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AMENDING REGULATION (EC) NO.1346/2000 ON INSOLVENCY PROCEEDINGS - SOLVING DEFICIENCIES OR ATTEMPT TO RESCUE COMPANIES IN DIFFICULTY?

Gabriela FIERBINȚEANU[*]

Abstract

EC Insolvency Regulation claims, after more than 10 years, several changes imposed by some of the issues raised by the practice of its application but also by the need to promote economic recovery for enterprises in difficulty in the current economic crisis.

This paper analyzes the major segments of change and aims to determine whether these segments provide a coherent answer for the practical difficulties faced by the EC Regulation and whether extending its scope by revising the definition of insolvency proceedings may offer better chances of recovery for the enterprises in difficulty.

Keywords: *scope, insolvency proceedings, COMI, procedures publication, groups of companies.*

Introduction

Regulation no.1346/2000 on insolvency proceedings is no longer a subject of curiosity or debate. It passed this phase long ago during the years of application. The problems raised by the practice during those years are not some abstract scientific notes but real questions having roots in the economic reality.

The actual need to rescue enterprises during the current economic crisis claimed a new approach of the Regulation and for this purpose, all existing debates generated mature ideas for changing the face of the Regulation. As professor Bob Wessels observed in his article "Revision of the EU Insolvency Regulation: What type of facelift?"[1], "The regulation has laid a basis for cross-border insolvency solutions. Some parts in the basis should be renewed, other parts should be added to create a European house in which one can live with some comfort".

This paper analyses the major segments of change by comparison with initial recitals and aims to determine whether these segments provide a coherent answer for the practical difficulties faced by the EC Regulation and whether extending its scope by revising the definition of insolvency proceedings may offer better chances of recovery for the enterprises in difficulty.

The offer of the Regulation no 1346/2000 on insolvency proceedings

The Insolvency Regulation is the product of a hard and long negotiation process having in mind that a body of substantive insolvency Law at EU level is not possible to be achieved because of so many disparities between national insolvency laws. This reality was acknowledged also in the eleven Recital of the Regulation, being also the reason for not forcing the obvious truth by trying to introduce insolvency proceedings with universal scope in the entire Community.

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[1] Wessels Bob, "Revision of the EU Insolvency Regulation: What type of facelift?", article presented at the Conference "The future of the European Insolvency Regulation", 28 April 2011, Amsterdam, available at www.eir-reform.eu.

Objectives that justified an action at EU level establishing a procedure applicable directly in Member States were also described in the Recitals of the Regulation and can be resumed in three ideas:

- proper functioning of the internal market requires efficient and effective proceedings;
- the measures taken over insolvent debtor's assets must be coordinated;
- forum shopping is to be avoided.

We will summarize the content of the Regulation according to this ideas so that the next section of the paper regarding the changes to be made in the Regulation will be easier to follow.

The Regulation scope is to apply to collective insolvency proceedings involving the divestment of the debtor and the appointment of a liquidator (all the collective proceedings referred to are listed in Annex A of the Regulation). The international jurisdiction, as article 3 provides, can be divided into primary and secondary jurisdiction[2]. According to article 3(1), "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary" and article 3(2) "Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State".

Clarifying the scope of the proceedings, article 3(3) and article 3(4) qualified as secondary proceedings the proceedings opened subsequently under paragraph 2 of article 3, when insolvency proceedings have been opened under paragraph 1 of article 3 (as winding-up proceedings) and as territorial insolvency proceedings the proceedings referred to in paragraph 2 of the article 3 that are opened prior to the opening of main insolvency proceedings only "where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated" (article 4a) or "where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment" (article 4b).

The Regulation stated the need to coordinate parallel proceedings so the realization of assets and a fair distribution to creditors can be offered. Recital 12, 16, 17, 19 provide proofs of the intention to protect diversity of interests - the courts are enabled to order protective measures form the time of the request to open proceedings, preservation measures taken prior and after the commencement of the insolvency proceedings, protection of local interest, opening of secondary proceedings when the efficient administration of the estate requires in cases when the debtor's estate is complex.

Duty to cooperate and communicate information is a special but poor section in the Regulation (article 31) representing a transcription of common ideas about what cooperation is meant to do (liquidators in the main and secondary proceedings need to cooperate with each other, communicating information relevant to the other proceedings).

In the matter of forum shopping, the problems are strongly related with the concept of "center of main interests" (COMI), referred to in Recital 13 and in article 3 "In the case of a company or legal person, the place of the registered office shall be presumed to be the center of

[2] Omar, Paul J., The European insolvency regulation 2000 - A Paradigm of International Insolvency Cooperation,Bond Law Review, Vol15, Iss.1, Article 10, available at http://epublications.bond.edu.au/blr/vol15/iss1/100.

its main interests in the absence of proof to the contrary". This concept must be interpreted according to Recital 13 as "the place where de debtor conducts the administration of his interests on regular basis", being "therefore ascertainable by the third parties". As explained in Report on the Convention on Insolvency Proceedings by Miguel Virgos and Etienne Schmit in 1996, by using the term "interests" the intention was to cover all general economic activities not only commercial, industrial and professional activities so that the provisions could be applied also to the activities of private individuals and as a criterion for the cases where the interests include different types of activities run from different centers was used the term "main".

Time and reason for changes

In 2009, an estimated 1.7 million jobs were lost because of business failures, according to Creditreform Economic Research Unit. In 2010, some 600 companies in Europe went into liquidation every day, pointed EU Justice Commissioner in Dublin, September 2012. According to the data published by the Insolvency Proceedings Bulletin, in Romania, in the first 8 months of the year 2012, the insolvency procedure began for a number of 16.481 companies, 7.59% more than in the same period in 2011, concluded Coface Romania. These are only numbers but all are reflecting the same idea - difficult economic times. The reform of the Regulation must be accommodated not only to concepts but also to practical needs. Article 46 stipulates that no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation.

On the 23.03.2011, the Legal Affairs Committee held a workshop on "Harmonisation of insolvency proceedings at EU level" trying to identify the areas eligible for harmonization in national insolvency laws. The debated issues were structured into 4 categories to be considered in future legislative initiatives:

- harmonization where possible in the maters of opening insolvency proceedings, filling of claims, avoidance actions, liquidators, restructuring plan;
- revision of the Insolvency Regulation regarding COMI, definition of the establishment, duty of cooperation for liquidators and for courts;
- insolvency of groups of companies;
- creation of an EU Registry in order to find information about the opening of insolvency proceedings and the deadlines and the form requested to fill in the claims.

In one of the papers[3] issued by the Directorate General for Internal Policies after the workshop, we can find also the practitioners' point of view (INSOL Europe working Group) about the improvements needed to be made. In brief, the document added to the 4 presented categories some practical problems as follows: extension of the scope of the Regulation (including reorganization proceedings); recognition of the proceedings opened in the case when COMI is situated in a non EU country; the different treatment for pledged assets, having in mind article 5(1) regulating third parties right in rem; difficulty to challenge detrimental acts (article 13) by selecting the law applicable to the contract; effects of insolvency proceedings on lawsuits pending (coordination of article 4(2)f and article 15); the treatment of secured and non-secured claims in different insolvency proceedings regarding the same debtor; different contract approach when a territorial proceeding is opened, by contrast with the law of the Member State where the main proceedings are opened.

[3] "The revision of the EU insolvency regulation", Directorate General for Internal Policies, Policy Department C:Citizens"Rights and Constitutional Affairs, 2011, available at http://www.europarl.europa.eu/studies.

At this point it is interesting to mention some of the suggestion made by the Committee on Employment and social Affairs to be incorporated by the Legal Affairs Committee in the motion for resolution - greater harmonization of insolvency proceedings will promote equality and may have a positive impact on Member State's competitiveness and also on potential employment opportunities; in the context of economic crisis, the issue of insolvency must be considered also from an employment-law perspective; the Committee considers necessary to be increased the priority of employees' claims relative to other creditors' claims; the Committee underlines the need for the timeframes for main and secondary proceedings to be harmonized and shortened in order to offer legal certainty to paid employees.

The European Parliament Resolution of 15 November 2011, on the Report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs, requested the Commission on insolvency proceedings in the context of EU company law to submit one or more proposals relating to an EU corporate insolvency framework. The detailed recommendations as to the content of the proposals requested was structured in 4 parts[4], as follows (we will insist only on some content of the recommendation).

1. *Harmonization of specific aspects of insolvency law and company law*

Opening of insolvency proceedings – insolvency proceedings can be brought against natural persons, legal entities or associations or can concern assets of entities without legal personality (European Economic Interest Grouping); proceedings are opened if the debtor is insolvent or if the request is made by the debtor if debtor's insolvency is imminent; the Member States must regulate the situations when the debtor is liable in the event of non-filing or improper filing.

Recommendation on the harmonization of certain aspects of the filings of claims - creditors file in written form within a certain period of time and Member States are required to regulate this period of time within one to three months from the date of publication of the bankruptcy decision; the creditor must disclosure the documentation in support of the claim; after this period filings imply if verified but additional costs for the creditor.

Harmonization of avoidance actions

Harmonization in the field of qualification of liquidator

Harmonization of restructuring plans – "unimpaired creditors, or parties that are not affected by the plan, should not be entitled to vote on the plan or, at least, should not be able to impede it"; the plan must be approved before the relevant court.

2. *Revision of Council Regulation (EC) No 1346/2000* – scope of the Insolvency Regulation should be extended to insolvency proceedings in which the debtor remains in possession; a clear definition of COMI must be included as to prevent forum-shopping; the Insolvency Regulation should include also a definition of 'establishment' as "any place of operations where the debtor carries on a non-transitory economic activity"; the Insolvency Regulation should provide for an unequivocal duty of communication and cooperation between liquidators and between courts; timeframes should be shortened; "the review of the avoidance action rules should take into account that due to avoidance actions some healthy subsidiaries of a company are driven into insolvency".

3. *Insolvency of groups of companies* – The Member State where the operational headquarters of the group is situated must open the insolvency proceedings and a unique insolvency practitioner must be appointed; when ancillary proceedings are opened a committee should be formed to defend the interests of local creditors and employees; establishing rules to

[4] "Motion for a European Parliament Resolution" and "Annex to the Motion for a Resolution Detailed Recommendations as to the content of the proposal requested",2011, http://www.europarl.europa.eu.

facilitate the use of the forms of cooperation between courts and insolvency practitioners to coordinate the insolvency proceedings.

4. *The creation of an EU insolvency register* – In the context of the European e-Justice Portal was proposed an EU Insolvency Register containing the relevant court orders and judgments, the appointment of the liquidator, the contact details and the deadlines for filling claims.

At the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, Vice-President of the European Commission, EU Justice Commissioner, Viviane Reding affirmed, mentioning that the Regulation does not accommodate the concepts of rehabilitation and reorganization, the need for a fresh start that must allow the surviving of honest enterprises during the difficult economic conditions: "We must now focus on the fresh start that allows good honest businesses the chance to survive these difficult economic times. The Insolvency Regulation has proved to be very useful over the years, but it now needs a face-lift. First, we have to assess the efficiency of the current Regulation. To what extent has the initial objective been achieved, "to avoid forum shopping"? Second, we must ensure that the Regulation is consistent with other EU policies and legislation – I would mention developments in banking law, company law, and the rights of employees as well as entrepreneurs. Furthermore, we want to bring EU insolvency legislation in line with national best practices and the UNCITRAL Model Law on cross-border insolvencies. Third, the Regulation should enter into the internet era. With e-Justice, any court in the EU will have access to insolvency registers in other Member States. The Commission is supporting a pilot project with 9 Member States for the interconnection of these registers. Beyond that, the e-filing of claims would present advantages to liquidators and foreign creditors"[5].

The proposal amending Council Regulation (EC) No.1346/2000 on insolvency proceedings - is the future brighter?

On 12 December 2012 in Strasbourg, the European Parliament and the Council of the European Union adopted the proposal for a Regulation amending Council Regulation (EC) No.1346/2000 on insolvency proceedings. As seen from the brief presentation of the Regulation and from the detailed recommendations, there were identified some main shortcomings - the scope of Regulation does not cover pre-insolvency proceedings or the hybrid proceedings which leave the existing management in place; determining the competent Member State to open the proceedings is difficult because of the problems raised in applying COMI concept in practice; opening of the secondary proceedings that moreover is a winding-up procedure is an obstacle in restructuring of the debtor's activities; the rules on publicity of insolvency proceedings and on cooperation between courts or insolvency practicioners are not mandatory; lack of provisions for group insolvency.

In the next steps, we will try to follow the amendments in the new Regulation having in mind the presented shortcomings.

The *scope* of the Regulation was extended. Article 1 states now that the Regulation applies to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation, the debtor is totally/partially divested of his assets and a liquidator is appointed or the assets of the debtor are subject to court control (the

[5] Taking Insolvency Law into the 21 st Century to Ensure Justice for Growth, speech of Vice-President of the European Commission, EU Justice Commissioner Viviane Reding at the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, http://europa.eu/rapid/press-release.

initial content provided that the Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator).

COMI concept was also clarified and through this the jurisdiction of the competent court. The Recital 13 from the Regulation was deleted and new Recitals, 13a and 13b are inserted. The Recital 13 a states that "The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties."[6] The new introduced Recital 12 a gives the court the possibility to examine ex officio whether the debtor's centre of main interests or establishment is located within its jurisdiction and also the possibility to require additional evidence or give the debtor's creditors the opportunity to present their views (proofs) on the question of jurisdiction.

In the matter of *secondary proceedings*, which may damage sometimes the efficient administration of the estate, new Recital 19a introduces provision according to which the court opening secondary proceedings is able to postpone or to refuse the opening if it is not necessary for protection of the interests of local creditors (but only on liquidator's request). Another different approach can be found in the new recital 20 that brings on strongly the idea of coordinated concurrent pending proceedings that can conduct to an effective realization of the assets and also gives the liquidator in the main proceedings a dominant role through several possibilities for intervening in the secondary insolvency proceedings proposing a restructuring plan or a suspension of the relaxation of the assets.

Cooperation and coordination seemed improved in the new Regulation by the provisions of new article 31 – "Cooperation and communication between liquidators" extended with the help of two new articles - 31a, "Cooperation and communication between courts" and 31b – "Cooperation and communication between liquidators and courts". For business consideration, the main content of the decision opening the proceedings should be published at the request of the liquidator and if there is an establishment in the Member State concerned, the publication should be mandatory until a system of interconnection of insolvency registers, is established, composed of the insolvency registers and the European e-Justice Portal which shall serve as central public electronic access point to information from the system.

