclusions

From the obtained results, at one hand – descriptive analysis, on the other hand – logistical model, there are some action venues for reduction the corruption level at local public administration. From most important it can be mentioned: i) intensify the reform process at local public administration level on three important components regarding civil service, decentralization process and improving the public policy formulation process. Also, these are in accord with the requirements of Romanian accession process in the European Union structures. It is recommended a clearer assignment of some city hall employees in specific tasks related to reform process. At the county council and prefectures level, by creating county modernizing groups, the reform actions are more clear and coherent; ii) elaborate a long term strategy and a specific law on civil servant pay system; iii) intensify continuous training courses for local electives; iv) fluctuation reduction of technical apparatus from city halls as result of political changes; v) continuous training courses for mayors.

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THE IMPACT OF NEW TECHNOLOGIES IN THE KNOWLEDGE SOCIETY

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Abstract

We live in a society where information and knowledge are dominant characteristics. The information revolution has most clearly invaded our homes and is hard not to agree that life has improved substantially. Society is becoming "knowledge society" and information has played a central role and had a great impact in all aspects of life. Economy, society, education, science and technology are all changing. New technologies will continue to play a key role and influence society. Adoption and implementation of the new technologies in the countries of Balkan region is an imperative and essential for achieving a knowledge and information society. This paper describes ways how the usage of new technologies have a wide influence in society, as well as how they impact on social and economic development and education. This components are defined and discussed in the paper, while the usage of these technologies in the countries of our region are proposed as the matter of urgency.

Key words*: New technologies, Internet, Knowledge society, Information Technology, Education*.

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1. Introduction

We are entering a period of change in all spheres of life as far reaching as any we have seen where usage of new technologies plays a central role. Society is changing rapidly and become more dependent on new technologies and Internet related technologies. Information has become a critical resource, synonymous with power and basic input to progress and development. Society is becoming "knowledge society" with workforce largely of a wide variety of "knowledge workers". New technologies had a great impact on all aspects of life and the global economy is undergoing a fundamental transformation. Our life has improved substantially and most of these changes have been driven by technologies. New technologies has the potential to be a powerful enabler of development and offer possibilities and opportunities for ensuring sustainable socio-economic development. Therefore, world wide countries are using new technologies to successfully explore the opportunities it presents for their social and economic transformation. Society is never the

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same again. We have new society, new economy, new business, new tools and new rules. The first section of this paper discuss the impact of information technology on social and economic development, while the second section look in detail at the impact of new technologies at education.

2. New technologies and knowledge society

The term "knowledge society" has now been in so much use in recent years that we are expected to know what it means. The information revolution has most clearly invaded our homes and our live has improved substantially[1]. The growing importance of new technologies result with the acceptance of the idea of a new kind of society, with a new age known as knowledge society [Krishan Kumar:16]. Knowledge society is a society that creates, shares and uses knowledge for the prosperity weel-being of its people and it's a society with workforce largely of a wide variety of "knowledge workers". In the knowledge society, technology is one of the most important factors of any production and service activity.

Technology brings economic growth opportunities and introduces social changes in society in general [C. Avgerou and T. Cronford, 2002:124]. Several theories elaborate on connection between technology and economic and social changes[2]. Even critics of the knowledge society concepts agree that new technologies has very real impact into our live. While, some authors argue that what makes today the knowledge society is the fact that so many people realy on computers, especially since the advent of personal computers and the Internet as network of networks, which opens completely new opportunities for enterprises, businesses and costumers.[15].

The convergence of computer and communication technologies have a wide ranging influence in society and is playing a critical role. As a result of development of new technologies[3] also known as information and communication technology (ICT) and their usage over the last few years, society has changed rapidly[4] and has been transformed into a knowledge society with a knowledge economy[5], where knowledge is the most important resource. Knowledge[6] is what people know about a specific technology as well as the various kinds of things can do using that technology. As economies move from industrial society to information and the knowledge society and post-industrial era, information and knowledge become important and crucial resources [C.W.Holsapple]. While, technological developments have transformed the majority of wealth creating work from "physically-based" to work "knowledge-based", information had become a priceless product and technology and knowledge are now the key factors of production [19]. Information technology defined as the technology required for information processing is a vital feature of the move to a knowledge society.

As noted earlier, information technology is a generic term covering computers, broadcasting, information systems and telecommunications and computer networks and is used to store,

[1] TV is still the most obvious symbol of new live, but Internet usage, telebanking, teleshoping and teleworking are also now making considerable inroads into our lives. (See: Krishan Kumar, pg.16).

[2] See: Crisanthi Avgerou & Tony Cronford: Developing information systems, issues and practice, pg.125.

[3] Without being too pedantic we need to clarify a point of terminology. The term "new technologies" is often used in the literature to denote the means for information and communication technology (ICT).

[4] Technologies that have particularly experienced expansion include telephone infrastructure and service, mobile and cellular telephone and Internet café service. Advances in information technology over the last thirty years have lead to the televison, for example being more widely used today than thirty years ago.

[5] Knowledge economy is economy in which growth, value and an improving standard of living are inextriacably tied to knowledge, its creation and its distribution.

[6] Knowledge means the skills and judgement of all workers at whatever level was to be gathered from every part of the organization.

manipulate, distribute or create information. Information technology[7] has played a central role in enabling the growth of the knowledge society where information and knowledge are increasingly becoming the key resource, global product and the gold of the knowledge society [13].

Information technology can countribute to income generation and enables people and enterprises to capture economic opportunities by increasing process efficiency and creating opportunities for employment [24]. The "digital" and "virtual" nature of new technology can reduce costs and is leading to creation of new products and services and distribution channels within traditional industries as well as innovative business models and whole new industries [24]. We can mention here businesses that start up where not possible without online access such as Amazon.com, eBay.com etc. and many of jobs such as Web designers, Internet consulting, network administrator etc. did not exist prior to decade ago. These technology is having potential impact in individuals, organization and society [James O. Hicks, 1993:90].

Usage of new technologies is revolutionizing the rules of business, resulting in structural transformation and playing an important role to foster innovative products and business processes. Challenge has know shifted to incorporating information technology in both the internal and external activities of organizations [20].

Information technology creates linkages and networkes that bring together people, markets, goods or even countries and enable individuals and groups to engage in activities which were previously impracticable and inaccessible [13]. The enormous adventages information technology has in easing the delivery of information around the world, as well as the central role of information in the knowledge economy [16]. Today, the rate of technological change in information technology is so rapid. Most new technologies become absolute only few years after it was introduced, requiring organizations to change to new technologies [James O. Hicks, 1993:535], since new technology is having a profound effect on business and business is conducted on a global environment and are increasingly becoming global in scope. Research over many years have confirmed the influence of new technology on organizational structures and on the way they operate [Terry Lucey, 2005:298].

New technologies are necessary to internationalization of business [James O. Hicks,1997:11], has offered new business opportunities[8] and the value of information to business organizations has greatly enhanced. Therefore, accurate, rapid and relevant information are considered to be vital to improving performance and competitive adventages of businesses [Martin R. Combs, 1995:67]. Modern businesses are not possible without help of new technologies and Internet and new technologies plays a significantr role in the way the product is produced, promoted and provided and enables firms to perform tasks even when individuals are located in many different countries or geographical locations [James O. Hicks, 1993:11]. Hunderds of products are designed for a wide range of world markets. While, appropriately used new technology can reduce cost, lead time and improve the performance of the processes, services and products of many sectors of economy [16]. Implementation of these technologies is helping to transform users of information and communication technology from consumers to producers of new knowledge as an important resource in the knowledge society.

According to Terry Lucey, new technology is playing an important role for the development of the country in general, while the use of appropriate technology in properly planned systems can have effects on day to day operations and in our social and economic life [Terry Lucey, 2005:29].

[7] Information technology mean the tools we use to perform calculations, to store and manipulate text and to communicate. In the broder sence information technology refers to hardware and software that are used to store, retrieve and manipulate information. In particular, information technology means the use of computer and computer software to convert, store, process, transmit and retrieve information.

[8] See: Panian, Željko (2005): Poslovna informatika za ekonomiste, pg. 295-296.

New technologies are at the centre of the present wave of change for many countries [C. Avgerou and T.Cronford:2002:126] and new technology is helping people to improve their lives, take adventage of new opportunities and realize their full potential. Countries have being empowered through rapid development and usage of information technology [13].

Recently, some countries of Balkan region have begun to stress the role of information and communication technology as an enabler of social and economic development and to utilize new forms of business through the Internet. With regard to information technology and Internet technology usage, there is an evident distinction between Balkan countries[9]. Slovenia has made substantial progress in this regard, followed by Montenegro, Croatia and Rumania, while in Kosovo a strong emphases has been put on the expansion of telecommunication inftrastructure and the telephone penetration rate as a measurement of the information technologies readiness of the country. The Government of Kosovo took measures towards implementation of the programs aid at improving information and communication technology infrastructure and services[10]. At the same time, the country has made several efforts to increase information and communication literacy, because widespread computer illiteracy among the general population is viewed as inhibiting the diffusion of new technologies. But, currently information and communication technology sector does not appear to have the potential to have significant impact on the economy as a sector itself [USAID, 2007:10].

New technologies are playing an important role for the development of the country. As country progress towards developing a knowledge society most industries are changing, while economy and society continue to undergo considerable changes too. In the future, new knowledge base industries will develop based on genetic engineering and biotechnology. [13]. This industries will have a high ratio of knowledge workers[11] and jobs will have a hugh knowledge requirement in particular area. This applies to all work sectors.

3. The impact of new technologies on education

Historically, since the industrial revolution people have had to locate themselves in large centres where they could learn, study or work with others, but know new technologies are rendering distance unimportant [13]. Knowledge society is promising and challenging education sector which is dependent from information and communication technology usage. Effective use of information technology involves changes to economy, society and organization and play an important role in achieving the objectives of policies in the area of work, health, justice and as well as education. Many basic activities and processes in education are know being redesigned to take adventages of the productivity increases that are available through the use of new technologies [James O. Hicks, 1993:2].

Technological developments which have accurred in information technology continuously is increasing its influence in most industries and in all aspects of economy, while education and other sectors continue to undergo considerable changes too. While, new technologies are transforming education, making it more interactive and empowering students and professors [14], the traditional education system is slow to react effectively to this changes, which may rise walls against further developments. Information and communication solutions present significant opportunities for enhancing the efficiency and effectiveness of education. Wider positive benefits information and

[9] For more informations visit Web-site: http://internetworldstatistics.com/stats4.htm

[10] E-government conference was heald in May 2008.

[11] Knowledge workers have specialist knowledge and skills which represents the major asset of the organizations for which they work.

communication technology have on learning and learners, such as motivation and skills, concentration, cognitive processing, independent learning, critical thinking and teamwork [25].

Neverless, the goal of entering the knowledge society is best served by a intensive focus on increasing new technologies and general literacy and focusing on school usage of information and communication technology. Developments of new technologies promote distance education[12] at all levels and education is heavily dependent on new technologies. In the knowledge based society access to information is universal and new methods of transmission and treatment of information had revolutionized teaching, working practices and management. Through the use of information and communication technology staff and student time can be scheduled more effectively, students performance can be monitored more closely, education materials can be easly distributed and used. Opportunities for distance and global learning has increase and the wider use of skilled specialist teacher resources is developing.

The capacity of new technology to reduce many tradicional obstacles in education, especially those of time and distance, makes it possible to use the potential of these technologies for the benefit of education sector to achieve long term success. However, we need to emphasize that providing information technology facilities for schools is a challenge. It is not just a question of the number of computers, but also the age of the equipments, and the availability of modems and telephone or satellite links, as well as operating costs. The rapid rate of change in it is a problem in relation to the adequacy of school facilities [13]. Knowledge society is promoting active life-long learning where an individual skills will be built and documented based on a mix of real-life experience, achivements and formal learning certificates [15].

We consider that opportunities provided to citizens through life-long learning are a potential tool for empowerment and development of education sector [15]. During the last decade the use of information and communication technologies in education and training has been a priority in most European countries[13]. All EU countries have invested in information and communication technology in schools: equipment, connectivity, professional development and digital learning [26]. It was recognized that connectivity and net access have helped to countribute to economic development and to increase computer literacy in schools. These trends are already occurring in countries in the region and they must be forced. At the same time, the Internet has become a major shareholder, which helps all nations to gain and derive advantages form this technologiey, since new technologies offers opportunities for personal advancement and the threat of being "left behind" [15].