A new chapter - IVA – "Insolvency of Members of a Group of Companies" was introduced as a response to the need of coordination of the insolvency proceedings concerning different members of the same group of companies. The new Regulation defines in Article 2 the concept *group of companies* as a "number of companies consisting of parent and subsidiary companies" and parent company as a company which has a majority of the shareholders' or members' voting rights in another company (a "subsidiary company") or is a shareholder or member of the subsidiary company and has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary or exercises a dominant influence over the subsidiary company. Referring to the opening of the procedure for several companies belonging to a group Principle 20b stipulates though that the "introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open

[6] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation(EC)No.1346/2000 on insolvency proceedings, http://ec.europa.eu.

insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of these companies is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same liquidator in all proceedings concerned".

Conclusions

Premises are good and as we can see, the aim of the proposal is not only to solve the problems but also to modernise the provisions of the insolvency Regulation no.1346/2000 but the truth is that only the economic crisis opened the eyes. Many solved problems are old facts spoken about since Virgo-Schmit report in 1996. The idea to help continuation of business through pre-insolvency and hybrid proceedings although for a long time "many policies have focused on the necessity to "produce" more entrepreneurs and not so much on the necessity to preserve the stock of entrepreneurs"[7], is not a new born, it represents a change made in French law since last century. Cases as Rechtsbank's Gravenhage, when the court decision determined Dutch entrepreneur to apply for insolvency and have his business liquidated because the debt reorganisation procedure was not covered by the EIR[8] or the apparition of the risk in the matter of mutual trust between courts, as we can follow in the ruling of CJEU in the Eurofood case (Case C-341/04, Eurofood IFSC Ltd) are not abstract elements but realities. Also, postponing the creation of a set of rules for groups of companies, for different political or practical reasons, was not a very good answer to the business evolution as professor Bob Wessels showed[9] "The lack of provisions concerning multinational groups of companies has been classified as an omission. However, not all critics take into account the fact that cross-border insolvency within Europe was discussed for over forty years before the Regulation finally enacted. The discussions concerned complex problems. At the time, the decision to postpone "group insolvencies" to a later date may have been considered both politically and practically prudent. Furthermore, the Regulation reflects thinking of the 1980s and 1990s, when the phenomenon of groups of companies was not as current as in the first decade of the 21st century and, moreover, in European domestic insolvency laws reorganisation or rescue of companies was not the prevailing option". The notice that "technological issues, procedural issues and substantive issues of the Regulation are mutually dependent"[10] has a correspondent in the operational objectives of the amendments as are presented in the Commission Staff working Document, Impact assessment, accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012[11]: regulate pre-insolvency and hybrid proceedings and clarify the rules relating to jurisdiction for opening insolvency proceedings without prejudice of the freedom of establishment in the European Union; reduce the number of cases in which determining the jurisdiction raised problems and also ensuring the possibility for judicial review in this cases; reduce the number of secondary proceedings;

[7] Report of the expert Group, "A second chance for entrepreneurs - Prevention of bankruptcy, simplification of bankruptcy procedures and support for a fresh start", 2011, European Commission, Enterprise and Industry Directorate - General, http://www. ec.europa.eu.

[8] Rechtsbank's Gravenhage, First instance court, Netherlands, judgment of 10 June 2010, www.insolvencycases.eu.

[9] Wessels Bob, Multinational Groups of Companies under the EC Insolvency Regulation: Where Do We Stand? 2009; www.bobwessels.nl.

[10] Stomel, Alan.J, Answering the Call of the European Court of Justice in Eurofoods a Proposed Package of Due Process Rights with a View Toward the 2012 Revision of the European Insolvency Regulation, 2011, available at http://www.ies.be.

[11] Commision Staff working document, IMPACT ASSESMENT, Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, 2012, available at http://register.consilium.europa.eu.

improved coordination between courts and practitioners; introducing mandatory publication of relevant decisions in each Member State so that transparency is increased; improved access to justice for SMEs through measures that facilitate the lodging of claims; introducing a legal framework for group insolvency.

Until the Regulation shall apply we can only trust the desire of improvement and continue to analyse in details in further materials each proposed action generally introduced in this paper.

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NEW TENDENCIES REGARDING SAME-SEX MARRIAGE IN THE MEMBER STATES OF THE EUROPEAN UNION: – A brief inside and outside perspective –

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Abstract

Sexual orientation discrimination has been recently outlined within the Plenary Session of the European Parliament that took place in Brussels, on 24th May 2012 as a priority in the fight against discrimination of all kind, making a "call on EU member states to consider giving access to cohabitation, registered partnerships or marriage to lesbian, gay, bisexual and transgender (LGBT) people". Taking this statement as a starting point, this paper aims first to briefly analyse the European Union's legislation defending sexual orientation discrimination and its limits. After that, a comparison between the Spanish and Romanian legislations will be made, choosing thus two countries within the EU that have very different paths and views in this matter, finally assessing the recent Tribunal Constitucional judgment regarding the constitutionality of same-sex marriage. In the same line our analysis will also focus on giving an overview of the EU panorama focusing on those countries that have extreme and opposite views about the matter. This study would not be complete without taking into account the contrary situation that is taking place in certain non-Member States of EU such as: Ukraine, Russia or Moldova. This fact was also highlighted by the European Parliament in the last Plenary Session saying that "in the European Union [and in other European states, referring to the recent situations occurred in Ukraine, Russian Federation or Moldova], the fundamental rights of LGBT people are not yet fully upheld".

Keywords: *European Union, same sex marriage, sexual orientation discrimination, Treaty of Lisbon.*

Introduction

Same-sex marriage[1] is legal in fourteen countries in the world: Argentina (2010), Belgium (2003), Canada (2005), Iceland (2010), Netherlands (2001), Norway (2008), Portugal (2010), South Africa (2006), Spain (2005), Sweden (2009), Denmark (2012), Uruguay (2013), New Zealand (2013) and France (2013). It is also legal in twelve states of the United States[2], as well as the district of Columbia and the native-American tribes of Coquille, Little Traverse Bay Bands of Odawa Indians and Suquamish; in some of the states in Mexico (Mexico D.F., Oaxaca and Quintana Roo); and in fourteen out of twenty-six Brazilian states[3].

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[1] This term (same sex marriage) will be used regarding lesbian and gay marriages, as is the term used in the global academic world.

[2] Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. GayMarriageProCon, "Should gay marriage be legal?" http://gaymarriage.procon.org/, accessed 20 May 2013.

[3] EFE Agency, "México DF legaliza el matrimonio homosexual", *El País*, December 22, 2009, accessed March 11 2013, http://elpais.com/diario/2009/12/22/sociedad/1261436409_850215.html. EFE Agency, "Solo en once países del mundo está legalizado el matrimonio homosexual", *Rtve.es*, November 6, 2012, accessed March 11 2013,

There are also some states that recognize same-sex marriage but do not carry them out, such as: the states of Brazil which do not perform same-sex marriage, Aruba, Curaçao and St Martins (which recognizes marriages carried out in the Netherlands), Israel, Mexico (for marriages taken place in Mexico) and some US states[4]. Outside the European Union (EU), it is being studied in many places such as Colombia[5] or Brazil. In both states right now it is possible to registry same sex marriages in front of a public notary following important sentences in both countries but there is not an approved law allowing it yet. In Nepal it remains in agenda but the future of the law remains uncertain.

Meanwhile, in the EU Member States a heterogeneous map is being drawn in the issue of same sex marriage. On the one hand, more than a half of the countries that perform same-sex marriage in equality with the heterosexual ones in the world are member states of the EU. On the other hand, there are others that have modified their laws in order to state clearly that marriage can only be performed between a man and a woman.

The EU itself has made, by ways of producing laws (such as 2000/42[6] and 2000/78 Directives[7]) which form part of the *acquis communautaire*, efforts to eradicate sexual orientation discrimination but harmonization of this issue remains undone.

An analytical description of the issue will be offered, describing the efforts made by the EU in this respect via the primary law, secondary law and multiple resolutions from the European Parliament or statements from the heads of the institutions.

Also, an analysis of the Spanish and Romanian situation will be given. The choice of these case-studies was made based in the different situations they are living towards same-sex marriage. Both are Members of the EU, but whereas Spain entered in 1986, Romania joined in 2007. Both have applied the above mentioned Directives in their territory but the outcome of that application has been very different. Spain approved same-sex marriage in 2005, but it was claimed unconstitutional from one of the political parties (the right-winged *Partido Popular*) and its future remained uncertain until the Constitutional Tribunal sentence reaffirmed its constitutionality last November. In Romania same-sex couples do not have the right to marry nor to civil unions.

After the analysis of the two specific cases, an overview of the issue in the EU will be offered, stating which countries have already approved same-sex marriage, which have it in the agenda and which ones have made changes in their constitutions so that heterosexual marriage is reinforced. A look to the Ukrainian, Russian and Moldavian situations will be offered so as to compare the situation inside and outside the borders of the EU, where strong anti-homosexual movements are taking place. Finally, some concluding remarks will be given.

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http://www.rtve.es/noticias/20121106/solo-once-paises-del-mundo-esta-legalizado-matrimonio-homosexual/573157.shtml.

[4] Freedom To Marry, "The Freedom to Marry Internationally", December 2012, accessed March 11, 2013 http://www.freedomtomarry.org/landscape/entry/c/international; USA Today, "Israeli high court orders gay marriage recognition" November 21, 2006, accessed March 11 2013, http://usatoday30.usatoday.com/news/world/2006-11-21-israel-gay-marriage_x.htm.

[5] As for 25th of April 2013 Colombia's parliament rejected same sex marriage law, although, as stated, in 2007 approved the possibility following a Constitutional Court ruling. It gives same sex marriages similar inheritance, pension and social security rights that heterosexual marriages do.

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in Official Journal of the European Union, L 180 of 19/07/2000.

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, published in Official Journal of the European Union, L 303 of 02/12/2000.

1. Anti-discrimination laws in the EU regarding sexual orientation

The principle of equal treatment constitutes a fundamental value of the European Union, first established as a principle in trade law, specifically in the context of the Economic liberties and clearly protected for first time in the Treaty establishing the European Economic Community (1957), by requiring that men and women should receive equal pay for equivalent work[8].

Regarding the principle of equal treatment, the European Union made in time significant progress in achieving gender equality[9], in recognising the principle of non-discrimination based on sex, race, nationality etc. and in banning these forms of discrimination. In this context, it is worth to mention that former Article 13 of the Amsterdam Treaty (1997) represents a milestone and was the first time sexual orientation discrimination was introduced as a protected ground in a EU Treaty[10]. This article was subsequently modified by the Nice Treaty (2001) to allow for the adoption of "s*timulus measures*" in order to support initiatives of each member state. This way the EU aims to show a coherent and integrated focus in the fight against discrimination, thus recognizing areas in which discrimination is common in order to combat it. In the same way, the wording lets the door open to legislate about situations of multiple discrimination[11].

Discrimination was also taken into account when drafting the European Constitution which finally was rejected, establishing the fight against discrimination (in general, not establishing a list of protected grounds, thus not including sexual orientation specifically) a priority, a fundamental objective in the EU.

In December 2000, the Charter of Fundamental Rights of the European Union was adopted, but won't be enforceable until 2009 along with the Treaty of Lisbon. The 3rd chapter of this document is dedicated to Equality and contains 7 articles (20-27). Article 21st is the one containing specific provisions about discrimination on the ground of sexual orientation discrimination[12]. Much more, according to the Lisbon Treaty, the Union promotes equality (Article 3 of TEU) and combats inequalities through the actions it implements (Article 8 of TFEU).

Also in 2000 two important Directives[13] were approved in the area of non-discrimination: Council Directive 2000/78/EC[14] establishing a general framework for equal treatment in employment and occupation (hereinafter the "Employment Equality Directive") and Council Directive 2000/43/EC[15] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in the following fields: employment, education, social security, health care and access to goods and services (Known as "Race Equality Directive").

[8] Article 119 of the Rome Treaty, 1957: Sex Equality was regarded as a principle to guide the European Economic Community.

[9] M. Koutselini, S. Savva, And S. Agathangelou, "Indicators of Gender Mainstreaming in European Union and Comparison with Genders' Depictions in Cyprus Mass Media", University of Ciprus (2007) 1, accessed March 11 2013, www2.ucy.ac.cy/~currinst/cur/pdf/.../sinedrio_patra_arthro_final.doc.

[10] "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament [to] take appropriate action to combat **discrimination based on** sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**".

[11] Jone Itxaro Elizondo Urrestarazu, "Discriminación racial y de origen étnico en la Europa de los Derechos", *Revista de Derechos Fundamentales. Universidad Viña del Mar,* no.6, (2011), 90-91.

[12] Article 21 of the Charter of Fundamental Rights of the European Union: "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

[13] Report *"Discrimination in the European Union"*, January 2007, accessed March 11 2013, p.4, http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_en.pdf.

[14] See footnote 9.

[15] See footnote 8.

Despite this variety of provisions, only the Employment Equality Directive mentions sexual orientation but focused solely in discrimination in employment and occupation. As a matter of fact, in line with the habitual "prudence" of the EU institutions when sensible matters are being discussed, the preamble of the Directiveit is expressly mentioned, that none of the provisions shall be interpreted as to oblige the Member States to change the Civil and Family Law. These two directives were complemented by the creation of a Community action programme to combat discrimination[16] with a budget of 100 million Euros between the years 2001-2006 including sexual orientation discrimination.

The European Parliament on the other hand has been much more clear in its approach to this topic and has adopted a great number of resolutions since the '90s regarding sexual orientation discrimination accepting same-sex marriage and encouraging Member States as well as the European institutions to take steps forward the recognition of same-sex unions, including marriage. Although not legally-binding the resolutions from the EU Parliament are seen as a strong political tool.

The first resolution adopted in this regard was the Resolution on equal rights for homosexuals and lesbians in the EC (A3-0028/94) the 8 February 1994[17] which aimed to finish the prohibition on same-sex marriage or provide access to equivalent regimes. It was based in what is known as the "Roth report" and asked for a Directive which should legislate about (among others) marriage equality for same sex couples[18].

The 3rd of July of 1997 a written question was presented to the Commission asking why there was still no Directive on the issue, to which the Commission answered that in the time the Roth report was adopted, the Community Treaties did not "bestow on the institutions any specific powers for tacking discrimination based on sexual orientation"[19]. The answer also stated that the Treaty of Amsterdam was going to give the Community powers in that respect. The Commission did not give any specifics about a possible Directive in this respect though, and the only Directive approved that tackled sexual orientation discrimination has been 2000/78 so far, which stated, as mentioned before, specifically that "(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon"[20].

Among other resolutions it is remarkable that in December 2008, the European Parliament voted 401 – 220 in favour of a report which calls for same-sex marriage and civil unions to be

[16] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), *Official Journal of the European Union* L 303, 2 of December 2000, p. 23–28.

[17] Resolution A3-0028/94 of the European Parliament on equal rights for homosexuals and lesbians in the EC, adopted the 8th of February 1994, published in the *Official Journal of the European Communities* C 61/41 of the 24th of February 1994, p.40.

[18] Believes that the Recommendation should, as a minimum, seek to end:

- all forms of discrimination in labour and public service law and discrimination in criminal, *civil*, contract and commercial law;

- the barring of lesbians and homosexual couples form marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships;

- any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children (italics added by author).

[19] Written question no. 2307/97 by Laura González Álvarez, Angela Sierra González, María Sornosa Martínez, Antoni Gutiérrez Díaz to the Commission. Establishment of a directive on equal rights for homosexuals and lesbians in the EC, made on 3 July 1997, published in the *Official Journal of the European Communities* C 76 of 11March 1998, p. 94.

[20] See note 9, pp. 16 – 22.

recognised across all EU states and at the same time, while adopting a Report on the Situation of Fundamental Rights in the EU recommended mutual recognition of same-sex partnerships[21].

Plenary Session of the European Parliament that took place in Brussels, on 24th May 2012 outlined as a priority in the fight against discrimination of all kind, making a *"call on EU member states to consider giving access to cohabitation, registered partnerships or marriage to lesbian, gay, bisexual and transgender (LGBT) people*"[22].

2. Situation in the europeanunion member states

A. Spain

Same sex marriage came as an electoral promise of the socialist government of Jose Luis Rodriguez Zapatero. After winning the elections in 2004 the socialist government passed the law[23] that allowed same-sex marriage in the *Congreso de los Diputados* and in the Senate the 30th of June 2005, making Spain the third country in the EU and the world allowing same-sex marriage.

The socialist group found a lot of opposition (even if a 56.9% of the population approved the policy-change[24]) from social groups linked in their majority to the Catholic Church (Bishops and *Foro de la familia*[25] mostly) and the right-winged party *Partido Popular* (PP). Indeed this last political party filed an appeal claiming the unconstitutionality of the law in September 2005.

There were no political changes until November 2011, moment in which the right-winged Partido Popular won the elections with an absolute majority and fear came that they would overrule directly the law now they were in charge and had the necessary power to do so. Because of that spread fear the new-elected government had to state that they would respect what the Constitutional Court would rule about this issue[26]. Until that moment, 22.442 same-sex weddings were at stake[27].

[21] Recommendations 75, 76 and 77 of the Report of the 5th December 2008 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)) for the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2008-0479&language=EN, accessed March 11 2013.

[22] "Parliament strongly condemns homophobic laws and violence in Europe" in the Plenary Session Justice and Home Affairs, on 24th of May 2012, accessed March 11 2013, http://www.europarl.europa.eu/news/en/pressroom/content/20120523IPR45696/html/Parliament-strongly-condemns-homophobic-laws-and-violence-in-Europe.

[23] Law 13/2005 of the 1st of July 2005 by which the Civil Code in matters of law to contract marriage is amended, published in the Official Journal (BOE) no. 157 of the 2nd of July 2005, pp. 23632 -23634.

[24] When asked about Civil marriage for same-sex couples by the CIS a 56.9% answered in favour, a 32.3% against and a 10.9% did not respond. Centro de Investigaciones Sociológicas, Study on "Opiniones y actitudes sobre la familia" no. 2578 October-November 2004, accessed March 11 2013, p.16, http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2560_2579/2578/Es2578.pdf.

[25] *Foro de la Familia* is an association self-declared defendant of the family. accessed March 11 2013, http://www.forofamilia.org/nosotros/quienes-somos/spanish-family-forum/.

[26] La Vanguardia, "El Gobierno esperará a la sentencia del TC para decidir sobre el matrimonio homosexual", November 6, 2012, accessed March 11 2013, http://www.lavanguardia.com/politica/20121106/54354891548/gobierno-fallo-tc-decidir-matrimonio-gay.html.

[27] Javier Garcia Pedraz and Emilio de Benito, "Siete años, 22.442 bodas y un recurso contra el matrimonio gay", *El Pais*, November 6, 2012, accessed March 11, 2013 http://sociedad.elpais.com/sociedad/2012/07/13/actualidad/1342215460_536337.html.

On the 6th of November 2012, the Sentence of the Constitutional Tribunal[28] came out, rejecting any kind of unconstitutionality in the law. The tree conservative judges out of 8 that voted against the sentence wrote dissenting votes.

The appeal petition was based in 8 reasons of unconstitutionality[29], the central one being the statement by PP that the wording of article 32 of the Spanish Constitution did not permit such a thing as same-sex marriages[30].

The adoption of the Law meant a change of some of the words used in secondary legislation (man or woman changed by the spouses, for example), that the PP interpreted as by changing some words, a mayor change was taking place including the total change and de-naturalization of the marriage institution.

For proving the law was unconstitutional, they claim a breach in article 32 of the Spanish Constitution of 1978. The article states as follows:

1. Man and woman have the right to marry with full legal equality.

2. The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects[31].

In this respect, the sentence stated that the article permitted a margin for interpretation, and even if it same-sex marriage was not probably what the legislator had in mind at the time of writing it, it provided the necessary margin not to have to change the Constitution for the adoption of same-sex marriage. That is to say that it did not implicitly bring same-sex marriage but neither excluded it of the marriage institution. The article was phrased like that due to the discriminatory situations lived by women during the Franco dictatorship[32], in order to prevent this situation from happening again this was a way of highlighting the equality between man and woman once more in the constitutional text.

At the same time, the Tribunal defended that the law, as well as the society was a "living tree" that required an evolutionary interpretation.

Spain was also the first country in the world permitting adoption in equality to heterosexual couples. In the same sentence we have mentioned in the previous paragraphs, the Tribunal stated that since same-sex marriage was equal to heterosexual marriages they had the same right to access the adoption of children. The Tribunal stated that the child's interest had to prevail at all times, thus every case had to be studied in its own, but that there was no reason of unconstitutionality[33].

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[28] Sentence 198/2012 of the 6th of November 2012. Unconstitutionality Appeal 6864-2005. Filed by more than fifty members of the Popular Group of the Congress in relation to Law 13/2005 of July 1, by which the civil code in matters of law to contract marriage is amended. Institutional guarantee of marriage and protection of the family: constitutionality of the legal regulation of marriage between persons of the same sex. Published in *the Official Journal (BOE)*, no. 286, 28 of November 2012, sec. TC., pp. 168-219.

[29] Breach of articles: 9.3, 10.2, 14 (in relation to articles 1.1 and 9.2), 32, 39.1, 2 and 4. 53.1 (in relation to article 32) and 167 of the Spanish Constitution.

[30] Fundamentos de Derecho (the held, unofficial translation) no.6 of the Sentence 198/2012.

[31] English version of the Spanish Constitution, accessed March 11 2013, available in http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

[32] Elvira Aranda Alvarez, 2Sinopsis del artículo 32 de la Constitución española", updated by Sara Sieira, on January 2011, accessed March 2013, http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=32&tipo=2.

[33] C. Guindal, "El TC legaliza también la adopción de menores por los matrimonios gay", *El Confidencial*, November 6, 2012, accessed March 11 2013, http://www.elconfidencial.com/espana/2012/11/06/el-tc-legaliza-tambien-la-adopcion-de-menores-por-los-matrimonios-gay-108723/#, and Sentence 198/2012 See footnote 30.

Still, there are voices claiming that marriage should only be called like that when it is formed between a man and a woman, the last case being the Minister of Home Affairs (Ministro del Interior) Jorge Fernández Diaz stated in March 2013 that the "survival of the species won't be guaranteed in the case of same-sex marriages", declarations that have been criticised even from his own political party.

B. Romania

According to the European surveys[34] Romania is "guilty" of having one of the strongest negative attitudes towards the Lesbian, Gay, Bisexual and Transsexual (LGTB for now on) community in the European Union. This attitude is contrary to the European values of protecting human rights that include the rights of the LGBT community, values which have been made their own by Romania when it joined the EU in 2007. With this occasion, the country was asked by the European Union legislation to "facilitate" the recognition of the same-sex relationships registered in other EU member states (e.g.: same-sex marriage, civil unions or domestic partnerships) and to eliminate as much as possible the discrimination based on sexual orientation at national level.

There are a range of positive aspects to be mention in which Romania has made significant progress as regards the LGBT rights legislation since 2000 when it fully decriminalised homosexuality: it has introduced and enforced wide-ranging anti-discrimination laws, equalised the age of consent and introduced laws against homophobic hate crimes. Also at the institutional level a new body in charge of analysing all the forms of discrimination has been formed, namely National Council for Combating Discrimination (CNCD). This council has the power to impose fines when discriminatory situations take-place, both to natural and legal persons and includes the protected ground of sexual orientation[35].

But we should highlight the fact that even after 6 years from the Romanian accession to the EU this topic is still a very sensitive subject to be discussed and analysed either by the NGOs for protection of human rights and in particular of LGBT rights or by the politicians.

The institutional and legislation modifications occurred in the last years have allowed the LGBT community to become more visible, for example by organizing social and cultural events. However, from the legal point of view there are still few achievements in this field, since the Romanian legislation does not recognise yet the partnership or same-sex marriage. Furthermore, in 2009 the Romanian Parliament decided to change the words "between spouses" from the Family Code, considered to be too vague into more concrete terms: *"between a man and a woman"*, banning, least for the next couple of years, the possibility of future same-sex marriages[36].

This rigid attitude of the Romanian authorities and *expressis verbis* provision into the new Civil Code that the marriage will only be that between a man and a woman has been considered to be discriminatory by the national and international NGOs (e.g.: group ACCEPT, the International Gay and Lesbian Human Rights Commission, and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) which

[34] Danish Institute For Human Rights, COWI, *Report: The social situation concerning homophobia and discrimination on grounds of sexual orientation in Romania*, European Union Agency for Fundamental Rights (FRA), March 2009, accessed March 11 2013, p. 11. http://fra.europa.eu/sites/default/files/fra_uploads/389-FRA-hdgso-part2-NR_RO.pdf.

[35] Consiliul National Pentru Combaterea Discriminarii, accessed March 11 2013, http://www.cncd.org.ro/?language=en.

[36] Rex Wockner, "Romania enacts discriminatory laws", *Asylumlaw*, August 10, 2009, accessed March 11 2013, http://www.asylumlaw.org/docs/showDocument.cfm?documentID=7959.

required for measures to be taken in order to eliminate this discrimination from the national legislation and harmonizing with the European one in the field[37].

Also, there were three articles of the mentioned new Civil Code that were regarded as discriminatory by the European Network of Legal Experts in the Non-discrimination Field: Article 277 (prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages registered in other countries for Romanians), Article 462 (the prohibition of adoption by two persons of the same sex), and Article 258 (definition of family as marriage between a man and a woman)[38].

Taking into consideration the above mentioned, a similar situation can be noticed as regards the same-sex partnerships or marriages celebrated abroad by the Romanian citizens, which are not recognised by the Romanian authorities, except for the partnerships or same-sex marriages made abroad where one or both partners are foreigners and have a valid partnership in their Member State of origin. In this context, the couple can be registered as such on the Romanian territory[39].

C. Overview of the situation regarding same-sex marriage in the other Member States of the EU

Referring to same-sex marriages in the EU a really heterogeneous map can be drawn. Out of the 14 states that perform same-sex marriages in the world, 7 are members of the EU. In this part we will have an overview of the situation of same-sex marriage in the EU, showing which states have already approved, in which it is being discuss right now and which states have a constitutional provision stating that marriage is between "a man and a woman" exclusively, what has come to be known as a constitutional ban.

As it has already been mentioned, there are seven EU member states that have approved same-sex marriage: The Netherlands, Belgium, Denmark, Spain, Sweden, Portugal and France. There are other member states which are currently discussing the issue: England and Wales, Ireland, Germany, Luxemburg, Finland or Andorra (even if it is not a member state of the EU it has a very special relationship with the EU).

In Ireland it seems movements in favour of same-sex marriage are driving the incorporation of the issue in the agenda of the government. In the case of Finland, it seems that for the moment there will be no change in the actual law, although it was one if the first states that approved registered partnership. On the other hand there are some states which have recently introduce modifications in their constitutions in order to reinforce the statement that marriage is between a man and a woman, which are Latvia, Lithuania, Poland, Hungary and Bulgaria.

The modification of Family Law contained usually in the Civil Code has been done both by introducing the possibility of different and same-sex marriages or by making the provision gender-neutral, thus not stating the sex of the spouses.

The first EU state member to approve same-sex marriage was The Netherlands[40] in a law Passed on the 7th of December 2001. This made the Dutch the first ones to have the right to same-sex marriage. Following the conclusions of a special commission created for the study of the issue

[37] Ibid.

[38] Romanita Iordache, "News report from the 28th June 2009", *European Network Of Legal Experts In The Non-Discrimination Field*, June 28 2009, accessed March 11 2013, p.1, http://www.non-discrimination.net/content/media/RO-15-RO-FLASH%20REPORT_New%20Civil%20Code%20adopted.pdf.

[39] See note 36, p.10.

[40] The New York Times, "Same-sex Dutch couples gain marriage and adoption rights", December 20 2000, accessed March 11 2013, http://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html.

in 1995, and after approving gay civil-unions in 1998, the final draft of the legislation was presented in September 2000 and was adopted by an overwhelming 107 votes against 33 in the House of Representatives[41].The main article changed in marriage law stated that "A marriage can be contracted by two people of different or the same sex"[42].