In Kosovo, until know, new technology usage in schools and access have been heavily concentrated in urban areas and among international and national government institutions, with no or limited access in the rural areas. Recently, the Government took initiative to increase computer literacy in schools and most of schools are connected to the Internet. However, not every citizen is enabled to use new technologies, because access and technology are available mainly in urban areas and while information and communication technology is improving in some instances, not all schools have infrastructure and computers and even when they do they fall into disrepair, without maintance and there is a short age of new technology literate staff to use and maintain them.

Studies have approved that those countries that have employed new technologies as an enabler of development goals can indeed achieve higher levels of development. While, increase of usage of new technologies on education could have substantial socio-economic benefits for other

[12] Distance education has been particularly successful model in developing countries.

[13] See: The ICT Impact Report, A review of studies of ICT impact on schools in Europe, December 11th, 2006. Available at: http://ec.europa.eu/education/pdf/doc254_en.pdf

sectors. Therefore, investment in new technology and it's implementation on education is the best investment into the future of societies.

Conclusions

It seems that new technologies which have changed our social and economic life, are likely to continue to be of first importance and to impact society, economy and our live. The world is becoming increasingly dependent upon new technology as is evidenced by the big role it is playing. New technology will continue to play a key role as the knowledge society develops its information infrastructure and will continue to be of first importance in the development of economies. New technologies help to do things better, they show a measure of development. Therefore, if we are going to be plugged into the world economy, particularly during the 21st centry we necessarily must be part of the information age and information technology is an imperative that our country would miss at it's own risk.

Taking into the consideration the full potential of new technologies they may also influence the future. Those who know to use and to benefit effectively from new technologies will be at a competitive adventages. Therefore, it is imperative to use this technology which will affect almost every aspect of our lives: how we do our jobs, how we communicate with each other, how we educate our children, and how we live. All countries and communities should take advantage of digital opportunities.

Without the successful adoption and implementation of the new technologies, future generations in these societies will further lag behind and will find themeself further impoverished. New technologies are essential for achieving a knowledge and information society. Countries of Balkan region must react to the challenges which are results of the impact of new technologies in knowledge society in time and in a proper way. Otherwise the favourable foundations created by social, economic and political transformation, may not serve the real adjustment to the global trends and the prices of social modernization will become extremely high. Therefore, cooperation is needed between countries and regions since new trends will develop rapidly over the next years and capabilities will steadly increase, accompanied by greater and ease of use. It is a dominant believe that the widespread development of new technologies will lead to benefit of all.

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THE ROLE OF HOSPITAL INFORMATION SYSTEMS IN SUCCESSFUL HEALTH AND EHEALTH SERVICES IN HUNGARY AND IN INTERNATIONAL DIMENSION

Adrienn AGGOD-FEKO*

Abstract

The study presents the importance of health sector and the usage of information and communication technologies (ICT) in support of health and health-related fields. ICT has an increasingly essential role in the healthcare system. Although most hospitals in Europe have some kind of an information system in place, only a few of them have "fully" integrated and functional hospital information systems[1] solutions installed[2]. The study aims to show the overall health and eHealth situation in Europe and the different health information systems, which are indispensable to deliver health care. The main development ways of the medical informatics will give a picture about the Hungarian health information systems through hungarian case study based on a survey. The role of HIS is crucial in the development of health and eHealth services. The study also shows some indicators which can measure and compare the eHealth levels in Europe.

Keywords: *Health, eHealth, eServices, Hospital Information System, European Union*

Introduction

The main aim of this paper is to describe the importance of the healthcare sector and the role of ICT in support of health and health-related fields. The increasingly essential role of ICT in the health sector, assume the operation of the hospital information systems, which are necessary to deliver health care. The paper describes the Hungarian hospital informatics, mainly the complex health information systems, mobile informatics tools, solutions and the barriers to its further development. Furthermore the study presents the wide range of the existing health information systems in Europe to give an international dimension to the topic. The study shows how important are these systems in supporting the health and eHealth services.

The hospital information systems (HIS) are able to transmit, gather, and evaluate medical information. The effectiveness of these systems can be observed in different fields in the hospitals. The challenges of the health system acquire the use of state of the art HIS solutions. The role of these systems is also important to improve the quality of care to patients.

The study contains a Hungarian case study based on a survey, presenting the Hungarian situation. An international comparison will be also shown inside Europe regarding the health sector and the usage of different type of HIS. The paper explores the present state of the health sector and the hospital information systems, the main barriers to its further development. The present state of these systems in international comparison is analyzed through available statistical data and other

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[1] hospital information system (HIS) is a computer system designed to ease the management of all the hospital's medical and administrative information, and to improve the quality of health care. An HIS is an integrating system by vocation, and could also be called an integrated hospital information processing system (IHIPS). Source: Patrice Degoulet, Marius Fieschi, 1999.

[2] The Healthcare Group at Frost & Sullivan

information. Another part of the study utilized semi-structured questionnaire based personal interviews taken with at least three employees of a given hospital (nurse or laboratory assistant, doctor or its assistant, IT-specialist) in August 2009. In the frame of the case study altogether 90 interviews were conducted in 29 hospitals, which represent well the 140 hospitals in Hungary.

The already existent literature contains different aspects of this topic. The study tries to give an overview about these aspects and to complement them with a special focus on the complex health information systems in Hungarian hospitals. Based on the interviews the paper will summarize the main experiences and the future improvements of the hospital informatics.

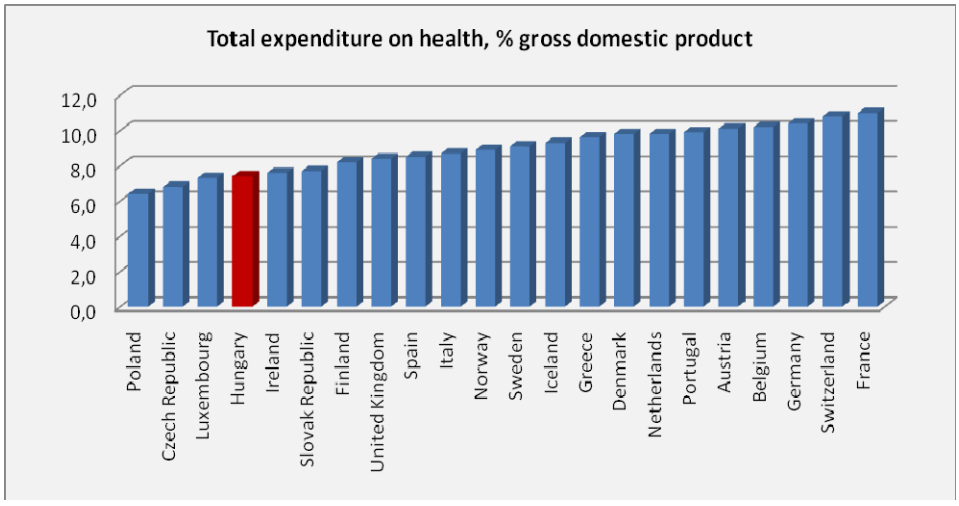
The examination of hospital information systems in Hungary and in international comparison regarding health and ehealth services

The importance of health and eHealth field relation to hospital information systems

In recent years the importance of health sector and the cost-effective and secure use of information and communications technologies in support of health and health-related fields are substantial. WHO has identified three overall goals for health systems, such us to be effective in contributing to better health throughout the entire population; to be responsive to people's expectations, including safeguarding patient dignity, confidentiality and autonomy and being sensitive to the specific needs and vulnerabilities of all population groups; and to be fair in how individuals contribute to funding the system so that everyone has access to the services available, and is protected against potentially impoverishing levels of spending.

The proportion of health in GDP is significant in Europe. In international comparison, Hungary's health spending is among the lowest in the OECD after Poland, Czech Republic and Luxembourg[3].

Figure 1. Total expenditure on health (% of GDP)



Source: OECD 2009, http://www.ecosante.org/index2.php?base=OCDE&langs=ENG&langh=ENG. Portugal and Luxembourg have data only for 2006.

[3] And Korea, but my research is not focus on the countries outside Europe. In Bulgaria the data was 7,2 and in Romania the data was 4,5% in 2006 according to WHO World Health Statistics 2009

The importance of eHealth is also noticeable in recent years. The definition of eHealth according to the World Health Organization is „…the cost-effective and secure use of information and communications technologies in support of health and health-related fields, including health-care services, health surveillance, health literature, and health education, knowledge and research..."[4]

ITU defines the potential benefits of e-Health as follows:

- Faster and easier storage, transmission and access to medical data and health-related information for healthcare providers and professionals, citizens/patients, academics, researchers, policy makers and others.
- Capacity building and improved delivery of healthcare services, particularly in rural and remote areas.
- Reduction of operational and administrative costs in implementing healthcare services.

The role of hospital information systems is essential in the development of eHealth services. The level of these services is different in the countries of Europe.

In the European Union the eHealth Action Plan[5] was an important base of the development of national healthcare systems and health information systems, furthermore the i2010 Initiative, the eEurope Action Plan provided basis to the improvements. Now all member states have an eHealth strategy in dedicated documents or as part of wider eServices policies. More and more eHealth became an important element of national health system priorities, which assume the installation of a hospital information system. In Denmark, Sweden and Norway exists fully operational national ICT infrastructures specifically for supporting communications in the health sector. In the EU the priorities of the eHealth varied according to the culture and implemented activities of the country. For example some countries give priority to the Electronic Health Record system, Electronic Patient Records, while the others give priority to the eHealth networks, infrastructure or eCards with the assistance of health informatics.

There are some indicators which can measure and compare the eHealth levels in Europe. In this respect the most important eHealth Indicators are the Euro Health Consumer Index 2009[6] and the Patterns of eHealth use in the EU[7].

The Euro Health Consumer Index 2009 includes the 27 European Union Member States, plus Norway and Switzerland, the candidate countries of Croatia and FYR Macedonia, and also Albania and Iceland. The index is made up of six sub-disciplines, these are:

1. Patient rights and information (relative weight: 175)
2. e-Health (relative weight: 75)
3. Waiting time for treatment (relative weight: 200)
4. Outcomes (relative weight: 250)
5. Range and reach of services provided (relative weight: 150)
6. Pharmaceuticals (relative weight: 150)

The top 3 countries were Netherlands, Denmark and Iceland with scores above 800. The main causes of Netherlands' excellent healthcare system that it is characterised by a multitude of

[4] Resolution 58/28 of the World Health Assembly, Geneva, 2005

[5] Commission of the European Communities-COM (2004) 356: Communication from the Commission to the Council, the European Parliament, the eEurope Economic and Social Committee and the Committee of the Regions: eHelath-making healthcare better for Europe citizens: An action plan for a European eHealth Area, Brussels 2004-04-30.

[6] forrás Health Consumer Powerhouse

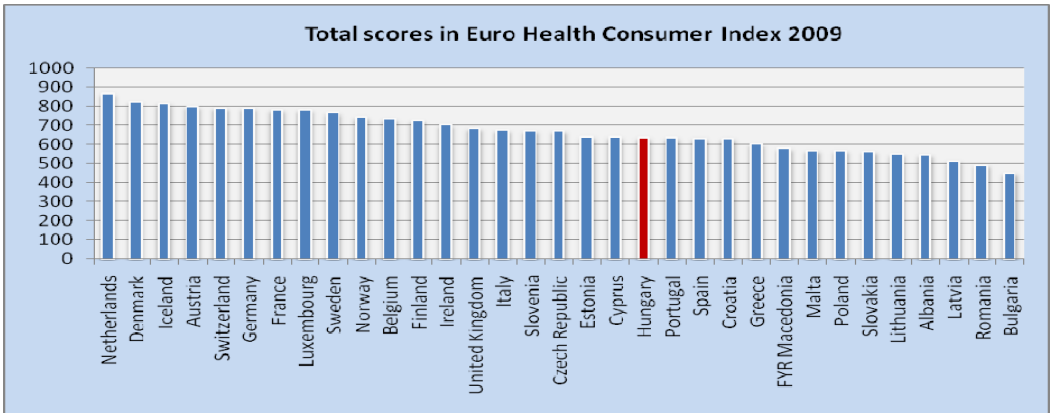
[7] forrás: Empirica

health insurance providers acting in competition, and being separate from caregivers/hospitals, as well as the country has the best and most structured arrangement for patient organisation participation in healthcare decision and policymaking in Europe. Denmark were good at eHealth, Patient rights and Information, but had a bit lower score in Outcomes. Iceland obtained the third position, due to its location, the country has been forced to build a system of healthcare services, which has the capability of a system serving a couple of million people (which is serving only 300 000 Icelanders).