Belgium, the second state member to approve same-sex marriage did on the 30th of January 2003. The next state to approve same-sex marriage was Spain in 2005, whose case has been studied in depth in another part of this article. In Sweden, same-sex marriage law passed the 1st of May 2009, followed by the decision of the church of Sweden of also marrying same sex couples the 1st of November 2009 by a 70% of the votes.[43]

Portugal passed the Law 119/XI[44] allowing same-sex marriage in January 2012 after an intense social debate. Francisco Assis, socialist member of the Parliament stated that "The living world has defeated the prejudice one"[45].

Denmark adopted legislation allowing same-sex marriage in June 2012, but since 1989 couples of the same sex could access registration as a couple with similar juridical effects as marriage (not in some aspects regarding adoption the parental rights o assisted reproduction). The change in the law has been done by making gender neutral the bill allowing gay marriages (both church and civil registry weddings)[46].

France was the last EU member state to approve same sex marriage. Like in the case of Spain it was an electoral promise of the socialist party, in this case ruled by François Hollande and has been a really controversial law that has moved a great number of French citizens both against and in favour of the law, followed by incidents and violence against the LGTB community. In spite of these attitudes approval rate (in August 2012) was of 65% for same sex marriages and 53% for allowing same sex unions to adopt children[47]. The law passed the 23rd of May 2013 but it was not signed by the President until the Council ruled it was a constitutional the 17 of May 2013.[48]

Some other EU member states have the issue on the political and legislative agenda or are working on it. These are: England and Wales (expected this year), Scotland, Germany and Ireland. It is still in Finland's agenda even if it was but put aside the 20th of February 2013th, when the Finnish Parliament's Legal Affairs Committee voted narrowly to reject a gender-neutral marriage

[41] BBC, "Dutch legalise gay marriage", September 12 2000, accessed March 11 2013, http://news.bbc.co.uk/2/hi/europe/922024.stm.

[42] Article 30 in the marriage law originally: "Een huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht." Taken from A. Llanza I Sicart, and S. Navas Navarro, Matrimonio homosexual y adopción: Perspectiva Nacional e Internacional. Madrid: Editorial Reus, 2006, p. 298.

[43] AFP, "Sweden's Lutheran church to celebrate gay weddings", October 23 2009, accessed March 11 2013, http://www.google.com/hostednews/afp/article/ALeqM5gBRXyAD2aAX4i7H5M0LujkDR0RhQ.

[44] Law 119/XI, that creates and gives legal protection to registered civil unions between persons of the same sex. Publicated in the *Official Journal* the 7 of January 2010. Available in http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=35011.

[45] "El mundo de la vida ha vencido al mundo de los prejuicios", stated Francisco Assis in Francesc Relea, "Portugal aprueba el matrimonio homosexual tras un intenso debate", *El Pais*, January 8 2010, accessed March 11 2013, http://sociedad.elpais.com/sociedad/2010/01/08/actualidad/1262905216_ 850215.html.

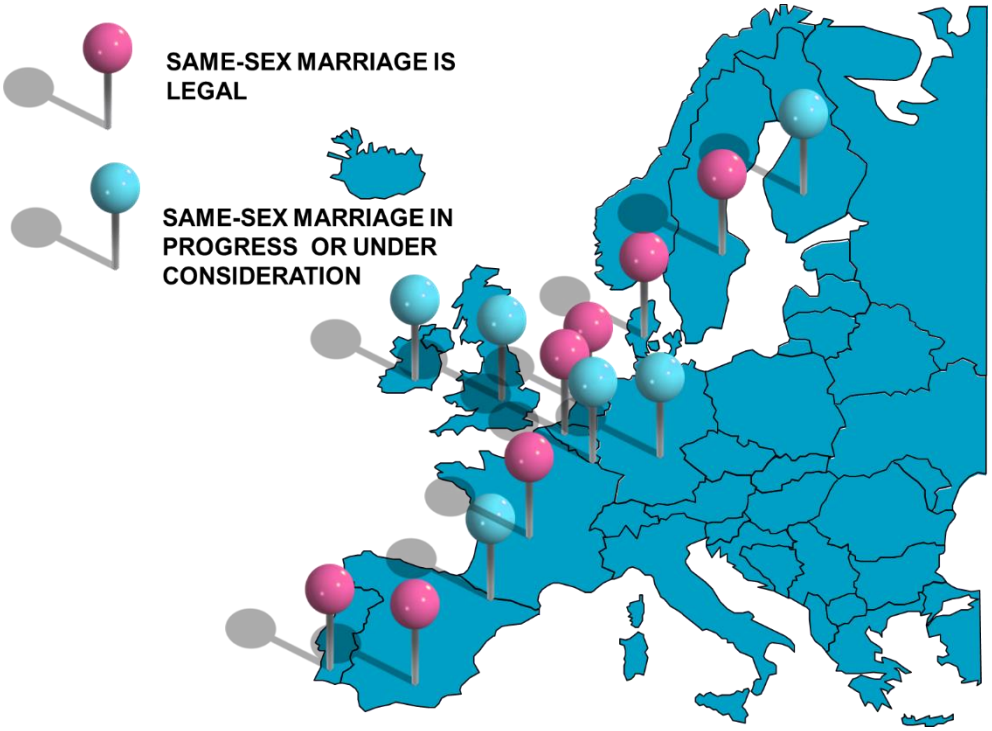
[46] BBC, "Denmark approves same-sex marriage and church weddings", June 7 2012, accessed March 20 2013, http://www.bbc.co.uk/news/world-europe-18363157.

[47] Xavier Heraud, "Sondage: 65% des Français-e-s sont favorables à l'ouverture du mariage pour les homos", August 15 2012, accessed March 20 2013, http://yagg.com/2012/08/15/selon-sondage-ifop-65-des-francais-sont-favorables-a-louverture-du-mariage-pour-les-homosexuels/.

[48] Leigh Thomas, "France's Hollande signs gay marriage law", *Reuters*, May 18 2013, accessed May 18 2013, http://www.reuters.com/article/2013/05/18/us-france-gaymarriage-idUSBRE94G0JH20130518.

bill proposed by National Coalition Party minister Alexander Stubb and others, meaning it will not be brought before the full legislature for consideration. Slovenia asked their citizens via referendum the 25th of March 2012 only a 26% of the population voted and the results where 55% against 45%.[49]

Map: Made by the author

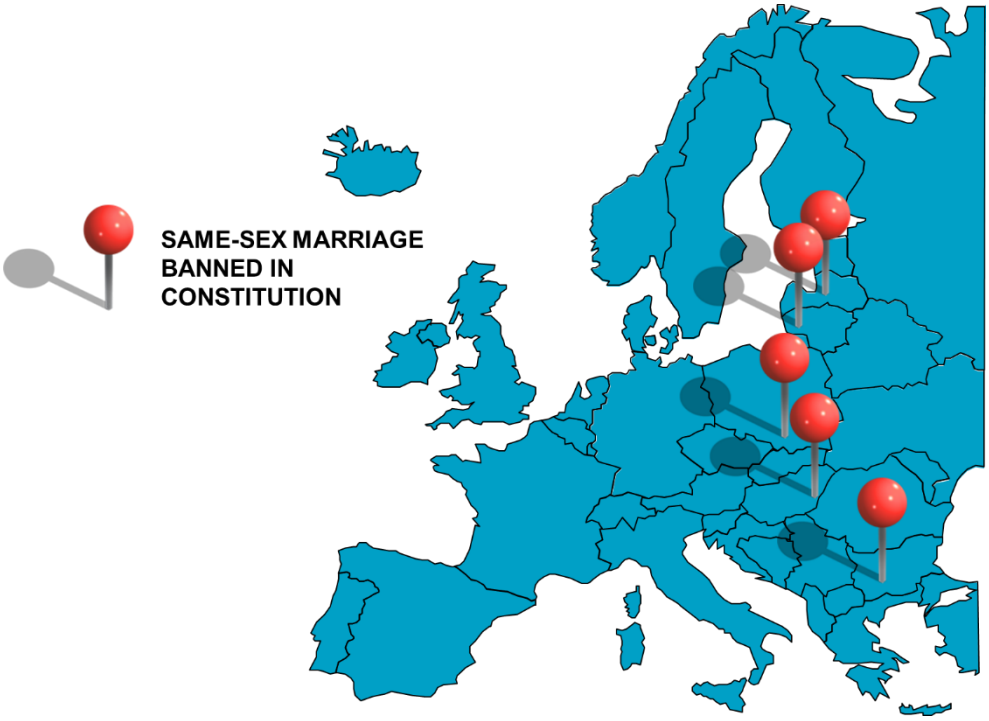


On the other hand, there are some countries, as explained earlier that had or have recently introduced or modified their constitution in order to expressly state that marriage is a union between a man or a woman: Poland (article 18), Latvia (article 110 changed in 2005), Lithuania (article 38, changed in 2010), Hungary (article L.1., changed in 2012) and Bulgaria (article 46). This movement towards a reinforcement of the heterosexual nature of marriage has been strong in ex-communist countries. In fact, the modification of the constitutions arose many protests from LGTB associations and worried NGOs. Reactions include a European Parliament Resolution[50] on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania.

[49] ACEPRENSA, "Eslovenia rechaza en referendum el matrimonio gay", March 30 2012, accessed March 11 2013, http://www.aceprensa.com/articles/eslovenia-rechaza-en-referendum-el-matrimonio-gay/.

[50] European Parliament Resolution of 19 January 2011 on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania (2012/C 136 E/10) Published in the *Official Journal of the European Union* C136 E/50 of the 11 of May 2012 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:136E:0050:0052:EN:PDF.

Map: Made by the author



It is also interesting to address the different support rates regarding same-sex marriage in the different Member States. A Eurobarometer Discrimination Survey in 2006 found that existed major differences between EU Member States also exist regarding public opinion towards LGBT people and issues. For instance, the majority of the population in The Netherlands (82%), Sweden (71 %) and Denmark (69 %) was in favour of same-sex marriage, but only a small minority in Romania, (11 %), Latvia (12 %) and Cyprus (14 %). Also, while in the Netherlands 91 per cent of the population was comfortable with having a homosexual as a neighbour, in Romania only 36 per cent was of the same opinion. The Eurobarometer Discrimination Survey in 2008, using a ten point 'comfort scale', produced similar results: Swedes (9.5%), Dutch and Danish respondents (9.3%) were the most 'comfortable' with the idea of having a homosexual as a neighbour, but a much lower 'comfort' level was recorded in Bulgaria (5.3%), Latvia (5.5%) and Lithuania (6.1%)[51].

[51] Data found in Fundamental Rights Agency of the European Union, Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member State, Part II: The Social Situation (2009), pp.9-10.

3. Legal status in non-member states: Ukraine, Moldova and Russia

A. Ukraine

In 1991 Ukraine became one of the first ex-Soviet countries where homosexuality has been decriminalized. This fact permitted the LGTB community to become more visible at the national level, more precisely, by having their own bars, publications, and human rights organizations.

Except the positive part of the visibility and changing the legislation as regards decriminalizing of the homosexuality, there are still problems in recognizing all the rights to this community since the political and social perception is still at a very low level, followed by violent attacks on LGBT activists took place during the commemoration March of the international Human Rights Day in 2003 or during other public events, such as "Kiev Pride" in 2012 and 2013.

From the legal point of view, the new Constitution, approved in 1991, apart from mentioning the basic human rights, it does not mention *expressis verbis* the terms of sexual orientation or gender identity. Furthermore, article 51 of the Constitution specifically defines only the marriage as a voluntary union between a man and a woman[52].

In recent years a couple of bills regarding the ban to discuss in public or in media about the homosexuality, bring into Ukraine various videos, photos or audio products or other similar products have been discuss. In fact, both Bill nº0945 (formerly Bill nº8711) and Bill nº1155 are pending second voting in the parliament and if approved it would mean that a person who offers information about LGTB associations (for instance) could face up to 5 or 6 years of prison. According to Human Rights Watch, the approval of these laws would "create an environment of state-promoted discrimination against LGTB people"[53].

This situation has been qualified by the local NGOs, Amnesty International organisation, the European Union, Human Right Watch and the United Nations to be serious "homophobic" actions which means that if the situation remains the same in the next period and no improvements are made in order to eliminate these bans, Ukraine will experience difficulties in the negotiations process to the European Union led under the EU-Ukraine Association Agreement, which entered into force in 1998. In fact, in the context of a Ukraine- EU visa liberalization negotiations the Foreign Minister of Ukraine was obliged in February 2013 to announce the adoption of anti-discrimination laws to reach at least one of the benchmarks for the process to be successful[54].

Moreover, in the opinion of the EU officials, "these homophobic bills are unacceptable for a country that aspires to deeper relations with the European Union"[55] and be part of a Europe of 28 Member States already, taking into account that Croatia will be fully Member states starting with the 1st of July 2013. The same statement has been made during the EU-Ukraine summit that took place in February 2013, where the main goal of the summit was the Ukraine's reform agenda,

[52] Article 51. "Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family.

Parents shall be obliged to sustain their children until they are of full age. Adult children shall be obliged to care for their parents who are incapable to work.

The family, childhood, motherhood, and fatherhood shall be under the protection of the State."

Ukrainian Constitution, accessed March 18 2013, available in: http://www.president.gov.ua/en/content/chapter02.html.

[53] Human Rights Watch, "Ukraine: EU Should Raise LGBT Rights at Summit", February 21 2013, accessed March 1, http://www.hrw.org/news/2013/02/21/ukraine-eu-should-raise-lgbt-rights-summit.

[54] The Guardian, "Ukraine gay pride marchers ready to defy violence", May 18 2013, accessed May 18 2013, http://www.guardian.co.uk/world/2013/may/18/ukraine-gay-pride-marchers-violence.

[55] See note 55.

including the situation of the human rights, linked to the possible signature of the EU-Ukraine Association Agreement.

Nowadays, there are no anti-discrimination laws covering sexual orientation or gender identity in Ukraine. There is though a national hate crime law that could be interpreted as including sexual orientation and gender identity.

It is necessary that Ukraine issues concrete laws in this field in order to eliminate as much as possible all the negative situations in which the LGBT community is put so far, as well as to clarify the contradictory laws being discussed right now. In addition, if Ukraine wants to become a full member State of the European Union it will be obliged to align and harmonize its legislation with the European one and also it will have to protect the LGBT citizens from certain forms of discrimination and harassment.