Some countries also had good results, but other countries are under score 600 (Figure 1.) Romania and Bulgaria had the lowest scores at the Euro Health Consumer Index with the scores 489 and 448, but they are at the stage of assessing their options, choosing a specific direction, so in the future their further development is anticipated.

Hungary is the 20th with the score 633. Hungary fulfilled well in Patient rights and information as well as in waiting time for treatment. However it was bad in eHealth and in outcomes.

Figure 2. Euro Health Consumer Index, 2009



Source: Health Consumer Powerhouse, Euro Health Consumer Index 2009.

The patterns of eHealth use in the EU indicator (Figure 3) consist of 3 main aggregates: electronic storage of patient data, computer use in consultation, electronic transfer of patient data. The indicator signs the overall eHealth use with an average index score and with the usage level. The eHealth frontrunners are: Denmark, Netherlands, Finland, Sweden and the United Kingdom. Norway is not an EU Member States, but it belongs to this group.

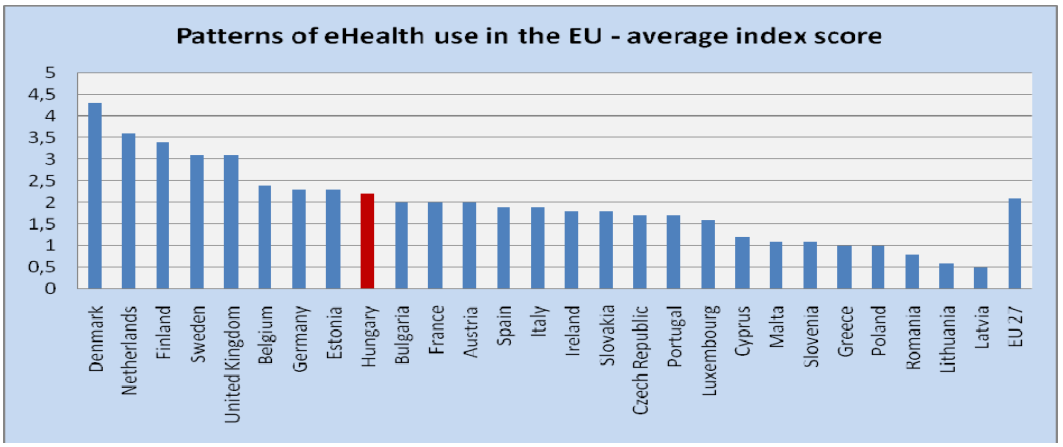
The eHealth laggards, with the lowest scores are: Greece, Poland, Romania, Lithuania and Latvia. The other countries are eHealth average performers. Hungary is fall under the eHealth average performers with 2.2 average index score. In this aspect Hungary has got a better position in Europe, but the electronic transfer of patient data of the country received very low scores.

In Hungary the Ministry of Health and the Ministry of Informatics and Communication play a major role in formulating the national eHealth policy.

The Hungarian Information Society Strategy (HISS) was published in 2002 by the Hungarian Government. From the July 2003, the Hungarian Information Society Strategy – Health and Social Services is available. The eHealth Program was prepared by the Ministry of Health in

2004 on the basis of the health and social information society strategy. The Ministry of Health set up an eHealth Program Management Unit (PMU) under the umbrella of its National Institute for Strategic Health Research[8] in 2004.

Figure 3. The patterns of eHealth use in the EU



Source: Empirica, Pilot on eHealth Indicators, 2007.

The development of Broadband network in health care is very important in Europe including Hungary. General eHealth Program including the development of a national health IT framework to comply with the EC eHealth Action plan for Europe (2004-2010).

The development of online services (e.g. healthy living, disease prevention, electronic health record, teleconsultation, preventive information air and water quality information) is also a main challenge of Hungarian eHealth policy.

Hospital information systems in international comparison

There are various definitions of hospital information systems. Here I use the following definition: hospital information system (HIS) is a computer system that is designed to manage all the hospital's administrative, financial and clinical aspects in order to enable health professional perform their jobs effectively and efficiently.

In the world the first hospital information system were developed in the mid-1960s in the United States and in Europe in a few countries, for example Netherlands, Sweden, Switzerland. The evolution of hospital information systems included the development of large central computers, then the appearance of micro-computers which replaced passive terminals, the implementation of mini-computers, the improvements of workstations and multimedia. The hospital information systems

The HIS of recent years is composed of one or few software components with specialty-specific extension and a large variety of sub-systems in medical specialities, such as Laboratory Information System, Radiology Information System.

[8] http://www.eski.hu

Although most hospitals in Europe have some kind of an information system in place, only a few of them have fully integrated and functional hospital information systems solutions installed[9].

The installation of a HIS in the hospitals is a basic requirement and a necessity and it widely supported by all the various players in the health system. The main international actors of the supply side in the field of health information systems are the followings[10]:

- AGFA: their product Orbis is present on EU market, and it was installed in 37 hospital when they won a tender with the amount EUR 95 million.
- Siemens: they have got several products, but their main product is medico//s, and the i.s.h. med integrated in SAP-environment.
- Nexus: they have a wide health product portfolio from PACS to quality assurance (MEDFOLIO as HIS, MEDICAL MODULES). They have an autonomous module for the psychiatric healing.
- iSOFT: their products are: iClinical Manager, RADCentre, Lorenzo. On their reference list there are 30 health institutions.
- SAP: their system is not a holistic HIS. They have got modules, but to handle the specific health data it is necessary to use other products.
- IBM: the main target group of IBM is the government sector. They have HIS solutions. For example IBM takes part in the development of the Slovenian health insurance system.
- Philips: their IT-development is based on the development of their other health product (radiological, cardiology products). Technological novelty: in 2006 they were pioneers to put in the market the web based PACS[11]. They are good at home care and telecare developments.

Besides these developers there are also local developers focused on a country or a region. For example in Hungary the main national hospital information systems are Hospitaly by Main, Hospnet by Meditcom, MedWorks by Globenet, which can assure the same hospital administrative, financial and clinical solutions than the main actors.

Hospital information systems in Hungary

The result of the development of Health sector is that the healthcare delivery becomes more and more patient oriented and safer. The use of ICT technologies make it easier to work in the hospitals through the complete health information systems, it facilitates the primary care (in everyday routine for patient management, medical records and electronic prescribing), and also the home care (telemedicine), but telemedicine exists in its initial phase in Hungary, the hospitals measuring devices are used by the patients at home could not connected to the health informatics system of the hospital.

The level of health services and infrastructure differs widely among Hungarian hospitals and even between departments in the same hospital, due to their uneven access to funds.

In the frame of the survey altogether 90 interviews were conducted in 29 hospitals, which represent well the 140 hospitals in Hungary. The survey included hospitals of different sizes, from

[9] Hospital Information Systems Market in Europe, 2009

[10] ICEG European Center

[11] PACS: a picture archiving and communication systems in medical imaging. It is a combination of hardware and software dedicated to the short and long term storage, retrieval, management, distribution, and presentation of images.

all the seven regions of Hungary, representing different levels of development and interviews were taken in both 'regional' and 'priority' hospitals.[12]

The three main parts of the questionnaire were: general data of the hospital, data and opinion about hospital information systems; use of informatics in cure, and an open part asking for personal opinions about barriers, trends in telemedicine and eHealth in general and in Hungary.

It is true also in case of Hungary that the hospitals have any kind of an information system in place, but only a few of them have fully integrated and functional hospital information systems solutions installed.

The first part of the questionnaire mapped the different types of the used hospital information systems and the possible linkages between systems inside and outside the hospitals.

There are at about twenty different hospital informatics systems in use in the 140 hospitals of Hungary. In the 29 interviewed hospitals 13 different HIS were used, which are usually not compatible information systems.

The two main groups of the Hungarian hospital information systems are:

- The adapted and used foreign complex health information systems, for example: MedSolution (ISH), eMedSolution (ISH), Helise (ÁSZSZ), Clinicom (Siemens)
- Hungarian developments such as: Hospitaly (Main), Hospnet (Meditcom), Inforend (Synergon), MedWorks (Globenet), Meditcom (Meditcom).

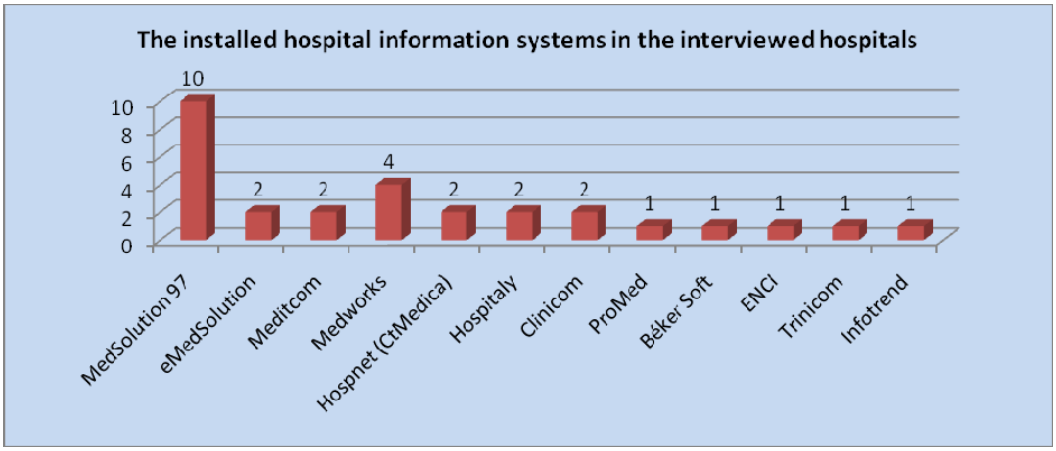
Since 1987, when the first laboratory information system was installed in Hungary the developments of hospital information systems started. The two first application was GYOGYINFOK software, which was a free service supported by the Hungarian Government and another DOS based system developed by SOTE (Semmelweis Medical University of Hungary).

Among the interviewed hospitals the first complex DOS based hospital information systems installation happened in the end of 90' (1997-1999), before these years the hospitals used GYOGYINFOK or SOTE software or another solutions and paper base. The second wave in the implementation of new systems started at the early 2000 (2002-2009), because of the installation of graphic based HIS. In some of the Hungarian hospitals the workers use the systems installed before 2000, nevertheless in other hospitals they use such systems which was installed in 2008 or 2009. The complex HIS has been developed to include all of the basic modules such as: patient records (patent care, out patent care), diagnostic modules (X-ray, UH, CT, MRI, pathology, cytology etc.), patient care modules, basic care modules, family doctor modules.

The most popular health information systems in the examined hospitals were: MedSolution 97 and MedWorks. The users of these systems were usually satisfied, only some specific problems were observed such as delays in informatics developments from the part of the service provider.

[12] Priority/specialist hospitals provide high quality services for patients with serious or specific illnesses (e.g. treatment of malignant tumours, organ transplantations). They participate in regional level capacity distribution procedures and compete for further contracted capacities across the country. Regional hospitals provide general services. They have an important, intermediary role between priority hospitals and family doctors' practice. These hospitals are obliged for example to do tonsillectomies, to manage childbearing and operate hernia or adenoids. (Source: Hungarian Health Ministry)

Figure 4. Hospital Information systems in Hungary in the interviewed hospitals



Source: interviews in hospitals

In some hospital beside the main hospital information system operates other systems. The hospitals usually do not install all of the modules of the selected HIS. For example in the hospital Jósa András (in Szabolcs-Szatmár-Bereg county) the complex HIS is MedWorks, but the dispensary uses the Phonix system. These two systems do not communicate with each other. MedWorks also had a dispensary module, but the hospital did not buy it, because the workers of the hospital insisted on the extant system, which was the Phonix system. Usually hospitals use a laboratory software beside the existing HIS, but in some cases they use more than 2 systems parallel, which could not communicate with each other and it could results the duplication of working processes.

It is a common problem in Hungarian hospitals that the health information systems cannot collaborate with the management information systems (if the hospital has got one), the controlling system and the economic system in all the time; however the diagnostic system is usually solved inside the hospital. It results delays in the flow of information.

The second part of the survey explored the existing informatics tools in the healthcare and the role of telemedicine.

Almost all of the interviewed hospitals use PCs, laptops, printers, mobiles. Mobile health devices, or POCTs[13] are not typical in hospitals. Some tools are not so popular in Hungarian hospitals and used only by the management, for examples hospital laptop or notebook (basic tools on screening bus), mobile financed by the hospital in most of the hospitals. The opinion of some radiologists was that it would be necessary to have "service" notebooks, because their work is not set to the hospital, so it could be fulfilled from a distance.