B. Moldova

Starting in 1991, an important moment in the history and evolution of Moldova, several progresses in decriminalizing homosexual relations were made, being in the same line with the general attitude of Moldova to guarantee protection of human rights by laws[56]. Thus, in 1995, homosexuality between consenting adults was legalised[57] while in Transnistria, the self-proclaimed autonomous republic, *"homosexuality is illegal[58]"*.

In addition, in September 2002 new laws were introduced in order to equalise the age of consent. As from January 2003, amongst other things, the position of gays and lesbians in Moldova looks to have improved in a very good manner, especially when nowadays Moldova shows to be very committed to the European values in the field of human rights as well as respecting these.

Nevertheless, nor same-sex marriage nor civil unions are legally recognised since the Constitution of Moldova is banning same-sex marriage[59]. Other laws mention in a general manner the terms of "sexual orientation" or "sexual orientation discrimination" but without defining them, examples are: the Law on Application of Lie Detector /Polygraph no.269 from 12.12.2008; the Law on Asylum no.270 from 18.12.2008 and the Law on Freedom of Expression no.64 from 23.04.2010[60]. That lead to the approval of anti-discrimination Law no.101/2012[61] the 25th of May 2012 that will enter into force this 2013 and even if they don't mention sexual orientation as a protected ground in the first article where a list of general discrimination protected grounds is given (it is important to state that the list is not closed, thus sexual orientation could be interpreted

[56] Vera Turcanu-Spatari, Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Moldova, CoE, (2011), accessed March 11 2013, p.8, http://www.coe.int/t/Commissioner/Source/LGBT/MoldovaLegal_E.pdf.

[57] Immigration And Refugee Board Of Canada, Moldova: The situation regarding gay men and lesbians, including the laws on homosexuality, the treatment of gay men and lesbians, protection offered by the State and the existence of support services (2008 - June 2010), UNHCR, June 30 2010, accessed March 11 2013http://www.unhcr.org/refworld/publisher,IRBC,,MDA,4e0302912,0.html.

[58] Freedom House, "Transnistria", 2012, accessed March 11 2013, http://www.freedomhouse.org/report/freedom-world/2012/transnistria.

[59] Article 48(2) The family is founded on the freely consented marriage of husband and wife, on the spouses equality of rights and on the duty of parents to ensure their children's upbringing and education.

Constitution of the Republic of Moldova, accessed March 11 2013, available in English in: http://www.presedinte.md/const.php?lang=eng.

[60] See footnote 58, pp. 3 and 9.

[61] This law transposed the Council Directive 2000/43/EC and the Council Directive 2000/78/EC into the legislation of Republic of Moldova, accessed March 11 2013, http://lex.justice.md/viewdoc.php?action=view&view=doc&id=343361&lang=1.

to be included in "any other similar ground"), it does mention sexual orientation during the text regarding discrimination protection as regards to employment (article 7)[62].

At the international scene, in 2011 Moldova used its vote in the United Nations Human Rights Council to vote against the first UN resolution condemning discrimination and violence against individuals based on their sexual orientation and gender identity[63], which *"represents a historic moment to highlight the human rights abuses and violations that lesbian, gay, bisexual and transgender people face around the world based solely on who they are and whom they love"* according to the U.S. Secretary of State Hillary Rodham Clinton.

As a final remark, during 2011, Moldova was subjected to the periodic reviewing process in the field of human rights in general and equality and non-discrimination policies in particular, taken by the UN, which final report was published in 2012. One of the recommendations made in the report was to *"intensify efforts to address discrimination against LGBT people; to investigate and prosecute crimes against LGBT community members"* but most of all *"to take action to build broad support for* [their] *rights in the context of the new anti-discrimination law"*[64].

C. Russia

In the Russian Federation, until 1993 homosexual relations made by adult males were punished under the Russian Federation Criminal Code by imprisonment. After this year and under the strong pressure coming from the European community and after the new Criminal Code came into force in 1997, this incrimination was repealed. Presently, the male homosexual acts are decriminalized[65], while the lesbian relations were not criminalised at all. Also,in 2003 the age of consent was modified and established in 16 regardless of sexual orientation.

The Russian Constitution in Article 19.2[66] it is stipulated very clearly the equality of all women and men, including the fact that the state will "*guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin* [...]", stipulating in the same time that "*any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden*". Sexual orientation discrimination is not, hence, protected as a ground of discrimination, nor is it in secondary legislation. This leaves Russia with no general or specific laws that protect against discrimination on the basis of sexual orientation or gender identity. In the same line, there is no recognition of same-sex couples (married or not) by the Russian laws. The family code establishes in its article 1.3 that "Family relations shall be regulated in conformity with the principles of a voluntary conjugal union between a man and a woman"[67], which has been an argument invoked to defend the thesis according to which marriage is celebrated only between

[62] ILGA Europe, "Mixed reactions to adoption of Moldova's anti-discrimination law", May 25 2012, accessed March 20 2013, http://www.ilga-europe.org/home/news/for_media/media_releases/moldova_anti_discrimination_law.

[63] AP, "UN backs gay rights for first time ever", *Updated News*, June 17 2011, accessed March 11 2013, http://updatednews.ca/2011/06/17/un-backs-gay-rights-for-first-time-ever/ Paul Ciocoiu, "Moldova focuses on human rights", *SETimes.com*, February 19 2013, accessed March 11 2013, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2013/02/19/feature-03.

[64] ILGA Europe, "Annual Review" 2011, accessed March 11 2013, p.113, http://www.ilga-europe.org/home/guide_europe/country_by_country/moldova/ilga_europe_annual_review_2011_on_moldova.

[65] Immigration And Refugee Board Of Canada, *Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals*, February 29 2000, accessed March 11 2013, http://www.unhcr.org/refworld/docid/3ae6ad788c.html.

[66] The Constitution of the Russian Federation in English, accessed March 11 2013, available on http://www.constitution.ru/en/10003000-03.htm.

[67] Family Code of the Russian Federation, accessed 20 March 2013, available in English in http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf.

man and woman by the Constitutional Court of the Russian Federation in a case introduced against the provisions of the Family Code, which considered that "*in order to register a marriage, the mutual free consent of a man and a woman was necessary*"[68].

Also, some laws similar to the Ukrainian under-consideration gay-propaganda laws have been approved in different regions of the Russian Federation, establishing *"administrative punishment for the so-called "promotion of homosexuality among minors*[69]*"*; as well as bans for the prides[70] in some major cities. The situation is unbearable for the LGTB community since violence from the authorities and ultra-orthodox groups has been increasing.

Conclusions

A clear and opposite double movement is taken place in the EU. On one hand, there is the "Western Europe" and on the other the "Eastern" one, formed by the countries that once belonged to the URSS. This is can be seen in the maps incorporated to the present article.

"Western Europe" is clearly working toward marriage equality and has already some kind of Civil Union system established, along with the guidelines of the EU. On the contrary, in "Eastern Europe", although a clear step against sexual orientation discrimination has been made to fulfil the EU's requirements, there is still a long way to go. In the last years many countries have changed their laws (both the Constitutions of Family o Civil Codes) against the recommendations from the European Institutions and NGOs to reinforce the idea of the heterosexuality of marriage. A study should be made to find out the reasons of that rejection to homosexuality in order to fight it from the core. It is senseless to provide a society with legal provisions (such as Directive 2000/43/EC or Directive 2000/78/EC) if social attitude remains archaic.

Another phenomenon that requires our attention is that there are many times that society is prepared to make a change and acceptance levels are high but the government rejects to take the necessary measures, for instance in Germany or Finland. The lack of relation and understanding between citizens and the government is also affecting rights.

Moreover one of the main problems same-sex couples find is that even if they get married in a member state that permits it their union won't be recognized in other member states if that legal figure does not exist in that same country. A system of recognition if not performance of same sex marriages is absolutely necessary across EU member states.

In the times there are yet to come, all this has to be borne in mind, since we cannot forget that we are *United in Diversity*[71]; and to be united, we have to be equal both in rights and obligations. This won't happen until the whole society possesses a whole citizenship; something that does not happen in all the Member states of the EU.

As President Mr. Van Rompuy said on the occasion of the International Day against Homophobia, "*Combating homophobia is thus enshrined in the EU's founding act and statement*

[68] The Decision of the Constitutional Court of 16 November 2006 No.496; Report on "The Situation of Lesbians, Gays, Bisexuals, and Transgender People in the Russian Federation", *Russian LGBT Network*, 2008, p.8.

[69] Report on The Situation of Lesbian, Gay, Bisexual and Transgender People in the Russian Federation (Last Three Months 2011 – First Half 2012), 2012, accessed March 11 2013, p.4, http://www.civilrightsdefenders.org/files/Russian-Federation-LGBT-situation.pdf.

[70] Steve Clemons, "Not the Onion: Moscow bans gay pride for next 100 years", *The Atlantic*, June 8 2012, accessed March 11 2013, http://www.theatlantic.com/international/archive/2012/06/not-the-onion-moscow-bans-gay-pride-for-next-100-years/258296.

[71] EU motto since 2000, accessed March 11 2013, http://europa.eu/about-eu/basic-information/symbols/motto/index_en.htm.

of values. It is something that distinguishes Europe from many other parts of the world". He also stressed three ideals that in his view represented European values[72]:

"*European values at their best:*

- accepting difference, not fearing it;

- living with diversity, not fleeing it;

- defending rights and responsibilities, not ignoring them".

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[72] Statement by President Herman Van Rompuy on the International Day Against Homophobia on May 17, 2010, PCE 88/10, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114351.pdf, accessed March 11 2013; Statement by President Herman Van Rompuy on the International Day Against Homophobia on May 17, 2011, PCE 0116/11 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/122014.pdf,accessed March 11 2013.

COPYRIGHT PROTECTION FOR CREATIVE INDUSTRIES: COMPARISON AMONG CHINA AND EUROPE

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Abstract

The impact and creativity has increased in the last years in Europe. It was focused by a United Nations report on creative economy in 2008. Cooperation and trade in goods and services has increased. Today, the EU is the biggest destination for China's exports and the second supplier to China. For the EU, China is the second trading partner, after the United States. Based on current agreements between the two continents, we can mention the following documents that justify our research: The bilateral issues and cooperation, including people-to-people exchanges in 2011[1]; EU-China Youth Policy Dialogue about education, culture and youth policies;[2] The EU-China high level people to people dialogue, celebrated in Chengdu, 2012.[3] EU-China Business Summit, which took place in September 2012, in Brussels.[4] The EU is committed to strengthening its partnership with China, as demonstrated by the fourteenth EU-China summit that took place in Beijing, 2012.[5] Also there are some forums and conferences that are relevant for our research such as, the EU- China high level cultural forum celebrated, in Brussels 2010[6]; Beijing in 2011; the Louvre in 2012[7], and the China-EU Seminar on cultural and creative industries cooperation.[8] The rights of intellectual property law are more vulnerable in the cultural and creative sector. For this reason, it is essential that we protect ideas and designs; they are the new creations and they need to be sheltered. In this article, we are going to explain what intellectual property (IP) law is, specifically copyright, and how it began to appear in China in order to understand the concept of copyright. To gather this information, we will discuss the copyright protection for creative industries in China. And we will do a brief comparison about the copyright protection for creative industries in EU, including legal mechanisms in EU that relates to China. The methodology is the investigation and examination of documentation and we will elaborate a diagnose to observe the main differences between the Chinese and European legislation.

In the end, we will summarize the previous material, and draw a conclusion.

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[1] EU and China set to boost co-operation on education, culture, youth and research (2011). Accessed December 20, 2012. http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2011/20111023_en.htm.

[2] Education & culture: EU and China launch people-to-people dialogue. 2012.Accessed December 20,2012.

http://europa.eu/rapid/press-release_IP-12-381_en.htm?locale=en.

[3] EU-China Youth Policy Dialogue. Accessed December 29, 2012. http://euchinayouth.eu/wp-content/uploads/YOPOD_Action_Plan_for_EU-China_Cooperation.pdf.

[4] 15th EU-China Summit (2012). Accessed December 20, 2012.http://www.ibec.ie/IBEC/DFB.nsf/vPages/Trade_and_international_relations~Asia_Business_Network~china-eu-china-business-summit-20-september-2012-brussels-23-10-2012?OpenDocument. Further information: http://eeas.europa.eu/china/summits_en.htm.

[5] European commission Report: EU-China High level people to people dialogue. Accessed December 26, 2012. http://ec.europa.eu/education/external-relation-programmes/china_en.htm.

[6] EU- China cultural Forum 2010. Accessed December, 27, 2012. http://ec.europa.eu/culture/news/first-eu-china-high-level-cultural-forum-brussels_en.htm.

[7] EU china high level transultural forum. Accessed December 27, 2012. http://www.euchinacultural forum.com/.

[8] EU-China Seminar of cultural cooperation. Accessed December 28, 2012. http://ec.europa.eu/culture/eu-china/events/event_172_en.htm.

Keywords: *Creative industries, copyright, China, Europe, EU-China agreements.*

Introduction

Few economic sectors have research as much economic potential in China and the EU as the cultural and creative industries. (CCIs) have over the past few years. China is leading Asia in the development of a creative economy. Its cultural sector contributes to 2.45% of Chinese GDP, rising 6.4% higher than the growth of the general economy. European CCIs are worth 2.6% of the EU´s GDP and generate 654 billion € in 2003, much more than the car manufacturing industry[9]. We can say that copyright in the creative markets is "the soul" of the creation to prevent plagiarism. It is the incentive for the creation. And it is for that, there is a local and global trade through the copyright mechanism, the piracy has a huge impact on these industries, and that is why copyright is a necessary tool to protect the profits of these industries. Europe believes that with the directives, regulations, rules, and normative that protects designs and copyright law, the piracy could decrease in a near future and the talent will rise again[10]. The European Union admits it has cost the creative industry over 185 billion Euros in employment alone in 2008, that's why the observatory of counterfeiting and piracy created in Europe has offered a competition called "hands off my design"[11].