The examined hospitals using LAN, and they keep clear of the initialization of Wi-Fi, first of all, because of safety reasons. The other reason against Wi-Fi is the high costs of installation. Among the interviewed hospitals only one of them had Wi-Fi connection, because of their buildings were far away from each other and the big differences between the floors forced them to use it.

[13] POCT- diagnostic tools near hospital beds.

The IT infrastructure is acceptable regarding the number of PCs and printers which is sufficient. IP telephony inside hospital exists in some of the interviewed hospitals. The other mobile devices can be table laptops, Holter monitors for example, is not typical in hospitals, only few of them have some, but the results of these mobile diagnostic tools cannot appear in the hospital information system. POCT is available in 28% of the hospitals and mobile instruments are available only in 18 % of the interviewed hospitals. The role of mobile devices and POCTs increase in the hospitals, but it is in an initial phase in Hungary.

The hospital information systems enable the communication inside a hospital, but it is very limited outside a hospital. Those hospitals are able to get access to information from each other, which form part of the Integrated Hospital Information System (IKIR). Three region of Hungary (Southern-Transdanubia, Northern Great Plain, Northern-Hungary) take part in the IKIR information system. The system allows the access to the health documents, queries of patient data or viewing in case of the patient pertains to one of the IKIR participated hospitals. At the end of 2008 the members of IKIR system amounted to 38 health institutions, 15000 healthcare employees, and 260 family doctor practices. The lack of wider use of IKIR system causes the duplication of medical examinations.

Telemedicine exists only in its very preliminary phase: in more than half of the hospitals measuring devices are used by the patients at home, but these are not connected to the informatics system of the hospital.

The main types of telemedicine are:

- Teleradiology: it provides diagnosis of radiological patient images like X-ray, CT, MRI, from one location to another.
- Teleconsultation: it is a general consultation through an audio-video conference and exchange of patient information for routine chronic disease management (like diabetes, high blood pressure).
- Telecardiology: it provides the observation of a chronic heart patient through monitoring of blood pressure, electrocardiograms (ECG), pulse. A cardiologist can review the data and advice on the condition and initiate any emergency care if required.
- Telepathology: laboratory specimens are viewed, located at a remote laboratory through a camera-based microscope.
- Teledermatology: it provides a remote diagnosis of the patient's skin condition.

The teleradiology and telepathology can be an important field in the future. Based on the interviews (and also the statistics and indicators) in Hungary the teleradiology does not work efficiency, it is an early stage. Static images are available, but only in case of digital radiology. The 30% of the Hungarian hospitals have digital radiology. In the future the lack of radiology specialists of rural areas would be eliminating by the use of teleradiology.

The electronic storage of pathology records realized in 28,6 % of the hospitals.

The telecardiology operates in the 25% of the interviewed hospitals.

Cardio-vascularise tools usually operate offline instead of online. The electronic data record of laboratory health records is possible in most of the hospitals.

The teleconsultation is possible in 21,4% of the interviewed hospitals (but mainly inside the hospital), but the doctors do not use this method generally for communication, because of the lack of IT skills. They use telephone or in some cases emails for consultation in case of long distances. Skype is not allowed in hospitals.

Currently the online registration is not possible in most of the hospitals. Primarily between the family doctor and the hospital there is a possibility for online registration, but very rarely. The

most popular way of registration is the telephone. The hospitals do not prefer the online registration of the patients.

The third part of the questionnaire enabled to meet the opinion of healthcare workers about the existing systems and further developments in the health sector.

The use of HIS could not take out the use of paper, which is not only the fault of the information systems (but the updated regulation of the National Health Insurance Fund Administration of Hungary, OEP). The OEP require the paper form at many medical examinations, other side the obsolete hospital information systems are not capable to print "work list" so the coordination of medical examinations happens on paper basis.

The economizing of the hospitals can effect that they are forced to purchase their other software (which are no health software) in a cost effective way. It means that they work with the OpenOffice.org, but this package is particularly compatible with the Microsoft Office (The HIS solutions prefer the collaboration with the Microsoft products).

The main elements of further developments are:

- Telemedicine, homecare
- Development of health and eHealth services
- Wider use of mobile informatics tools, technologies and mobile visit.
- The improvement of the diagnostic tools (clinical sign and picture)
- Diagnosis and therapy supported by PC
- Electronic patient register systems:
- The improvement of the compatibility of the systems.
- The wide use of digital signature

Conclusions

In conclusion, eHealth is a major policy initiative underlying both the National Health Strategy and the Convergence Programme in Hungary and the development of health information systems is the base of its further improvements.

The result of the development of Health sector is that the healthcare delivery becomes more patient oriented and safer. The use of ICT technologies make it easier the work in the hospitals with the assistance of complete HIS.

The main problems of health sector are the lack of interoperability, the lack of funds and the underperformance of healthcare workers in the field of ICT.

The healthcare organisational structure, the use of information system in hospitals in all European countries is naturally distributed.

Hungarian hospitals use different information systems which cause problems in data and file exchange. The hospital information systems enable the communication inside a hospital, but it is very limited outside a hospital.

The most important thing in the future developments regarding the hospital information systems would be the integration among hospitals in order to assure the information flow. It is essential that the systems could communicate with each other.

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THE LOCATION OF MOBILE COMMUNICATIONS EQUIPMENT TECHNICAL AND LEGAL ASPECTS

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Abstract

The development of the Information Technology and the large scale use of the modern cut-of-the-edge means of electronic communications constitute an undisputable progress of the Knowledge Society and the creation of the new social relations based on these platforms necessitated in time also a change in the Law philosophy. If the communication by electronic means still poses nowadays an attraction for the legal experts and professionals, chiefly for the law enforcement agencies or the intelligence services, another product of science, the location, starts highlighting its benefits but also the legal challenges. The paper aims at presenting the localization of mobile communications devices, both from technical and legal perspectives, with the view to be seen and understood as an Information Society service for the citizens.

Keywords: *mobile communications, legal aspects, technical aspects,*

Introduction

The developing of the Information Technology and the large scale use of modern means of electronic communications constitute an undisputable progress of the Knowledge Society and the creation of the new social relations based on these platforms necessitated in time also a change in the Law philosophy.

If the communication made by electronic means still poses nowadays an attraction for the legal experts and professionals, chiefly for the law enforcement agencies or the intelligence services, another product of science, the location, starts highlighting its benefits but also the legal challenges.

For the beginning we plan to present the process of locating the mobile communications equipment, as it must be regarded and understood more like as an Information Society service for the citizens.

Positioning techniques and technologies largely available these days have risen to a high level performance. The so called *Location Based Services (LBS)* are in fact information services functioning on technologies capable of providing the location of any user. Complex computer programs, called *Geographic Information Systems (GIS)*, have been developed in order to process and execute an array of operations on spatial data and to further present them to the user in a respective format.

A call can be dialed on a landline phone, a simple mobile phone or a sophisticated and performing smartphone which embeds cutting-edge technologies. Comparing with the case of a call made from a landline phone, where the location information is fixed and can be stored and found in a database, in the case of a call made from a mobile phone the location information is not

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a priori known (with the certainty needed for a good location) and for the positioning of the caller that information has to be created in real time, during the call.

Constructing the location information depends on the technological possibilities available. The developed countries are working now for the unification of all these technologies with the purpose to obtain the proper location information of a caller.

In the following instances we will approach the topic of the location of a caller in a mobile network, taking into consideration the present techniques and the future development perspectives.

The techniques used to determine the location in the mobile networks differ by accuracy, coverage level, updating frequency, cost of installation and maintenance.[1]

In a first evaluation, for the location there are the following techniques to be considered, such as: **network-based techniques**, **terminal-based techniques** and **hybrid location techniques**.

In the case of network-based techniques, the location of the mobile equipment is calculated by the Base Station Network which receives the radio signal of the caller mobile phone. These techniques benefit from the advantages of undertaking the location of any mobile terminal active in the network, implying a technological advantage only on the operator‘s side, with a general low cost, being easier to implement and with the burden of the location calculations left on the network.

Terminal-based location techniques request the embedding of a certain positioning technologies into the mobile equipment. The location is thus processed following the receipt of the signals sent by the neighbor positioning devices, such as the satellites. The most popular technology of this kind is Global Positioning System – GPS. The advantages of these technologies are the high precision in non-urban areas and a better control over own privacy (the user having the choice to broadcast or not GPS signals, whilst switching-off a mobile terminal means it is useless). By examining both the GSM/CDMA and terminal/GPS technology features one could notice that they are complementary in certain areas, and their simultaneously usage in so called *hybrid location techniques* could lead to very efficient positioning.

According to GSM Association, the location techniques could be split into three: **primary, enhanced** and **advanced**.[2] The primary location techniques are based on the cell identification (Cell ID). This could be used alone or in conjunction with Timing Advance (TA) or Network Measurement Report (NMR) methods. The Enhanced Observed Time Difference (E-OTD) technique may be classified as an improved one, while the Assisted GPS (A-GPS) could be very well regarded as an advanced one.

During the positioning based on the **Cell Identification**, the location data is provided by the cell which has the Transmission-Reception Base Station connected to the monitored mobile terminal in a certain timeframe. This data is stored both in the network and in the mobile device and the location could be done by searching the Cell ID in a specific database, for example the operator coverage database, and extracting the geographical position of the cell. The localization could be much accurate by decomposing the terrestrial area into Voronoi cells.

If available, the **Timing Advance** (TA) information could be used as well. TA is a number from 0 to 63 which measure of the distance between the mobile terminal and the serving Base Station.

Although not bringing much enhancements in what regards the accuracy of the positioning (the resolution of such location being round 554m), using TA could determine whether the monitored mobile device is connected to the closest Base Station. TA parameter has the disadvantage of being sent by the mobile device only in *active mode*, whereas for the transmission

[1] *John Chuang, Madeleine Moss,Tracy Olsen, Slav Petrov, Richard Teo,* Landscape of Wireless Applications in the US Marketplace, Berkeley University of California, Opportunity Recognition

[2] GSM Association PRD SE2.3

in *idle mode* being necessary to have a modified terminal or to obtain a *forced handover* (technical procedure allowed by the most of the commercial devices by which the Base Station forces a connection between the mobile terminal and a neighbor station; the *handover connection* is refused but is only done with the purpose to measure various TAs).

Moreover, by refining these technologies the operator could obtain the **Network Measurement Reports** (NMR) – various level of the signals received from the Base Station the monitored mobile device is connected with, and also from other stations in vicinity (RXLEV). These levels are estimated in every cellular-type network by the mobile terminal and then sent to the Base Stations for the handover process. The power levels measured by the terminal could be then used to determine the distance between every Base Station and the respective terminal, based on simple propagation models or/and network planning tools.

The signal power measurement in adjacent sectors of the same site could offer valuable information about the positioning angle of the traced mobile device. By repeated measurements, models may be constructed and algorithms can be used for recognition of these models to increase accuracy of localization.

In estimating the location of a mobile device, the operator could also use the measurement of the timeframe the radio packets reach the Base Station from the mobile terminal (**Time of Arrival** principle). In the simplest model, that distance between the mobile device and the Base Station is the mathematical product of propagation time times propagation speed (light speed). For a better accuracy, multiple Base Stations could be used and the location is calculated by triangulation.

Another approach is that of measuring the time difference occurred when signals are sent simultaneously to a mobile device from three different Base Stations (**Downlink Time Difference of Arrival - TDOA**) or the time difference occurred when signals sent simultaneously from a mobile device are received by three different Base Stations in vicinity (**Uplink TDOA**).

The Base Stations could not be perfectly synchronized; in this case the real time difference includes the time difference between the stations.

The Downlink Time Difference of Arrival in GSM networks is called E-OTD.

E-OTD (Enhanced Observed Time Difference) needs the terminal to do the measurement of the time difference when the signal arrives from three or more different Base Stations in vicinity. This measurement function is no more common to all kind of mobile devices, as it is a brand new feature. The time differences are further sent to a Service Mobile Location Center (SMLC) using the standard signaling for location services. The measured data sent to SMLC comprise the distances between the MS and all the Base Stations in vicinity and the position of the device is thus calculated through triangulation. In the case of the pure terminal-based location in E-OTD technique, the calculation function for location is implemented in MS and the location is directly returned to the SMLC.

The specific position of each BTS must be known with accuracy (less then 10m) in order to process with the triangulation and find the MS position. BTS also has to use the same time reference. If the network is not synchronized then using the Location Measurement Units (LMU) should be considered. LMU are modified terminals, eventually featured with a GPS emitter, placed in well-known positions (separately or integrated within the LMUs), which undertake E-OTD-type measurements further returned to SMLC.

The SMLC receives reference measurements from LMUs and, based on this data and the acknowledgement of the Base Stations' location, calculate the coordinates of the monitored mobile phone.[3]

[3] *Bernd Resch, Peter Romirer-Maierhofer* Global Positioning in Harsh Environments, School of Information Science, Computer and Electrical Engineering, Halmstad University

Alternatively, in CDMA networks another technique similar to E-OTD could be very well used. It is called the Advanced Forward Link Trilateration (AFLT). AFTL base principle is the same with E-OTDs, and the differences only exist in the measurement of the Time of Arrival and the fact that the network is already synchronized.[4] The measurement is done for the out-of-phase between signals sent from a pair of Base Stations and signals sent from another pair of Base Stations. The same way TDOA-type systems find a location, data received from three stations could be used to locate a terminal.[5]

The Assisted GPS Technique (A-GPS) comes as an enhancement of the usual GPS technique in the conditions of the existence of a mobile network support. A-GPS is a location procedure based on time measurement, because the GPS equipment calculates the timeframe the signals from three or more satellites arrive. In order to use the A-GPS the Hardware and Software architecture of terminals must be modified accordingly. On the other hand, A-GPS has a low impact on the overall mobile network architecture, only small modifications to SMLC being necessary.

In case of A-GPS, the information to be decoded by the GPS receiver is transmitted to the MS through the network and thus enhancing the Time To First Fix (TTFF – the time to capture the information needed in "almanac" and "ephemeris" position calculations) and the battery life. All of these are due to the fact that the majority of the processes are done within a Secure User Plane for Location server (SUPL).

In simple terms, by various network positioning techniques (Cell ID, E-OTD etc.) the location is determined and the terminal is taught which are the satellites to be in contact with. Further on, the terminal receives signals from the respective GPS satellites. Then, either the terminal calculates itself the position or sends the data to the SUPL server, in both cases with a GPS precision.

Location Based Services (LBS) provide the users with a number of features starting from the determination of the geographical position of the client. The location services include two main aspects: obtaining the user location and using that information with the purpose to provide a service.[6]

Caller location service could be regarded as a particular case of a Location Based Service. For example, the client could be a first responder agency in case of an emergency situation or even the caller in a dangerous situation.

In the case of a PULL-type service, the client itself requests the location. By issuing this request, he agrees that his location information will be revealed, otherwise with no such data available the service cannot be provided and the request is useless.

Comparing to the PULL-type services, in the PUSH-type services the location request is not issued by the client, but the network operator. Also in this case, the client should agree the operator capturing his location information whenever needed.

The Tracking is the third location services category. The idea of Tracking-type services is that a person (either natural or entity) requests the location of a certain mobile communications device. Similar to PULL and PUSH-type services, the location is only processed when the consent of the user is clearly expressed.

[4] *Behcet. Sarikaya*, Geographic Location in the Internet Published 2002, Springer, ISBN:1402070977

[5] Guide to Wireless Location Technology, http://www.unstrung.com/document.asp?doc_id=15060&page_number=3

[6] GSM Association PRD SE2.3

The Romanian Legal Framework in the matter of the localization of mobile communications equipment

The Criminal Procedure Code is the basic legal instrument offering the investigative authorities the possibility to proceed to the location of a mobile electronic communications equipment.

Article 91^1 provides with the conditions and situations for the legal interception and wiretapping of the conversations and communications made by phone or any other electronic communications mean. Thus, if there is certain evidence regarding the preparation and the committing of a crime (for which the criminal proceedings starts by default), and the interception and the wiretapping are strictly necessary for establishing the status of the event or because the indentification and the localization of the participants cannot be done by other means or the investigation would last too long, the criminal investigation authorities may request the Court the official aproval for undertaking these measures.

Even though from the provisions of Article 91^1, in a technical view, the interception of communications could be very well regarded as an act of processing the location data for the communications equipment used by the suspects, the Romanian legislator wished to eliminate any doubt and, by Law 365 from 2006, modified the Criminal Procedural Code in the sense of adding another subsequent point, 91^4, by which mentioned that all the provisions regarding the interception and wiretapping of communications should be applied, accordingly, to the ambient wiretapping, **location or GPS monitoring** or to any other kind of electronic surveillance as well.

The Law 506 from 17th Novermber 2004 *regarding the processing of personal data and the protection of privacy in the field of electronic communications*, with the further adds and modifications, is one of the first legal documents (along with the Law 304 from 2003 of the Universal Service) providing with provisions on the location of a mobile communication device.

Thus, **Article 8** of the law allows the processing of the location (localization) data, other than traffic data, with the referrence to the users or subscribers of public electronic communications networks, when technically possible, but with certain restrictions, such as:

- the location data must further be transformed into anonymous data;
- there should be a prior and clear consent from the user or the subscriber to whom the location data referrs to and only for and during the value-added service (e.g. Info Cell type services provided by almost all the Telco operators for the street guidance of the users in a town);
- Strictly when the value-added service with location function is provided for one-way and non-differentiated transmission of information to users.

Also important is that the provider of the electronic communications has the obligation (according to **Article 8 2nd alignment**) to inform the users, prior to the expression of their consent, about the:

- Type of location data to be processed;
- Purpose and the duration of such data processing;
- The possiblity of transmitting this data to another person, with the purpose to provide the value-added servce.

The law also mentions the possibility of every user or subscriber of a public communications network to use his right to withdraw anytime the consent issued with regard to the processing of his location data or to temporary refuse the processing of such data by the operator for every connection to the network or any transmission of a communication. The use of these rights should be guaranteed by the provider of the electronic communications services and made possible by a simple and free mean (procedure).

As a suplementary safety measure, the Romanian legislator has introduced the obligation that the processing of the location data to be executed only by the persons which act under the

authority or on behalf of the provider of the public electronic communications network or the provider of electronic communications service to the public or the third party provider of the value-added service, all of these being bound to strictly limit to what is necessary for the provision of the value-added service.

The law has yet an exception in what regards the necessity to prior obtain the consent of the user or the subscriber of the public communications network for the procesing of his location data: when the location data is needed by the first-responder agencies in case of emergency situations (such as police, firefighters, gendarmery, ambulance etc.).

Even though the law clearly established the conditions for the processing of the location data within a public communications network, we have to mention that this data are technically transparent for the operator (provider) and constitute the parameters exclusively for the assurance of the good functioning of the administered infrastructure.

For all that, there have been numerous cases when the operators or providers of electronic communications services refused to disclose location data to the criminal investigation authorities, invoking the safeguards granted by Law 506, but this uncertain situation only rest until 2006 when the Criminal Procedure Code was modified and Article 91^4 brought clarifications.

In what regards the processing of the location data, in order to eliminate the interpretation of the legal provisions in place but also with the aim to come out with an useful tool for the criminal investigators, Romania chose to transpose into its national legislation the provisions of the European Commission Directive EC/24/2006, well-known as the **Data Retention Directive**. And thus, at the end of 2008 the Parliament adopted the **Law 298** *on the retention of data generated or processed in connection with the provision of the publicly available electronic communications services or of public communications network and amending the Law 506/2004 regarding the processing of personal data and the protection of privacy in the electronic communications field.*

According to **Article 3 1st alignment** of Law 298, the providers of public communications networks and publicly available electronic communications services have the obligation to assure the creation of a digital database with the purpose of retaining certain categories of data (traffic data), as well as data for the **identification of the location of a mobile communications equipment**. The maximum length for data retaining was set for 6 months.

The law also establishes clearly in **Article 9** which data is to be retained (stored) with regard to the location of mobile communications equipment, respectively: the cell identifier (Cell ID) at the beginning of the communication as well as data which allow the geographical localization of every cell (Base Station), for the entire length of data retaining process.

In what regard the obtaining of these data by the competent authorities, according to the law (Article 16) the request for transmitting the retained data is submitted officially only after the initiation of the criminal proceedings and only based on the authorization issued by the president of the court of justice competent to judge the case in the first instance or the court with the higher rank, upon the request of the public prosecutor who undertake or supervise the criminal proceedings, if there is strong evidence about the preparation or the committing of a serious crime.

Although the document contains numerous safeguards related to the retaining of traffic data, especially location data, and also a clear procedure for obtaining such data by the competent authorities, the Law 298/2008 has been recently declared unconstitutional by the Romanian Constitutional Court. One of the fundamental arguments of the Decision claimed that by storing or processing the location data a fundamental human right is infringed, the one which protects the secrecy of correspondence.

At least in what location data is concerned, but also the traffic data, we consider that the Romanian Constitutional Court was a sophism, and the solution had to be found by a specific and clear answer to the following question: where does the secrecy of correspondence stop? To the content or to the envelope? In this view, we think that, similar to the data written on the ordinary post letters (name, surname, address, place of residence, postal code etc.), for the sender as well as for the recipient, as a base condition for the good functioning of postal services, location data is

beyond the safeguards of the Constitution or Criminal Code and could be processed or stored according to the Criminal Procedural Code, Law 506/2004 or even Law 298/2008.

Locating the mobile communications equipment is an interesting subject also for the first responder agencies in case of emergency situations, and therefore, in 2008, the Romanian Government issued the **Ordinance no. 34** *on organizing and functioning of the National Single System for Emergency Calls* (SNUAU)[7].

The National Single System for Emergency Calls has been established and is administered with the purpose of providing the citizens with the 112 Emergency Service, by which the state ensures answering the emergency calls and, depending on each case, the transfer to the specialized intervention agencies in order to have an immediate, uniform and unitary reaction to solve the emergency situations.

According to **Article 3 point n)** of the Ordinance, the location information consists of certain data, which content and format are established by the national communications regulating authority, implemented into SNUAU, and which indicates the geographical position where the user equipment is to be found or the equipment installation physical address in the case of a landline phone network.

Based on the **Article 10**, the Public Safety Answering Points ensure the call-taking process as well as the automated recording of the emergency calls made by phone, radio, automated warning devices, signaling devices, alarming devices or any other communications means, and then confirm and **locate**, as accurate as possible, these calls.

The public communications network operators, as well as the providers of the public available electronic communications services are bound to provide the National Single System for Emergency Calls with all the necessary information to locate a mobile communications mean calling to 112, as requested by the national regulating authority[8].

The safeguard elements of the law related to the processing of the location data are provided by **Article 20 3rd alignment** of the Ordinance, which states that the access to the location data is only allowed during the processing of an emergency call.

At the end of 2008, Romania has been under an infringement procedure imposed by the European Commission due to the inexistence of the location facility of the 112 callers in the mobile networks, but thankfully to the joint effort made by the administrator of SNUAU and the Telco operators, a solution has been implemented and is now operational at European standards.

Conclusions

As we have seen in this article, beyond the benefits provided to the citizens - users of mobile communications equipment, as an Information Society service, the location also bring about certain element of challenge, even fear or unsafe, being often perceived as an infringement of the privacy of the individuals.

For all that, this study demonstrates that, similar to the interception and wiretapping of the communications made by electronic means, the location has also been regulated in the way of providing safeguards with the purpose to guarantee the security of this kind of data processing or the privacy of the citizens and, even more, offering the state the possibility of a better intervention in an emergency situation, saving the life, property or the environment.

[7] Modified and completed by Law 160 of 26 September 2008

[8] Article 24 of Law 304/2003 of the Universal Service and Article 25 of the Decision 1023 issued by the Romanian National Autority for Communications Regulation

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LOCALIZAREA ECHIPAMENTELOR MOBILE DE COMUNICAȚII. ASPECTE DE ORDIN TEHNIC ŞI JURIDIC

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Abstract

Dezvoltarea tehnologiei informației şi utilizarea pe scară largă a mijloacelor moderne de comunicații electronice constituie un progres incontestabil al societății cunoaşterii, iar apariția noilor relații sociale bazate pe aceste platforme a necesitat, în timp, şi o schimbare profundă în filosofia dreptului. Dacă şi în prezent comunicarea efectuată prin mijloace electronice constituie o atracție pentru juriști, dar mai ales pentru agențiile de aplicare a legii ori serviciile de informații, un alt produs al ştiinței, localizarea, începe să îşi pună în valoare beneficiile dar şi provocările de ordin legislativ. Pentru început, ne propunem să prezentăm localizarea echipamentelor mobile de comunicații, ce trebuie privită şi înțeleasă mai mult ca serviciu al societății informaționale pentru cetățeni.