This article will explain the impact of copyright law in the creative industries between China and the European Union and the opportunities for trade and exchange among both continents. The importance of this topic is on the agenda of many international organizations. (UNESCO,[12] WTO[13], UNCTAD[14], WIPO[15]). The procedure of the methodology consists in content analysis of the Chinese legislation and the main differences in the Chinese and European legislation concerning copyright in the creative and cultural industries.Also we will support the analysis in the main organizations and treaties that exist in both continents that are important for this topic. For example; The UNCTAD is his 2008 report on the creative economy has mention:

"It has the potential to generate income, jobs and export earnings while at the same time promoting social inclusion, cultural diversity and human development. This is what the emerging creative economy has already begun to do as a leading component of economic growth,

[9] KEA."China EU creative industries mapping. December 2010." Accesed January 23, 2013. http://www.keanet.eu/report/china%20eu%20mapping%20exec%20sum%20english.pdf.

[10] European Patent office report. "Scenarios for the future". 2007.22-30,106 110. http://www.marcasepatentes.pt/files/collections/pt_PT/1/178/EPO%20Scenarios%20For%20The%20Future.pdf.

[11] "Intellectual property rights: Winners of "Hands off my Design. Accessed on January 01, 2013.http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/93&format=HTML&aged=0&language=en&guiLanguage=en.

[12] United Nations,Educational, Scientic andCultural Organization. (UNESCO). More information available on UNESCO report 2009. What is and what it does. Accessed January 03, 2013. http://unesdoc.unesco.org/images/0014/001473/147330s.pdf.

[13] Word trade Organization. (WTO). Accessed January 03, 2013.More information available on http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.

[14] United Nations conference on trade and development. (UNCTAD). Accessed January 03, 2013. More information available on: http://unctad.org/en/Pages/Home.aspx.

[15] Intelectual Property Organization. (WIPO): Accessed on January 03, 2013. More information available on: http://www.wipo.int/about-wipo/en/.

employment, trade, innovation and social cohesion in most advanced economies. The creative economy also seems to be a feasible option for developing countries"[16].

Policies must therefore be designed to support all forms of innovation, not only technological innovation. Specific approaches may also be needed for innovative services with high growth potential, particularly in the cultural and creative industries"[17] [18].

Is the role of copyright important for the development and exchange in the creative and cultural industries (ICC)?

In April 2012, the commission wrote a report "policy handbook"[19] in which it noted the importance that creative and cultural industries had in the world economy. It says: "Cultural and creative industries are in a strategic position to promote smart, sustainable and inclusive growth in all EU regions and cities, and thus contribute fully to the Europe 2020 Strategy, which is the EU's growth strategy for the coming decade"[20].

The copyright has experienced a process of harmonization worldwide through the Berne Convention, which is now coordinated by WIPO that negotiates with international treaties. For example, the diplomatic conference on the protection of audiovisual performances, in 2011[21].

China has developed his copyright system since the adhesion of the WIPO in 1980. Currently, China is leading the market. In the last two parts of this paper we will explain the importance of the creative industries in China and Europe and why copyright is so important for both in the commerce. China is as potential future second worldwide in 2017[22], it will be very important for trade and development of creative industries. China has moved to design in China to create in China, and there are many opportunities for business between China and Europe[23] [24].

Creating opportunities in the creative industries sector between China and Europe:

Copyright is a part of intellectual property (IP) law. Intellectual property law refers to some of the rights related to ideas and innovations. Most countries agree that some inventions and

[16] UNCTAD (Conferencia de las Naciones Unidas sobre Comercio y Desarrollo) 2008, *Creative Economy: Report 2008*, New York, ONU. Accessed February 18, 2013. http://unctad.org/en/Pages/Publications/Creative-Economy-Report-(Series).aspx.

[17] European Commission. Europe 2020 Flagship Initiative Innovation Union, Brussels, 6.10.2010, COM (2010) 546 final. 2010.18.

[18] We remember the creative industries concept. The world cultural industry refers to those industries that combine the creation, production and marketing of creative content that is tangible and cultural by nature. These contents are usually protected by copyright, and may take the form of a good or service. The ideas and designs need to be sheltered; it is for that the copyright concept is important for this industry. We can mention the UNESCO: Understanding creative Industries report: pp 3. http://portal.unesco.org/culture/es/files/30297/11942616973cultural_stat_EN.pdf/cultural_stat_EN.pdf.

[19] EC (2012), Working Group of EU Members States Experts, *Policy Handbook*, Brussels, April 2012.Accessed February 29, 2013. http://ec.europa.eu/culture/our-policy-development/documents/policy-handbook.pdf.

[20] *Ibid*., p. 3.

[21] Diplomatic conference on the protection of Audiovisual performances. (2012). Accessed on February 18, 2013. http://www.wipo.int/meetings/en/details.jsp?meeting_id=25602.

[22] Chamber of commerce and industry of the Russian federation report. China to become world's biggest economy. February,11, 2013. Accessed February 25, 2013. http://eng.tpp-inform.ru/princple_theme/845.html.

[23] Creative Industries in China. Opportunities for business. Uk trade& investment report. London. 2008. Accessed February 25, 2013. http://www.cbbc.org/guide/downloads/uktilondon_creative.

[24] Dr Zhen Ye. Wales- China Creative industries forum. Mega trends in China's creative industries report. 2009. http://waleschinacreativeindustries.net/wp-content/uploads/DrZhenYepaper1.pdf.

creative works must be protected in a legal form. This is because the vast majority of workers and owners should be entitled to receive some benefit from the fruits of their labor. If they are guaranteed protection, they maintain incentives to innovate, otherwise creativity is discouraged. For this reason, IP law is divided into two big branches, industrial property and *copyright*[25].

Since the adhesion of the P.R China to the World Intellectual Property Organization (WIPO) in 1980 and the entry in the World Trade Organization (WTO) in 2001, the protection of intellectual property rights (IPR) has been an issue of rising importance for new legislation[26]. Also the Agreement on Trade Related Intellectual Property Rights 1994 (TRIPS) and the Berne Convention on Literary and Artistic Works of 1886 have helped China to increase the cooperation abroad[27] [28].

Trade in copyright between the P.R China and other countries is increasing rapidly and it therefore requires protection on both national and international levels. With the international trade in copyright growing at an annual rate of 50% during the period between 1994 and 1999 and continuing to grow, copyright protection requires new legislation to keep up with technical developments, such as through the use of the internet. In spite of the described development, Chinese Copyright Law (hereinafter *CCL*) was amended in October 2001 for the first time. The revision mainly incorporated the necessary changes due to the accession of the PRC to the WTO and the requirements of the Accession Protocol.

In Feb. 2010, *CCL* was revised for the second time and went into effect on Apr.1, 2010. Notably, the amendment to Article 4 contained in the *CCL* (2nd Revision) was adopted primarily in response to recent findings by a WTO panel that China's denial of copyright protection of certain censored works was inconsistent with its TRIPs Agreement obligations[29]. Copyright protection is now extended to all "works," without regard to restrictions on publication and distribution that are imposed by PRC authorities under other laws and regulations (these restrictions are unaffected by the amendments).

In 2006, the council of international Affairs and External Relations in Brussels, (Council 2771), had begun searching solutions of global problems and China played a key role, The EU and China have important commitments and responsibilities whose base is the United Nations.

The Council welcomes the agreement reached in September 2006 to set up negotiations with China as a Partnership and they have signed a cooperation Agreement. This agreement began to cover all aspects of bilateral relations, including the strengthening of the agreements between the two continents, supports dialogue, cooperation and integration in East Asia considering that this agreement could promote stability and prosperity and that will lead to further progress towards resolving territorial disputes in the region. The cooperation with China aimed at strengthening stability in East Asia, including through multilateral mechanisms such as the Regional Forum of the Association of Southeast Asian Nations (ASEAN) and the Asia-Europe Meeting (ASEM), and the role of China as a country host the seventh summit ASEM7. On that date the Council

[25] Xhu, Yuquan. Concise Chinese law. Beijing, China Law Press 2007,81.

[26] Zhang, Yuwing; Gebhardt Inmanuel. Chinese intellectual property law. Comparative cases studies part 2. Department of treaty and law. Volume V Ministry of commerce PRC advisory service to the legal reform is china..(1997). 102-103.

[27] Montgomery, Lucy; Fitzgerald, Brian F. "Copyright and the Creative Industries in China". International Journal of Cultural Studies 9(3) (2006): 407-418.

[28] The original version of the Berne Convention for the Protection of Literary and Artistic Works dates from 1886.

[29] See *Report of the Panel-China C* "Measures affecting the protection and enforcement of intellectual property rights." WT/DS362/R.(2009). 41 Accessed December 13, 2012. http://www.worldtradelaw.net/reports/wtopanels/china-iprights(panel).pdf.

recognizes that trade and economic relations are an increasingly important element between the EU and China. It is very probable that the extraordinary growth of exports, imports and Chinese investment in recent years continue to occur in the immediate future. This represents both a challenge and an opportunity. The challenge for the EU, and for China, is to manage and deepen relationships on a sustainable, predictable, and balanced. The best way to overcome this challenge is the association, through cooperation and common standards and mutual agreements.

Currently, in the creative industries sector China and Europe have signed so many action plans in 2012. For example: EU-China Youth Policy Dialogue in Chengdu, 23 of February of 2012[30]. Furthermore, China and Europe have agreed an EU-China high-level people-to-people dialogue in 2012, in Beijing[31]. EU diplomatic relations with China were established in 1975 and are governed by the 1985[32]. On the other hand, EU-China trade and cooperation agreement and seven other legally binding agreements were reached on those years. China has emerged as the world's third economy, after the EU and the US, the biggest exporter in the global economy, and an increasingly important political power. EU-China trade has risen dramatically in the last decades. The EU remains China's biggest trading partner while China is now close to becoming the EU's largest trading partner as well[33].

Also, on December 19, 2012, China-Central and Eastern Europe Cooperation Secretariat held its annual meeting in Diaoyutai State Guesthouse in Beijing. At the meeting, progress that has been made in cooperation between China and Central and Eastern European countries was reviewed and plans made for the Secretariat's work in 2013[34].

We have to mention as well that Europe and China has signed in 2012 many cultural agreements and forums and seminars in which copyright has a relevant part. For example, the "High level cultural forum" and 3rd edition that took place in Beijing in November to cooperate in culture[35].

The history and prospect of China's Copyright Law

Since the late 1980's China has taken major steps in the legislation improving its copyright law. The Chinese desire to open their doors to trade in order to encourage foreign direct investment.

There was no copyright norm in Chinese feudal history. Copyright was a purely western concept that was introduced in China in the 20th century under pressure from the western countries. On the other hand, the concept of copyright is contrary to the Chinese and Confucius culture, and

[30] Education & culture: EU and China launch people-to-people dialogue. 2012.Accessed December 20, 2012. http://europa.eu/rapid/press-release_IP-12-381_en.htm?locale=en.

[31] Eu-China high level people to people dialogue 2012. Accessed December 20, 2012. http://ec.europa.eu/education/external-relation-programmes/china_en.htm.

[32] W. John Morgan& Tujnman, Albert. "Europe and China: a new era of cultural contact and cooperation in education." European Journal of Education,Vol. 44, No. 1. (2009) 1-142.

[33] European Union. EU-CHINA SUMMIT (Beijing, 14 February 2012). EU RELATIONS WITH CHINA. n this context, the 2012 EU-China Year of intercultural dialogue aims to enhance cultural relations and cooperation and was officially launched on 1 February. Activities will include not only artistic exchanges, but all forms of people-to-people contacts and mobility contributing to mutual understanding. More information on the activities can be found at: http://ec.europa.eu/culture/eu-china/intercultural-dialogue-2012_en.htm. Accessed January 3, 2013.

[34] Vice Foreign Minister Song Tao Attends Annual Meeting of China-Central andEastern Europe Cooperation Secretariat. Ministry of Foreigners Affairs of the people´s Republic of China. December 12, 2012. Accessed January 4, 2013. http://www.fmprc.gov.cn/eng/zxxx/t1000583.shtml.

[35] High level cultural forum.Beijing. 2010. Accessed January 05, 2013. http://ec.europa.eu/culture/eu-china/index_en.htm.

is contradictory with the Marxist socialist ideology[36]. Chinese law always encourages the society over the interests of individuals.

China has one of the most distinct and deep philosophies, which is essentially contradictory with the notion of copyrights[37]. History indicates that China was ahead of Europe when it came to printing techniques that had been invented in the middle of the 11th century. China has an incredible traditional culture, and Confucianism was so basic to feudal Chinese philosophy and social conduct that is almost contradictory to the notion of copyright.

"As a legal concept, copyright seems even less attuned to the Chinese concept of law with its reluctance to rely upon rigid codification and abhorrence of litigation. The traditional Chinese conception of law is so different from the western concept that it has often been described as a rejection of the idea of law "[38].

Confucianism always believes in the concepts of equality and individuality, and provides a basic premise for claiming copyright. Confucianism believed that past experiences were indispensable for personal moral growth. Confucius said: "I transmit rather than create, I believe and I love the ancients"[39]. He believed that intellectual knowledge, as a whole, was the common heritage of all Chinese. They monopolized authority based on the wisdom of the past, spent time on literature, and tried to express them through art.

In China, the protection of printers, publishers and authors on occasions by means of official prohibitions had remained unchanged for more than eight hundred years, although in the Ming Dynasty this form of protection seems to have been suspended for some time. Neither written law for the protection of copyright nor clauses in statute law have been discovered[40]. By the 17th and 18th centuries, with the European industrial revolution, Europe had begun to develop a concept of copyright. Nevertheless, as early *as 800 years ago China had some definitive notions regarding the idea of copyright or, intellectual property.* The stamp, first appearing between the years 1190 to 1194 would read: this book was published and distributed by the Cheng Family of Meishan, *any reproduction without permission is forbidden.* The notice is strikingly similar to the modern copyright notice --© "All rights reserved". The question might still be raised, then: why has there been no copyright law in China for such a long time[41]? When the west pressured China to open its doors to trade, they had to make special concessions and foreigners were permitted to live in Guangdong and Macao to do business with licensed Chinese intermediaries, known as the Hong[42]. After the Opium War (1839-1842) the social contradictions and conflicts with China became more intense. Prior to the opium war, there was a little foreign investment in China and trade was confined to items, such as opium, tea, raw silk, sold as bulk commodities instead of under brand names[43].

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[36] Ploman, E.W and Hamilton, L.C, copyright, London, Routledge&Kegan Paul, (1980) 140.

[37] Qu, Sanqiang. To understand the copyright in China. Copyright in China. 2002.4-8.

[38] Ploman and Hamilton..see supra note 4, at 142.