Cuvinte cheie: *localizare, comunicații, rețele, interceptare, monitorizare*

Introducere

Tehnicile si tehnologiile de poziționare disponibile în zilele noastre s-au ridicat la un grad de performanță înalt. Aşa numitele *Location Based Services (LBS – Servicii bazate pe localizare)* sunt servicii de informare ce funcționează pe tehnologii capabile să furnizeze localizarea unui utilizator. Au fost dezvoltate programe pentru calculator complexe denumite generic *Geographic Information Systems (GIS – Sisteme Informatice Geografice)* capabile să execute o serie de operații asupra datelor spațiale şi să le prezinte utilizatorului în formatul necesar.

Un apel se poate efectua de pe un telefon fix, de pe un telefon mobil simplu sau de pe un telefon mobil performant ce înglobează tehnologii evoluate. Spre deosebire de cazul unui apel de pe un telefon fix, unde informația de localizare este invariantă, poate fi stocată iar apoi uşor regăsită într-o bază de date, în cazul unui apel de pe un telefon mobil informația de localizare nu este apriori cunoscută (cu exactitatea necesară unei bune localizări) iar pentru poziționarea apelantului ea trebuie construită în timp real, în momentul apelului.

Construirea informației de localizare depinde de posibilitățile tehnologice disponibile. Statele dezvoltate ale lumii lucrează în acest moment la unificarea acestor tehnologii în scopul facilitării obținerii informației de localizare.

În cele ce urmează vom trata aspectele localizării apelantului în rețele de telefonie mobilă, având în vedere tehnicile de localizare folosite în prezent şi perspectivele de îmbunătățire a acestora.

Tehnicile pentru determinarea localizării în rețele de telefonie mobilă diferă prin acuratețe, grad de acoperire, frecvența actualizărilor sau costul instalării şi întreținerii.[1]

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Într-o primă aproximaţie se pot enunţa **tehnici de localizare bazate pe reţea**, **tehnici de localizare bazate pe terminal şi tehnici de localizare hibride**.

În tehnicile de localizare bazate pe reţea localizarea echipamentului mobil este calculată de reţeaua staţiei de bază ce recepţionează semnalul telefonului mobil. Aceste tehnici se bucură de avantajele că pot efectua localizarea oricărui terminal mobil din reţea, implicând un avans tehnologic doar pe partea operatorului, au un cost general mai mic, sunt mai uşor de implementat iar sarcina laborioasă de calcul al localizării este efectuată numai de reţea.

Tehnicile de localizare bazate pe terminal implică înglobarea în echipamentul mobil a anumitor tehnologii de poziţionare. Localizarea este calculată prin recepţionarea de către terminal a semnalelor trimise de echipamentele pentru poziţionare (de exemplu sateliţii) din vecinătate. Cea mai populară tehnologie de acest fel este GPS. Avantajele acestor tehnologii sunt precizia ridicată în zone din afara oraşelor şi un control mai bun asupra propriei intimităţi, deoarece utilizatorul poate alege când să emită GPS sau nu, pe când decuplarea din reţeaua mobilă înseamnă lipsa de utilitate a terminalului. Prin examinarea particularităţilor tehnologiilor reţea GSM/CDMA şi tehnologiilor terminal/GPS se poate observa că acestea sunt pe anumite porţiuni complementare iar folosirea lor simultană în cadrul aşa-numitelor tehnici de localizare hibride poate conduce la poziţionări foarte eficiente.

Conform GSM Association tehnicile de localizare se împart în **tehnici primare**, **tehnici îmbunătăţite** şi **tehnici avansate**.[2] Tehnicile de poziţionare primare sunt bazate pe identificarea celulei (Cell ID). Identificatorul de celulă poate fi folosit singur sau împreună cu metode Timing Advance (TA) şi Network Measurement Reports (NMR). Tehnica E-OTD (Enhanced Observed Time Difference) este clasificată ca o tehnică îmbunătăţită. Metoda A-GPS (Assisted GPS) este o metodă de poziţionare avansată.

În **tehnica de poziţionare bazată pe identificatorul de celulă** informaţia de localizare a unui mobil este dată de celula la a cărei staţie de bază emiţător-receptor este conectat terminalul în momentul respectiv. Această informaţie există atât în reţea cât şi în terminal. Localizarea se obţine prin căutarea identificatorului respectivei celule într-o bază de date (baza de date de acoperire a operatorului de exemplu) şi extragerea poziţiei geografice ce corespunde celulei. Precizia localizării în acest caz poate fi uneori mărită prin utilizarea descompunerii spaţiului terestru în celule Voronoi.

Dacă este disponibilă, se poate folosi şi informaţia **Timing Advance** (TA). TA este o măsură a distanţei la care se află terminalul de staţia de bază. În fapt TA este un număr cuprins între 0 şi 63 ce reflectă distanţa la care se află terminalul de staţia de bază care îl serveşte.

Deşi nu aduce mari îmbunătăţiri în ceea ce priveşte precizia (rezoluţia unei poziţionări obţinute astfel este de cca. 554 m), totuşi prin folosirea TA se poate vedea dacă mobilul este conectat la cea mai apropiată staţie de bază. Parametrul TA are dezavantajul că este transmis de terminal doar în modul *active*, pentru transmiterea în modul *idle* este necesar un terminal modificat sau recurgerea la ceea ce se numeşte handover forţat, suportat de toate terminalele, prin care staţia de bază forţează terminalul să se conecteze la staţia vecină, aceasta măsoară TA şi refuză handover-ul, iar prin repetarea procedeului se pot realiza mai multe măsurători ale TA.

Mai departe, prin rafinarea acestor tehnologii se obţin aşa numitele **Network Measurement Reports** (NMR) - diferite niveluri ale semnalului primit de la staţia unde este conectat terminalul şi staţiile din vecinătate (RXLEV). Aceste niveluri sunt estimate în orice reţea celulară de către terminal şi trimise staţiilor de bază pentru procesul de handover. Nivelurile de putere măsurate în

[1] *John Chuang, Madeleine Moss,Tracy Olsen, Slav Petrov, Richard Teo,* Landscape of Wireless Applications in the US Marketplace, Berkeley University of California, Opportunity Recognition

[2] GSM Association PRD SE2.3

terminal pot fi folosite pentru a estima distanţa staţie de bază – terminal având la bază modele simple de propagare sau/ şi unelte de planificare a reţelei.

Măsurarea puterii semnalului în sectoare adiacente ale aceluiaşi site poate oferi informaţii despre unghiul de poziţionare a mobilului în raport cu acel site. Prin măsurători repetate pot fi construite modele şi apoi pot fi folosiţi algoritmi de recunoaştere a acestor modele pentru a mări precizia localizării.

În estimarea poziţiei unui echipament mobil se poate folosi măsurarea timpului necesar parcurgerii distanţei dintre terminal şi staţia de bază (principiul **TOA – Time of Arrival**). În cel mai simplu model distanţa se obţine ca produs al timpului de propagare cu viteza de propagare (viteza luminii). Pot fi folosite simultan mai multe staţii de bază iar poziţia să rezulte prin triangulaţie.

O altă abordare este aceea a măsurării diferenţei de timp necesar parcurgerii unui semnal emis simultan către un terminal de cel puţin trei staţii de bază la un anumit moment (**Downlink TDOA** – varianta bazată pe terminal) sau a diferenţei de timp în care un semnal emis de un terminal este recepţionat de staţiile de bază din vecinătate (**Uplink TDOA** – varianta bazată pe reţea).

Staţiile de bază pot să nu fie perfect sincronizate, în acest caz diferenţa de timp reală include şi diferenţa de timp dintre staţii.

Implementarea Downlink Time Difference Of Arrival în GSM se numeşte E-OTD.

E-OTD - Enhanced Observed Time Difference – Metoda îmbunătăţită a diferenţei de timp observate - necesită ca terminalul să efectueze măsurarea diferenţei de timp la care semnalul soseşte de la trei sau mai multe staţii din vecinătate. Această funcţie de măsurare nu mai este comună tuturor tipurilor de terminale, fiind o capabilitate nouă. Diferenţele de timp sunt apoi raportate unui SMLC (Service Mobile Location Center – Centru al Serviciului de Localizare Mobile) prin folosirea semnalizării standard pentru servicii de localizare. Măsurătorile transmise către SMLC reflectă distanţele între MS şi BTS-urile din vecinătate iar poziţia mobilului este calculată prin triangulaţie. În varianta bazată integral pe terminal a tehnicii E-OTD funcţia de calculare a localizării este implementată în MS iar ceea ce se returnează SMLC-ului este direct localizarea.

Poziţia fiecărei BTS trebuie să fie cunoscută cu exactitate (precizie mai bună de 10 metri) pentru a se putea face triangulaţia şi se afla poziţia MS-ului. De asemenea BTS-urile trebuie să folosească acelaşi reper temporal. Dacă reţeaua nu este sincronizată, este necesar să se folosească aşa-numitele LMU (Location Measurement Units – Unităţi de Măsurare a Localizării). LMU sunt terminale modificate, eventual dotate cu emiţător GPS, plasate în poziţii bine cunoscute (separate sau integrate în BTS), ce pot efectua măsurători E-OTD pe care le întorc către SMLC.

SMLC primeşte măsurători de referinţă de la unităţi LMU şi calculează coordonatele telefonului pe baza acestor măsurători şi a cunoaşterii localizării staţiilor de bază.[3]

Alternativ în reţelele CMDA se poate folosi o tehnică înrudită cu E-OTD denumită AFLT (Advanced Forward Link Trilateration). Principiul de bază al AFLT este acelaşi ca al E-OTD; diferenţele apar în măsurarea TOA (Time of Arrival) şi în faptul că reţeaua este deja sincronizată.[4] Se efectuează măsurarea defazajului între semnalele trimise de o pereche de staţii de bază şi compară aceste date cu cele obţinute de la altă pereche de staţii de bază. La fel cum sistemele TDOA găsesc o localizare, datele primite de la trei staţii pot fi folosite pentru a localiza un terminal.[5]

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[3] *Bernd Resch, Peter Romirer-Maierhofer* Global Positioning in Harsh Environments, School of Information Science, Computer and Electrical Engineering, Halmstad University

[4] *Behcet. Sarikaya*, Geographic Location in the Internet Published 2002, Springer, ISBN:1402070977

[5] Guide to Wireless Location Technology, http://www.unstrung.com/document.asp?doc_id=15060&page_number=3

Tehnica A-GPS (Assisted GPS) vine ca o îmbunătățire a tehnicii GPS în condițiile existenței unui suport rețea de telefonie mobilă. A-GPS este o metodă de poziționare bazată pe măsurarea timpului, deoarece echipamentul GPS măsoară timpul în care sosesc semnalele trimise de trei sau mai mulți sateliți. Pentru utilizarea A-GPS trebuie să fie modificată construcția hardware şi software a terminalelor. Pe de altă parte, A-GPS are un impact redus asupra arhitecturii rețelei mobile, necesitând modificări doar la SMLC.

În cazul A-GPS, informația ce trebuia decodată de receiver-ul GPS este transmisă către MS prin intermediul rețelei, acest lucru îmbunătățind TTFF (Time to First Fix – timpul necesar captării informației necesare calculelor de poziție, „almanac" şi „ephemeris") şi timpul de viață al bateriei, toate acestea datorită faptului ca majoritatea procesărilor se fac într-un server SUPL (Secure User Plane for Location).

În termeni simpli, prin intermediul unor tehnici de poziționare rețea (Cell ID, E-OTD) se determină localizarea şi se indică terminalului ce sateliți trebuie să asculte. Mai departe, terminalul primeşte semnal de la respectivii sateliți GPS, iar de aici sunt două posibilități: fie terminalul îşi calculează singur poziția, fie trimite datele de la sateliți către serverul SUPL, iar acesta calculează poziția, în ambele cazuri cu o precizie GPS.

Location Based Services (LBS – Serviciile Bazate pe Localizare) oferă utilizatorilor o suită de facilități pornind de la determinarea poziției geografice a clientului. Serviciile de localizare includ două aspecte importante: obținerea localizării unui utilizator şi folosirea acestei informații pentru a oferi un serviciu. [6]

Serviciul de localizare a apelantului poate fi privit ca un caz particular al Location Based Services, de exemplu clientul putând fi agențiile de intervenție în caz de urgență sau în ultimă instanță însuşi apelantul aflat în dificultate. Există trei tipuri de bază ale LBS: pull, push şi tracking.

În cazul unui serviciu de tip pull, clientul însuşi face cererea de localizare. Prin efectuarea acestei cereri el este de acord ca informația despre localizarea sa să fie aflată, pentru că fără această informație solicitarea nu îşi are sensul şi nu se poate finaliza.

Serviciile push diferă de serviciile pull prin faptul că cererea de localizare nu este inițiată strict de utilizator ci de furnizorul de servicii. Şi în acest caz clientul trebuie să fie de acord ca furnizorul de servicii să-i capteze informația de localizare când este nevoie.

Tracking reprezintă a treia categorie de servicii de localizare. Ideea serviciilor de tip tracking este aceea că cineva (persoană sau serviciu) cere localizarea unui terminal mobil. Similar serviciilor Pull şi Push ideea de la care se porneşte este că abonatul a dat permisiunea ca o persoană sau un serviciu să-l poată localiza.

Cadrul legal al localizării echipamentelor mobile de comunicații în România

Codul de Procedură Penală este instrumentul legal fundamental care oferă organelor de urmărire penală posibilitatea de a efectua localizarea unui terminal (mobil) de comunicații electronice.

În cuprinsul **art. 91[1]** sunt prevăzute condițiile şi cazurile de interceptare şi înregistrare a convorbirilor sau comunicărilor efectuate prin telefon ori prin orice mijloc electronic de comunicare. Astfel, dacă există indicii temeinice privind pregătirea sau săvârşirea unei infracțiuni (pentru care urmărirea penală se efectuează din oficiu), iar interceptarea şi înregistrarea se impun pentru stabilirea situației de fapt ori pentru că identificarea sau **localizarea** participanților nu poate fi făcută prin alte mijloace ori cercetarea ar fi mult întârziată, organele de urmărire penală pot solicta instanței de judecată autorizarea punerii în practică a aacestei măsuri.

[6] GSM Association PRD SE2.3

Chiar dacă din enunțul art. 91^1, în sens tehnic, prin interceptarea comunicărilor se poate înțelege inclusiv prelucrarea datelor de localizare ale mijloacelor de comunicații folosite de persoanele asupra cărora a fost luată această măsură, legiuitorul a dorit să elimine orice echivoc și, prin Legea 365/2006 a adus modificări Codului de Procedură Penală, statuând prin **art. 91^4** faptul că toate dispozițiile privitoare la interceptarea și înregistrarea convorbirilor sau comunicărilor se aplică în mod corespunzător și în cazul înregistrărilor în mediul ambiental, **localizării** sau **urmăririi prin GPS** ori prin alte mijloace electronice de supraveghere.

Legea 506 din 17 noiembrie 2004 *privind prelucrarea datelor cu caracter personal și protecția vieții private în sectorul comunicațiilor electronice*, cu modificările și completările ulterioare, este (alături de Legea 304/2003 a Serviciului Universal) prima lege care a stipulat în cuprinsul unui articol distinct condițiile în care este permisă localizarea unui terminal de comunicații.

Astfel, potrivit **art. 8**, este permisă prelucrarea datelor de localizare, altele decât datele de trafic, referitoare la utilizatorii sau abonații rețelelor publice de comunicații electronice, atunci când este tehnic posibil, însă cu următoarele restricții:

- Datele respective sunt transformate în date anonime;
- Dacă există un consimțământ expres și prealabil din partea utilizatorului sau abonatului la care se referă datele respective și numai în măsura și pe durata necesară furnizării unui serviciu cu valoare adăugată (ex. vezi serviciile de tip Info Celulă oferit utilizatorilor de majoritatea operatorilor de telefonie mobilă pentru orientare în localități);
- Numai atunci când serviciul cu valoare adăugată cu funcție de localizare are ca scop transmiterea unidirecțională și nediferențiată a unor informații către utilizatori.

De asemenea, foarte important, furnizorul de servicii de comunicații electronice are obligația (potrivit **alin 2 al art. 8**) de a pune la dispoziția utilizatorului sau abonatului, anterior obținerii consimțământului acestuia, informații referitoare la:

- Tipul de date de localizare care vor fi prelucrate;
- Scopurile și durata prelucrării acestor date;
- Eventuala transmitere a datelor către un terț, în scopul furnizării serviciului cu valoare adăugată.

Legea prevede, totodată, și posbilitatea fiecărui utilizator sau abonat al unei rețele publice de comunicații electronice să uzeze de dreptul de a-și retrage oricând consimțământul exprimat în vederea prelucrării propriilor date de localizare sau de a refuza, temporar, prelucrarea de către operator a respectivelor date pentru fiecare conectare la rețea sau pentru fiecare transmitere a unei comunicări. Exercitarea acestor drepturi trebuie să fie garantată de furnizorul serviciilor de comunicații electronice și operaționalizată printr-un mijloc simplu și gratuit.

Ca o măsură suplimentară de siguranță, legiuitorul a introdus și obligația ca prelucrarea datelor de localizare să fie efectuată numai de către persoanele care acționează sub autoritatea furnizorului rețelei publice de comunicații electronice sau al serviciului de comunicații electronice destinat publicului ori al terțului furnizor de servicii cu valoare adăugată, toți aceștia urmând a se limita strict la ceea ce este necesar pentru furnizarea serviciului cu valoare adăugată.

Legea prevede, totuși, și o excepție în ceea ce privește necesitatea obținerii consimțământului utilizatorului sau abonatului unei retele publice de comunicații electronice pentru prelucrarea datelor de localizare, și anume în cazul în care aceste date sunt necesare agențiilor de intervenție (recunoscute în condițiile legii: poliție, pompieri, jandarmerie, ambulanță, SMURD) pentru soluționarea unor situații de urgență.

Chiar dacă legea a prevăzut în mod clar condițiile în care datele de localizare pot fi prelucrate în cadrul unei rețele publice de comunicații electronice, trebuie menționat faptul că

aceste date sunt transparente pentru operatorul reţelei şi constituie parametri ce ţin exclusiv de asigurarea bunei funcţionări a infrastructurii administrate.

Cu toate acestea, au fost numeroase cazuri în care operatori de telecomunicaţii sau furnizori de servicii de comunicaţii electronice au refuzat să comunice organelor abilitate datele de localizare ale echipamentelor mobile de comunicaţii solicitate, invocând în acest sens prevederile de siguranţă oferite de Legea 506/2004, însă această situaţie de incertidudine s-a menţinut doar până în anul 2006 când Codul de Procedură Penală a fost modificat iar art. 91^4 a adus clarificări.

În ceea ce priveşte prelucrarea datelor datelor de localizare, pentru eliminarea interpretării prevederilor legale în materie, dar şi cu scopul de a oferi un instrument util investigatorilor, statul român a ales să transpună în legislaţia naţională prevederile Directivei Comisiei Europene 24 din 2006, binecunoscută sub numele Directiva Reţenţiei Datelor. Astfel, la sfârşitul anului 2008 a fost adoptată **Legea 298** *privind reţinerea datelor generate sau prelucrate de furnizorii de servicii de comunicaţii electronice destinate publicului sau de reţele publice de comunicaţii, precum şi pentru modificarea Legii 506/2004 privind prelucrarea datelor cu caracter personal şi protecţia vieţii private în sectorul comunicaţiilor electronice*.

Potrivit **art. 3 alin 1** din lege, furnizorii de reţele publice de comunicaţii şi de servicii de comunicaţii electronice destinate publicului au obligaţia de a asigura crearea unei baze de date, în format electronic, în vederea reţinerii unor anumite categorii de date (date de trafic), precum şi date necesare pentru identificarea locaţiei unui echipament mobil de comunicaţii. Durata maximă de reţinere a acestor date este 6 luni.

Legea stabileşte destul de clar în **art. 9** şi care sunt datele care sunt reţinute (stocate) cu privire la locaţia unui echiopament mobil de omunicaţie, respectiv: identificatorul celulei la începutul comunicării şi datele care permit stabilirea locaţiei geografice a fiecărei celule, prin referire la identificatorul acestora, pe durata în care aceste date sunt reţinute.

În ceea ce priveşte obţinerea acestor date de către autorităţile competente, potrivit legii (**art. 16**) solicitarea transmiterii datelor reţinute se realizează numai după ce a fost începută urmărirea penală şi numai în baza autorizaţiei emise de preşedintele instanţei căreia îi revine competenţa să judece cauza în primă instanţă sau de la instanţa superioară în grad a acesteia, la cererea procurorului care efectuează sau supraveghează urmărirea penală, dacă sunt date sau indicii temeinice privind pregătirea sau săvârşirea unei infracţiuni grave.

Cu toate că documentul conţine numeroase elemente de siguranţă în ceea ce priveşte reţinerea datelor de trafic, în special a celor de localizare, dar şi a procedurii de obţinere a acestora de către autorităţile competente, Legea 298/2008 a fost declarată neconstituţională de către Curtea Constituţională a României, unul dintre argumentele de bază ale Deciziei fiind acela că prin stocarea ori prelucrarea datelor de localizare s-ar aduce atingere unui drept fundamental al omului, şi anume dreptul la secretul corespondenţei.

Cel puţin în ceea ce priveşte datele de localizare, dar chiar şi pe cele de trafic, considerăm că decizia Curţii Constituţionale a României este un sofism, iar soluţia trebuia identificată prin printr-un răspuns fără echivoc la întrebarea fundamentală: unde se opreşte secretul corespondenţei? La conţinut sau la plic? În acest sens, suntem de părere că, asemenea datelor înscrise pe plicul de corespondenţă (nume, prenume, adresă, cod poştal), atât pentru expeditor, cât şi pentru destinatar – ca o condiţie de bază a exercitării serviciului poştal obişnuit, şi datele de trafic şi cele de localizare se situează în afara cadrului juridic de siguranţă a corespondenţei (Constituţia României, Codul Penal) şi pot fi prelucrate sau stocate în conformitate cu legile existente (Codul de Procedură Penală, Legea 506/2004 şi chiar Legea 298/2008)

Localizarea echipamentelor mobile de comunicaţii este un subiect interesant şi pentru agenţiile de intervenţie în situaţii de urgenţă, sens în care, tot în anul 2008 a fost emisă **Ordonanţa**

de Urgenţă nr. 34 *privind organizarea şi funcţionarea Sistemului Naţional Unic pentru Apeluri de Urgenţă*[7].

Sistemul Naţional Unic pentru Apeluri de Urgenţă – SNUAU este constituit şi administrat în scopul furnizării către cetăţeni a Serviciului de Urgenţă 112, care asigură preluarea apelurilor de urgenţă şi, după caz, transmiterea acestora către agenţiile specializate de intervenţie în vederea obţinerii unei reacţii imediate, uniforme şi unitare pentru soluţionarea urgenţelor.

Potrivit **art. 3 lit. n)** din ordonanţă, informaţia de localizare este reprezentată prin datele, ale căror conţinut şi format sunt stabilite de către autoritatea naţională de reglementare în comunicaţii, implementate în cadrul SNUAU, care indică poziţia geografică în care se află echipamentul terminal al unui utilizator de telefonie mobilă sau adresa fizică de instalare a punctului terminal pentru o reţea de telefonie fixă.

În baza art. 10, centrele de primire apeluri de urgenţă asigură recepţionarea şi înregistrarea automată a apelurilor de urgenţă comunicate prin telefon, radio, dispozitive automate de anunţare, semnalizare, alarmare sau alte mijloace şi confirmă şi **localizează**, pe cât posibil, aceste apeluri.

Operatorii de reţele publice de comunicaţii, precum şi furnizorii de servicii de comunicaţii electronice sunt obligaţi de către autoritatea naţională de reglementare în comunicaţii (care stabileşte condiţiile tehnice de implementare) să furnizeze Sistemului Naţional Unic pentru Apeluri de Urgenţă toate informaţiile necesare localizării unui echipament mobil de comunicaţii al cărui utilizator a apelat 112[8].

Elementele de siguranţă în privinţa prelucrării acestor informaţii de localizare sunt date de **art. 20 alin 3** din ordonanţă, care prevede că accesul la datele de localizare este permis numai pe perioada deservirii unui apel de urgenţă.

La sfârşitul anului 2008, România a fost ţinta unei proceduri de infringement din partea Comisiei Europene pentru inexistenţa facilităţii de localizare a apelanţilor la 112 din reţelele de telefonie mobilă, însă graţie efortului comun depus de admnistratorul SNUAU şi operatorii de telecomunicaţii, o soluţie în acest sens a fost implementată şi este operaţională la standarde europene.