[39] Early models of collaboration before the eighteen century. Accessed February 03, 2013. http://mako.cc/academic/collablit/writing/BenjMakoHill-CollabLit_and_Control/x243.html. More information available on Chinese Intelectual property protection. http://www.123helpme.com/view. asp?id=35245.

[40] Chengsi, Zhen and Pendleton, Michael. Copyright law in China. 1990. 16.

[41] See Zhou Lin,Copyright Law In China,accessed January 24, 2013. http://www.chinaiprlaw.com/english/forum/forum59.htm.

[42] Described in Fairbank, J.K, Trade and diplomacy on the china coast: the opening of the treaty ports, (Cambridge. Harvard University Press, 1953), 45.

[43] Gardella, R. " Boom years of the Fukien Tea trade, 1842-1888" in May E, and Fairbank, J.K. America´s china trade in historical perspective: the Chinese and American performance, council on East Asian studies, (Cambridge, Harvard University 1986), 69.

In the second half of the 19th century, the western economic involvement in China expanded. At the same time, the infringements of intellectual property, such as foreign trade names and trademarks began to work[44]. To protect the interest of foreigners, the Qing government commenced a series of negotiations regarding protection of copyright. China did not have universal national laws to deal with the problem of copyright infringement. So, as China began to industrialize, they also began to duplicate the copyrighted works of foreigners. China did not provide any legal protection for copyrights until 1910. In 1928, the KMT government promulgated its first copyright law. In 1949, the People's Republic of China was founded[45]. The copyright law changed and the nation had been influenced by the Mao ideology, and the creation of literature and art had to serve the overall social interest[46]. During the Cultural Revolution, (1967-1977) China made no progress at all in improving its copyright scheme. On the contrary, many aspects of copyright protection regressed considerably. Almost all kinds of what the west would consider creative literature were regarded as bourgeois liberalism and restricted from publication and dissemination[47]. From 1979 to 1985, the administration responsible for publication drafted a succession of administrative regulations with respect to copyright protection. The interim provisions declared by the Ministry of Radio and Television in 1982 also emphasized that the rights of authors, performers and audio-radio recorders would be protected in effective ways. The copyright law in 1990 was promulgated and after these regulations they created the protection of computer software. The law is enacted according to the Chinese Constitution with the aim to protect the copyright of the authors and the creative workers, as inventors or designers in their literary, artistic and/or scientific works related with the copyright, in order to encourage them to continue to innovate and develop a better world[48].

Understanding Chinese copyright. Definition and analysis.

Copyright is defined as the personal right and property right legally enjoyed by authors and creators of literary, artistic and scientific works. This law stipulates that the copyright includes two categories; spiritual right and economic right[49].

Art. 6 of the *CCL* provide that copyright arises at the date when creation of the work is complete. Para. 2 and 3, Art 21 provide that the term copyright of a work owned by an employer, or the copyright in a film, television broadcast, photograph, video or sound recording is 50 years from the date of publication. If the author is the owner of the copyright, the term is the life-time of the author plus 50 years after his death, in the case of published work. According to para. 1, Art. 2, foreign works receive the same treatment as works created by Chinese persons and entities.

[44] See also Allen G and Donnithorne A:" Western entreprise in far eastern economic development", (New York, Mcmillan 1954). 61.

[45] Id. at. 33.

[46] See 1967, quotations of Chairman Mao Tse-tung, People´s Publishing House, Beijing, 1973.

[47] Qu, Sanqiang.supra note 5, at p. 40.

[48] Copyright Law of the People's Republic of China" (Revised in 2010) UPDATED: June 1, 2010 NO. 20 MAY 20, 2010. Accesed December 12, 2012. http://www.bjreview.com.cn/document/txt/2010-06/01/content_275779.htm.

Adopted in the 15th meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990 and revised in the 24th meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001 in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the first time and in the 13th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on February 26, 2010 in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the second time.

[49] "China law guideline in protection of intellectual property rights."China Council For the Promotion of International Trade Law Department (China market press. 2006). 1.

Any work of a foreigner or stateless person published for the first time and within the territory of China shall enjoy copyright in accordance with this Law. (See para. 2-4, Art. 2, *CCL*). Art. 8 of the Implementing Regulations of the Copyright Law of the People's Republic of China (*hereinafter Implementing Regulation*) also provides that where works of foreigners or stateless persons are first published outside the territory of China and then, within thirty days, published in the territory of China, the works shall be deemed to have been simultaneously published in the territory of China, but the moral rights will be perpetual[50].

Copyright Object, Subject and Content

Works are the result of intellectual creation in the literary, artistic, and scientific fields and may be reproduced in a material form in accordance with Art. 2 of *CCL* and the *Implementing Regulation* formulated by the state council in 2002. They have to follow three requirements:

- They should be the expression of ideas and feelings.
- They should be original
- They should be able to be reproduced in a material form.

The subject of the copyright enjoys the rights and bears the obligations of the copyright. It has three categories: includes the natural person, legal entity or other organizations that create the works: the authors. Second category includes the natural person, legal entities or other organizations, besides the author, who enjoy the copyright. The third category includes the natural person, legal entity or other organizations that is entitled to the copyright by trust contract or service the contract.

The object of the copyright refers to literary, artistic, and scientific works protected by copyright law.

What is protected?

The legal term work is defined in Art. 2 of the *Implementing Regulation* as an intellectual creation which is in the field of literature, arts or science, displays originality and is capable of reproduction in a certain tangible form

Art. 3 of *CCL* supplemented by Art. 4 of the *Implementing Regulation* identifies particular categories of works as including[51]: Literary works; Oral works; Musical, dramatic and choreographic works; Acrobatic works; Works of fine arts and architecture; Photographic and cinematographic works; Graphic works and software works.

Copyright Limitations

The Chinese Copyright Law imposes two limitations on the exercise of copyright by its owner, namely fair use and statutory license Fair UseConsistent with the Copyright Law 2001, 12 kinds of fair uses have been identified(Art.22, CCL). As a civil law country, *CCL* provides detailed circumstances for "fair use" in legislation, and the court may exercise the interpretation rights only according to the specific circumstances set forth in *CCL* and cannot rule "fair use" under other circumstances beyond the scope set by *CCL*.

Statutory License. The statutory license includes that where the copyright owner has not declared that the work concerned is forbidden to be exploited by others, a newspaper or periodical

[50] Zhang, Yuwing and Gebhard Inmanuel. Chinese intellectual property law. Comparative cases studies part 2. Department of Treaty and Law. Ministry of commerce PRC advisory service to the legal reform is china. Volume V. (1997). 113.

[51] Yuwing, Zhang; Gebhardt, Inmanuel.Author: Chinese intellectual property law. Comparative cases studies part 2. Department of treaty and law. Ministry of commerce PRC advisory service to the legal reform is china. Volume V. (1997). 104-105.

may reprint or print an abstract of the work which was published in another newspaper or periodical (see Para.2, Art.33, CCL), and work published may also be exploited for public performance or for the production of a sound recording, video recording, radio program or television program; but subject to the payment of remuneration (see Art.37, 40&43, CCL).

Related RightsChina's Copyright Law protects not only works by traditional copyright (author's right), but also subject matters other than works by "related rights". Related rights mean "rights and interests related to copyright". According to Art.26 of *Implementing Regulation*, the so called "rights and interests related to copyright", as mentioned in China's Copyright Law (see Art.1) and these regulations mean the rights enjoyed by publishers in the typographical arrangements of their books or periodicals published, the rights enjoyed by performers in their performances, the rights enjoyed by producers of sound recordings and video recordings in their sound recordings and video recordings and the rights enjoyed by radio and television stations in their broadcast radio or television programs. (Art 34, 36, 38 CCL).

Copyright Infringement and Enforcement

Chinese Copyright Law enumerates acts of infringement in Art. 47 and 48. According to Item (1) to (11), Art. 47 of *CCL*, one who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology, or paying compensation for damages, depending on the circumstances. The copyright administrative departments under the local governments shall be responsible for investigating and handling infringements of copyright, with prejudice of the social and public interests, as enumerated in Article 47 of the Copyright Law. The copyright administrative department under the State Council may investigate and handle copyright infringements that are of nationwide influence (Art. 37, *the Implementing Regulation*).

According to Item (1) to (8), the Art. 48 of CCL says: one who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringements, eliminating the effects of the act, making a public apology, or paying compensation for damages, depending on the circumstances; where he damages public interests at the same time, the copyright administration department may order him to cease the act of tort, may confiscate his illegal gains, confiscate and destroy the reproductions of infringement, and impose a fine on him; if the case is serious, the copyright administration department may also confiscate the materials, instruments, equipment, etc. mainly used to make the reproductions of infringement; where his act has constituted a crime, he shall be investigated for criminal liabilities in accordance with the law.

Copyright enforcement

Protection against copyright infringements and the enforcement of copyrights may still prove to be a difficult task in the PRC. However, the situation changed when China entered the WTO. Copyright can be enforced by administrative or judicial means.

Administrative Action

With respect to the infringement of copyright, with prejudice of the social and public interests, as enumerated in Article 47 of the Copyright Law, the copyright administrative departments may impose a fine not exceeding three times the amount of the illegal business turnover. When it is difficult to calculate the amount of illegal business turnover, it may impose a fine of no more than RMB 100,000 Yuan (Art. 36, *the Implementing Regulation*).

Judicial Enforcement

According to Art 55 of *CCL*, a dispute over copyright may be settled by mediation or be submitted for arbitration to a copyright arbitration institution under a written arbitration agreement

concluded between the parties concerned, or under the arbitration clause in the copyright contract. In fact, the copyright infringement disputes shall be settled via mediation. If the mediation fails, it should be submitted to the court. Also, in the copyright contract disputes, it must be sent to the arbitration organization (designated in the clauses of the contract). In the case of no clauses or arbitration agreement, the concerned party goes directly to the court.[52] The courts in China are divided into basic courts, Intermediate Courts, High Courts and the Supreme Court. The court where the initial dispute is brought is known as the court of first instance, while the appellate court is known as the second instance court. This appellate system is similar to that which is in place in the United States. In major metropolitan areas, the intermediate court will be the court of first instance for many of the intellectual property cases. Jurisdictions in major metropolitan areas, such as Beijing, Shanghai and Guangzhou handle the majority of intellectual property cases. Because of this specialized capability and the associated protection existing largely only in major metropolitan areas, there should be a heightened awareness among companies in China with regard to where they bring claims in Chinese courts. Venue, as such, becomes a very important issue when litigating intellectual property claims in China.

Creative industries in China

What is the first idea that comes to mind when someone asks us about the creative industries? What can we understand about this? Are Cultural industries the same as creative industries? According to UNESCO, culture must be considered to be the distinct spiritual, material, intellectual, and effective identity that characterizes a society or social group and encompasses, in addition to literature and art, lifestyles, the way to live together, value systems, traditions, and beliefs. The term cultural industries concern those industries that merge the creation, the production, and the commercialization of creative contents which are cultural by nature. All of these contents and designs are protected by copyright and they can take the form of a good or a service. (These industries normally include printing, publishing, multimedia, audiovisual, phonographic and cinema, crafts, and design). However, the creative industries are involved with more activities than the cultural industries. This includes architecture and advertising, so, in general, creative industries are those that have an artistic and creative element.

Chinese government has banned an official definition that differentiates core peripheral and culture related industries. (10th five-year plan, 2002). However, this exists with other classifications developed by large cities, such as Beijing and Shanghai.

Inside the cultural industries there are many associations that were created to transmit ideas and create initiatives. Also, they want to unify their rights and have more power in their decisions. Of the categories that we can frame in art are the following: Architecture, customs and traditions, theater, music, literature, visual arts, dance, crafts, audiovisual, multimedia and digital culture.

Chinese and European cultural and creative industries are important sectors (they contribute 2.45% and 3% to the Chinese and EU GDP's, respectively), and account for a growing portion of trade between the two zones. Europe and China are important partners and their cultural exchanges are still to be fully developed. In this table we can check the different contributions to each economy[53] [54]:

[52] China law guideline in protection of intellectual property rights. China market press. 2006.6.

[53] China and Europe Trade. Accessed on Jan.2, 2013. http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/china/index_en.htm.

[54] China EU bilateral Trade and Trade with the World.. 2012. Accessed February 20, 2013. http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113366.pdf.

Figure 1. GDP in EU and China
Source: Creative industries working paper.2012

Economic data	EU	China
Turnover	More than € 654 billion in 2003	€ 47.6 billion in 2006
Value added to GDP	2.6% of EU GDP in 2003	2.45% of GDP in 2006
Employment	In 2004, almost 6 million people were employed = 3.1% of total employed population in EU27	In 2006, 11.32 million employed = 1.48% of total employed population
Trade	The export of cultural services from the EU 27 to China has increased, growing from € 31 million in 2004 to € 49 million (+58%)	China has become the third largest exporter (€ 3.7 billion) and the sixth largest importer (€ 2.2 billion) of cultural goods in the world in 2005
Contribution to growth	12.3% higher than growth of the general economy	6.4% higher than growth of the general economy

Over 70% of total exports of cultural products are produced by foreign-funded enterprises. The cultural exports from the U.S., EU, and Hong Kong account for more than 85% of China's export of cultural products, with the share from the Guangdong province accounting for over 70%. Of China's total exports of cultural products, 50% are videogames, 30% are sculpture and visual arts products, while exports of products with real Chinese content account for no more than 15%10[55].

Currently, the added value of China's cultural industry has increased 25.8% and now represents 2.75% of GDP, as counted by the National Bureau of Statistics. The Minister of Culture expects this to represent 5% of the GDP, as this trend continues to rise. A more detailed review of events shows that profits in sectors, such asfilm, exceed 1,600 billion. Another business in design, digital animation, architecture and performing arts continues to grow, to the extent that the bank of China has supported the creation of capital funds and successful companies to take public stock market[56].

Currently, as is being developed jointly by the General Office of CPC Central Committee and the General Office of the State Council, the reform plan of China cultural development for the period between 2011 and 2015, defines the development of cultural industry how to make it a pillar in the global economy. Also, China will intensify the union between effective copyright enforcement administrative and judicial protection, stop the different kinds of infringement and piracy actions and raise the awareness of the whole society in copyright protection. Lastly, the country will develop other industries relevant to copyrights.