Concluzii

După cum am văzut din cuprinsul acestui material, dincolo de aspectele benefice pe care le aduce pentru cetăţenii utilizatori de echipamente mobile de comunicaţii, ca serviciu al societăţii informaţionale, localizarea comportă şi anumite elemente de provocare, teamă sau nesiguranţă, fiind percepută adesea drept o ingerinţă în viaţa privată a indivizilor.

Cu toate acestea, studiul demonstrează că, asemenea cazului interceptării sau înregistrării comunicaţiilor efectuate prin mijloace electronice, şi localizarea a fost reglementată corespunzător, existând în acest sens măsuri de siguranţă care garantează securitatea prelucrării unor astfel de date ori viaţa privată a cetăţenilor şi, mai mult, oferă statului de drept posibilitatea unei mai bune intervenţii în situaţii de urgenţă, pentru salvarea vieţii, proprietăţii sau mediului.

[7] Modificată şi completată prin Legea 160 din 26.09.2008

[8] Art. 24 din Legea 304 din 04.07.2003 a serviciului universal şi art. 25 din Decizia 1023 din 24.10.2008 a ANCOM

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PREVENT, BACKUP AND RESTORE PROCEDURES FOR A WEB SERVER

Cosmin Cătălin OLTEANU[1]

Abstract

In These days when everything is stored online on a server a real disaster recovery plan should be a must for every network administrator. From my experience I would say that the first step is to prevent and than to make a detailed backup plan and a restore one too. Custom cron scripts can make automated scheduled various commands just tools for trustworthy systems.

Key words: *informatic system back-up plan, mysql dump, prevent power failure*

1. INTRODUCTION

In the WEB integrated informatic systems era, reliability of servers is a big issue.

If we have a real disaster plan for prevention and recovery of data loss and hardware failure, we can say that we have a trust worthy system and we can rely on it.

Every user should trust the system and should work with confidence that his work will be also available tomorrow.

2. PREVENT, BACKUP AND RESTORE A REAL DISASTER RECOVERY PLAN

These days when everything is stored online on a server a real disaster recovery plan should be a must for every network administrator.

From my experience I would say that the first step is to prevent and than to make a detailed backup plan and a restore one too.

Let's assume that we have a web generated application that is used as an integrated informatic system for a university campus.

We'll go further and we'll presume that everything is based on Linux (any distribution available, like Fedora 13, Gentoo, Debian etc.).

Fig. 1.Gentoo Logo.

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Fig. 2.Fedora 13 Logo.

Data losses can happen any time due to many reasons and we have to manage that paper plan is not always equal with real plan:

- ❖ We can have accidental data loss
- ❖ We can have intentional data loss
- ❖ We have to deal with small budgets for components and not ideal ones etc.

I have to say that we have a few causes and I have discovered from my previous experience that this causes can be:

- ➢ electrical / power problems;
- ➢ failure of devices;
- ➢ bad coding
- ➢ Database bug's etc.

a) electrical / power problems that can be avoided

I our country every issue about power supplier is a closed one because is just one supplier and we just do not have an alternative and usually when we encounter such problems the results are devastating.

Just a few years ago a mail server that I usually maintain just burn out because of a big overvoltage. The UPS and mainboard were fried.

After a few days (after I have replaced the components and the server was working again) I have tried to find an assurance company to have all the equipment assured but from 11 companies none of them could make an offer for electrical problems generated by supplier. The conclusion was just annoying: No one takes responsibility due to power failure. All must be done by lawyers, court law suites and time just could be extended for years until something is done.

All I could do in an environment where "time is money" was to separate the problem in two stages and deal with both of them:

1) problems generated through power cables (220v);

2) problems generated through small curents cables (UTP).

For the first problem the solution was to install a good automatic voltage regulator (Fig. 4) doubled by powerful Uninterruptible Power Supply (Fig.3).

For these I have chosen APC products like:

Fig. 3. APC Smart-UPS 1000VA.

Fig. 4. APC Line-R 1200VA Automatic voltage regulation

For the second problem I have to say that for UTP Ethernet stable connections at 1 Gbit/s I used also an APC product (Fig.5):

Fig. 5. APC APC ProtectNet standalone surge protector for 10/100/1000 ase-T Ethernet lines

b) failure of devices

For this type of failures I have encountered only problems with magnetic storage devices like hard drives. The others components were stable in time (remember that we have server components where the quality and control process is very reliable).

The first thing to do is to have a server managed with mirror RAID 1 enabled (Fig. 3), doubled by enterprise hard disk in SAS technology.

I have chose RAID 1 as a solution because if we have problems with one hard drive we have just to change it and reconstruct the RAID matrix before everything is back as it was in no time.

I recommend for such hard disks to use Seagate 7/24 latest technology of Barracuda® ES.2 with a rate of 1.2 M hrs. MTBF or Constellation™ ES with a rate of 1.8 M hrs. MTBF.

I have to say that these HDD's proved to be the most reliable on the market and the warranty of 5 years is all that we need for the moment.

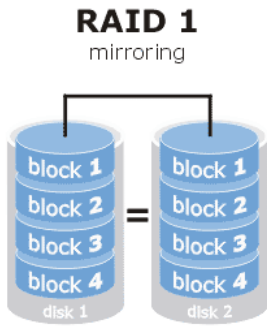


Fig. 6.RAID mirroring diagramme.

c) bad coding

The problems generated by any code of a certain application are hard to find and can be eliminated only in time. For this type of errors the solution is to have strict back-up of database and to update that application as quick as the resolving patch appear.

d) Database bug's

Database platforms are quite often improved by new general release or by small patches. A successful database on linux world is MySql that is quite secure and reliable.

The patches of the distribution must be installed on a daily bases to have a secure system.

Four layers of back-up

In a real time server environment based on Linux if we discuss about back-up we have to talk about a plan for every layer that is needed to be managed in order to have a full working server.

In real life I realized that the layers can be grouped as:

- ✓ Operating System of server with particular configuration files for every service/server system
- ✓ Database files
- ✓ Web Application files
- ✓ Log files

a) Operating System of server with particular configuration files for every service/server system

Usually the Operating System (OS) of a production server is kept frozen about new installations of additional software but open for security patches of existent services.

As a backup procedure for OS, I have implemented two methods for quick restore.

First method is to have a clone image for whole hard drive. I usually use Symantech Professional GHOST 11 (Fig. 7) or dd (1).

dd if=/dev/rdsk/dks0d1s0 bs=32k of=/dev/rdsk/dks0d2s0 (1)
(Example of dd backup)

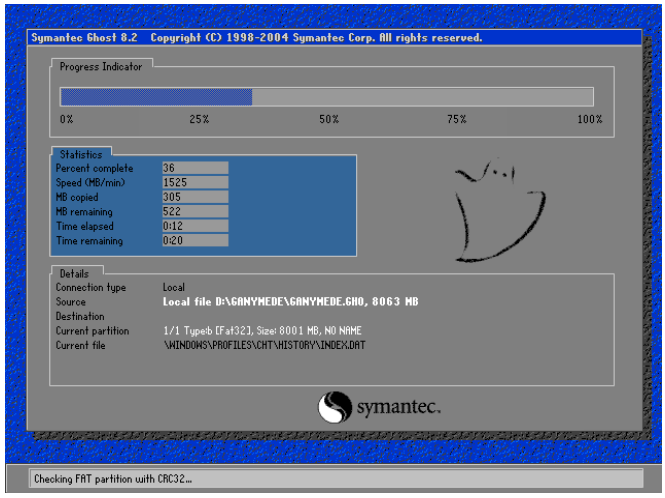


Fig. 7.Symantec GHOST clonning program

Let's say that this kind of back-up is done on a monthly basis.
Further more, I generate also an automated back-up on a cron schedule for every service personal config file by using tar (2).

tar –czpf /mnt/etc/etc.tar.gz /etc (2)

After the archive is generated an automated script verify if the connection with another server is stable and active (4) and save the archive on a date folder (3) for future storage.

data_noua=`date +%w_%Y`(3)

if !(mount -t cifs //192.168.X.X/docum /mnt/profback -o username=nume_utilizator, password=parola,rw)
then(4)
exit 1

b) Database files

In order to have a real back-up of the database, I had to make a couple of scripts that runs on a daily schedule, usually night a 4 o'clock.
There are two methods for a MySql database full back-up.
An sql dump (5) and full real archive of table files (6) of the database.
mysqldump -u ${mysql_user} -p${mysql_pass} --opt -A > ${date}_mysql_dump.sql
bzip2 -9 ${date}_mysql_dump.sql(5)

c*d ${nt_mysql}*
tar -czpf /tmp/site/bd_site_nt.tar.gz.(6)

The resulting files are automatically copied on a daily schedule basis on another server and from there are copied monthly on blue ray disks for archive and storage.

b) Web Application files

The web application files are the ones that interrogate the database and display the results. These files dynamically generates web pages for the real management of the integrated informatic system.

It must be mentioned that the updates are quite often available and the files are modified almost daily.

For that reason the back-up is done at night by a cron schedule. The script make an archive of all files and copy it on another server for safety on a date folder (7).

```
#!/bin/bash
mysql_user="nume_utilizator"
mysql_pass="parola"
http_base_dir="/var/www/localhost"
backup_dir="/mnt/backups" (7)
pwd=`pwd`
date=`date +%j_%d_%m_%Y`
random=`echo $RANDOM`
mkdir /tmp/${random}
cd /tmp/${random}
cd ${http_base_dir}
tar cvfp /tmp/${random}/${date}_http_dump.tar.
cd /tmp/${random}
bzip2 -9 ${date}_http_dump.tar
/opt/bin/rar a ${date}_backup.rar.
mv ${date}_backup.rar /mnt/backups/
chown -R coc:users /mnt/backups
rm -rf /tmp/${random}
```

d) Log files

With the log files we can discover if we have bugs in php files or in sql interrogation scripts etc. Also we can see if some hardware is not working properly.

The logs are kept only for a month older and for daily basis (8).

```
data_noua=`date +%w_%Y`
tar –czpf /mnt/log/log.tar.gz /var/log  (8)
```

The date folders are available for code developers in order to solve code bugs and errors.

If we have all the back-up's for the restore procedure we have just to take in reverse order the back-up plan.

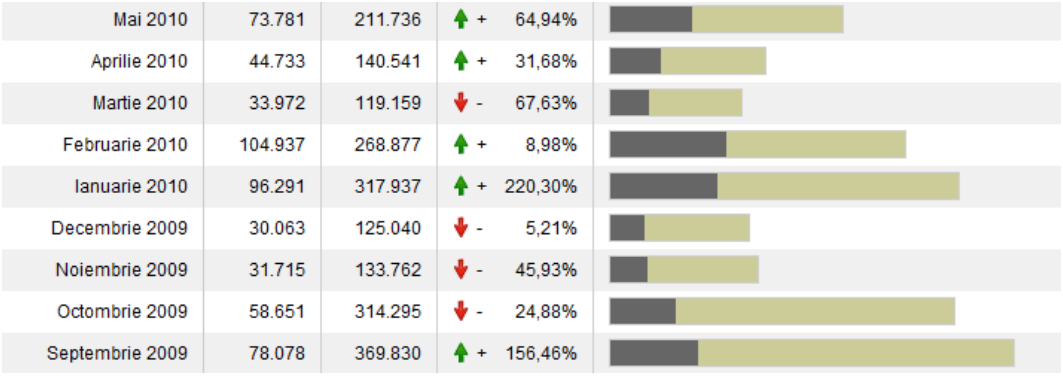
6. CONCLUSIONS

Prevention is the most important thing that can be done in an server environment. If a disaster appear only the back-ups can save the work of hundreds of people.

From my experience I have developed some schedule cron scripts that helps me in order to have all organized and in good conditions.

The results are quite encouraging because the production server of the integrated informatic system is customized by me from 2004 and everything works fine and data can be restored quickly.

This is why the users trust is growing and in February 2010 I had 104937 visits than January 2009 when I had only 22459 (Fig. 8).



Mai 2010	73.781	211.736	+	64,94%
Aprilie 2010	44.733	140.541	+	31,68%
Martie 2010	33.972	119.159	-	67,63%
Februarie 2010	104.937	268.877	+	8,98%
Ianuarie 2010	96.291	317.937	+	220,30%
Decembrie 2009	30.063	125.040	-	5,21%
Noiembrie 2009	31.715	133.762	-	45,93%
Octombrie 2009	58.651	314.295	-	24,88%
Septembrie 2009	78.078	369.830	+	156,46%

Fig. 8. Statistics over new visitors.

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