What is the main purpose of the legislation? Releasing the potential of the creative industries in Europe

The European Competitiveness Report, dated in 2010, told: "Innovation and competitiveness in the creative industries" as one of the four factors that determine the competitiveness of the EU in world market"[57]. The ICC´s are innovative and they are catalysts for

[55] http://culture360.org/news/mapping-the-cultural-and-creative-sectors-in-the-eu-and-china/ Accessed on Jan, 22, 2013.

[56] China to develop cultural industry into pillar one. Accessed January.22, 2013. http://www.chinaipr.gov.cn/newsarticle/news/government/201202/1280107_1.html.

[57] European Commission (2010), *European Competitiveness Report 2010*, Brussels 28.10.2010, Commission Staff Working Document, SEC (2010) Volume 1. 1276 final. Accessed February, 27, 2013. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1276:FIN:EN:PDF.

innovation[58]. In conclusion, the EC has defined SCC sector as one of the key sectors of the new European Agenda 2020:

"We must strengthen the potential for growth and innovation in the creative industries, we must take action"[59].

Thousand of designs, pictures, and photographs are copied and when the plagiarism is discovered, their company's designers, and the company itself, lose their prestige and credibility. We need to protect the talent, so the European Union (EU) decided to create a regulation and law that could protect the inventions and the drawings of the designers and artists.

Attempts to harmonize copyright law in Europe can be dated back to the signature of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. All Member States of the European Union are signatories to the Berne Convention, and compliance with its provisions is now mandatory before accession. The first important step taken by the European Economic Community (EEC) to harmonize copyright laws came with the decision to apply the common standard for copyright protection of computer programs, enacted in the directive on computer programs in 1991. A common term of copyright protection, 70 years after the death of the author, was established in 1993 as the duration of the Copyright Directive.

The application of the directives on copyright has been rather more controversial than many other subjects, as shown by the six trials for non-transposition of the Copyright Directive. Traditionally, copyright laws vary considerably among Member States, especially among common law jurisdictions (Cyprus, Ireland, Malta and the UK) and civil law countries. Changes in copyright law have also become linked to the protests against the WTO and globalization in general.

The main treaties concerning copyright and relative rights are as follows:

- Berne Convention for the Protection of Literary and Artistic Works (WIPO)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- Agreement on Trade-Related Intellectual Property Rights (WTO)
- WIPO Copyright Treaty (WIPO)
- WIPO Performers and Phonograms Treaty (WIPO)

The European copyright law is based in the following directives:

- COUNCIL DIRECTIVE 93/83/EEC OF 27 SEPTEMBER 1993 on the coordination of certain rules concerning copyright and rights related to copyright in the field of satellite broadcasting and cable retransmission. Transposed into Spanish law by Law 28/1995, which is now part of the IPL.
- DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 MARCH 1996 on the legal protection of databases. The term of protection of this right "sui generis" is 15 years.
- DIRECTIVE 98/71/EC of the European Parliament of the council of 13 October 1998 on the legal protection of designs.
- DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF JUNE 8, 2000 on certain legal aspects of the services of the information society, in particular electronic commerce in the internal market.

[58] *Ibid*., p. 5.
[59] Ibid., p. 14.

- DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2001[60] on the harmonization of certain aspects of copyright and rights related to copyright in the information society. Confers on authors the right to authorize public communication and distribution in all its forms.
- DIRECTIVE 2001/84/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 SEPTEMBER 2001 on the right for the benefit of the author of an original artwork. Establishes an inalienable right, the author of original artwork to participate in certain percentages in resales involving art market professionals.
- DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2004. This directive requires member states to take specific procedural measures to ensure the possibility of obtaining evidence (for example; distribution networks of illegal products) and the efficiency of judicial decisions (interim measures), and determine the scope of compensation.
- DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 on rental right and lending right and certain rights related to copyright in the field of IP. Recognizes rights of performers, phonogram producers and film and broadcasting.
- DIRECTIVE 2006/116/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 concerning the term of protection of copyright and related rights. Amended by Directive 2011/77/EU, the European Parliament and the Council of 27 September 2011, cited below.
- DIRECTIVE 2009/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 APRIL 2009 on the legal protection of computer programs. Establishes the obligation to protect computer programs as literary works, with a minimum of 70 years harmonized protection.
- 2011/77/EU DIRECTIVE OF 27 SEPTEMBER, THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2006/116/EC of 12 December on the term of protection of copyright and certain related rights. Extend the term of protection of the rights of performers, and sound recordings from 50 to 70 years after the death of the owner or the date of posting[61].

There are important differences from country to country in the Europe. We do not have enough time to analyze in this paper more deeply to observe the heterogeneity of the legislation between European countries. The main difference among them is the manner in which moral rights and economic rights under copyright are interpreted in relation to each other, with important

[60] "Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society **".** Official Journal L 167, 22/06/2001 P. 0010 – 0019. Accessed January 25, 2013.http://eurlex.europa.eu/ LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML.

[61] Conclusiones del Consejo y de los Representantes de los Gobiernos de los Estados miembros reunidos en el seno del Consejo, sobre el plan de trabajo en materia de cultura (2011-2014) *Diario Oficial n° C 325 de 02/12/2010 p. 0001 – 0009.* Accessed January, 03, 2013. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:325:0001:01:ES:HTML.

consequences for alienability and its limits in the fields of both moral rights and economic rights[62] [63] [64].

The European Union believes it has cost the creative industry over 185 billion Euros in employment alone in 2008, that's why the observatory of counterfeiting and piracy created in Europe has offered a competition called "hands off my design"[65].

Main treaties and mechanism related with China copyright legislation

To comply with the topic of this paper, it is not necessary to discuss in detail the EU copyright law, so this paper will focus on the main difference with China and how the system works there in general.

Very few economic sectors have revealed as much economic potential in China and the EU as thecultural and creative industries (CCIs) have over the past few years. China is leading Asia in the development of a creative economy. Its cultural sector records € 50.32 billion of value added, contributes to 2.45% of Chinese GDP, registering growth 6.4% higher than growth of the generaleconomy. European CCIs are worth 2.6% of the EU's GDP and generate a turnover of more than € 654 billion (2003), much more than that generated by the car manufacturing industry (€ 271 billion in 2001) and by that of the ICT manufacturers (€ 541 billion in 2003).

There is no law that can protect an idea which has not yet been expressed. Hence, copyright does not protect ideas. In Europe and Spain, Copyright is a legal concept describing *rights given to creators*for their literary and artistic works, which include books, music, works of fine art, such as paintings and sculpture, as well as technology-based works, such as computer programs and electronic databases. *A work does not need to be published or 'made available to the public' to be protected*. It is protected from its creation.

Culture also contributes to social cohesion. The development of cultural and creative industries is intrinsically linked with brand strategies. Copyright in Europe provides not only the same economic rights as those in China, but also they include the same moral rights as in China, including:

- *the right of paternity* (the right to claim authorship of the work); and
- *the right of integrity* (the right to object to any distortion, mutilation, modification, or other derogatory action in relation to the said work, which would be prejudicial to the author's honour or reputation)[66].

There is no better way to demonstrate the power of the publisher over the intellectual property under his control than to provide examples of how the unscrupulous use of it can deprive creative workers of their fair rewards.

[62] R. Rosenthal Kwall, The Soul of Creativity – Forging a Moral Rights Law for the United States, Stanford. 2010.

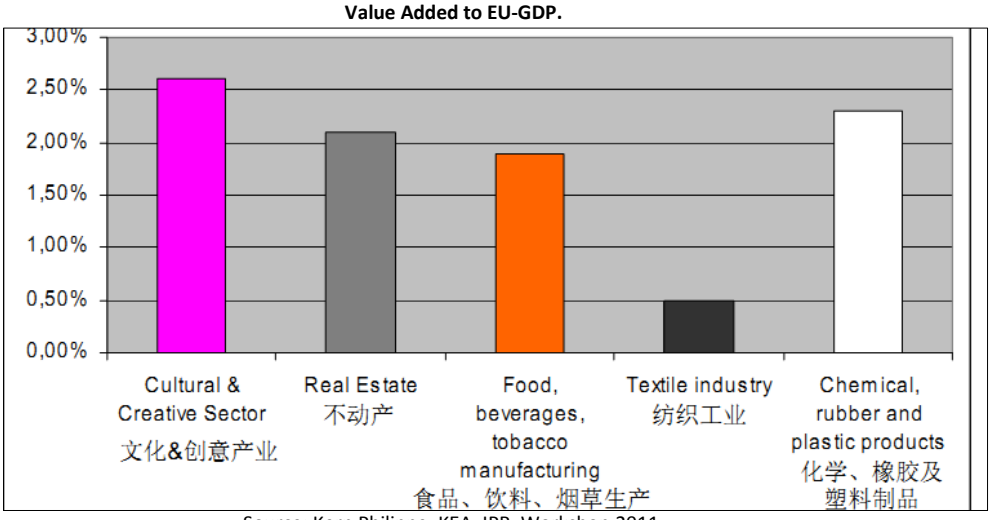
[63] See in particular, A. Dietz, Legal Principles of Moral Rights (Civil Law). General report, in: ALAI (ed.), Le droit moral de l'auteur/the moral right of the author, Congress of Antwerp (1993), Paris 1994. 54-6o.

[64] Dietz, Adolf. Chinese Copyright System: Anglo-American or Continental European model? International Forum on the Centennial of Chinese Copyright Legislation. Renmin University of China. Beijing. 2010.

[65] Intellectual property rights: Winners of "Hands off my Design" competition announced. Accessed January, 03, 2013. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/93&format=HTML&aged=0&language=en&guiLanguage=en.

[66] Managing Intellectual Property in the Book Publishing Industry A business-oriented information booklet. Creative industries – Booklet No. 1 World intelectual organization. 2011. 15 and 27-30.

What we can conclude about the economic aspects in the cultural and creative industries in Europe?



Source: Kern Philippe, KEA. IPR. Workshop.2011.

We can observe in the graph that Chinese CCI is one of the most important sectors that add GDP to the country. European CCIs (Cultural and Creative Services) are equal in value to (or simply "are equal to") 2.6% of the EU's GDP, and produce a turnover of € 654 billion (2003), much more than that which is produced by the car manufacturing industry (271 billion66 in 2001**)** and by ICT manufacturers (€ 541 billion in 2003)[67]. Overall, the growth of CCIs in 1999-2003 was 12.3% higher than the growth of the general economy[68]. Almost five million people work in the cultural sector (2005), or 2.4% of the active population in the EU27[69] (6 million if we include people working in cultural tourism[70]).

However, Europe and China ensure their full development in particular through a better use of IP. The economic overview still needs to improve:

- Developing statistics and collaborating more with each other;
- Collecting data, especially cultural and creative SMEs;
- The spilling over effect - for example on tourism or ICT, new devices for cultural, such music or videos.

[67] *Restoring European economic and social progress: unleashing the potential of ICT*", a report for the Brussels Round Table (BRT) by Indepen, Brussels, January 2006. Accessed January, 25, 2013. http://www.indepen.uk.com/docs/brt-main-report.pdf.

[68] KEA, *The Economy of Culture in Europe*, Study completed for the European Commission – DG Education and Culture, 2006 - Accessed January 25, 2013.http://ec.europa.eu/culture/key-documents/doc873_en.htm.

[69] EUROSTAT, Cultural Statistics, 2007.Accessed January 26, 2013. http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-77-07-296/EN/KS-77-07-296-EN.PDF.

[70] Media Consulting Group, *The Potential for Cultural exchanges Between the EU and Third Countries: the case of China*, Study prepared for the European Parliament – Directorate General for Internal Policies, 2009. Accessed January, 26, 2013.

In some cultural aspects, China and Europe's creative industries suffer the same problems as those in the U.S., domination and oligopolistic behaviours. Also, they suffer piracy[71]. 30% of books sales are pirated and 95% of CDs are of pirate origin. In Europe, it is estimated that piracy will cost 1.2 billion jobs and 240 € billion in lost profits by 2015. In Europe, small and medium size companies are 99% of the total enterprise and provide one third of the employment. On the other hand, architects tend to be self employed. They need to take more risk and invest in talent.

In Beijing, Shangai and Shenzen, local authorities that exist under the municipal government comply with laws and regulations that affect banks, tax, and copyright rules. The local government collaborates with the creative industry leadership groupsfor the big projects.

The national government applies the different rules and laws and the different administrative measurements. The state administration of radio, TV, and film has the role of planning, legislating, and supervising the audiovisual sectors. They also act as agents, because GAPP manages the state owned publishing companies. GAPP also approves publication licenses for periodicals, books, and music[72]. China has to focus more on the international cultural impact via the creation of a platform of cooperation. Also, they have to export more cultural products that are created in China and not just made/manufactured/produced in China. They have to reinforce domestic brands and cultural companies. Chinese industry has another problem; some people do not want to convert cultural industries into businesses and profit making companies.

Globalization and Europe are becoming closer everyday, mixing and generating new expressions and lifestyles. Digital networks become a perfect cultural space. Chinese Statistical Bureau and Culture Bureau with Eurostat should consider a joint development project[73] [74]. The public sector provides notably to the cultural and creative activities, but its contribution is difficult to grasp. It has an impact via public funds[75], but also through reducing VAT, or by giving fiscal advantages to attract private donations and sponsorship[76]. The overall economic and social weight of the cultural and creative sectors is, however, largely underestimated.

What can do copyright for China and Europe?

Right now, we have an idea of how we can relate the copyright and the Chinese creative industries and why it is so important for these kinds of companies. The copyright is not only important for the license, but it is really significant for those companies that always generate profits using designs and those in which the first product or service made is the original one, and

[71] Pricewaterhousecoopers, global Entertainment and media Outlook 2009-2013- Accessed January 27, 2013. http://www.pwc.es/en_ES/es/sectores/entretenimiento-medios/gemo/assets/informe-gemo-09-13.pdf.

[72] Media Consulting Group, the potencial for cultural exchanges between EU and Third countries. The case of China, study prepared for the European parliament. 2009. http://www.marcasepatentes.pt/files/collections/pt_PT/1/178/IPR2%20-%20Mapping%20the%20Cultural%20and%20Creative%20Sectors%20in%20the%20EU%20and%20China.pdf.

[73] http://www.eucopyright.com/en/why-should-i-register-my-work-if-copyright-protection-is-automatic, accessed on Feb, 20, 2013.

[74] http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm, accessed on Feb, 20, 2013.

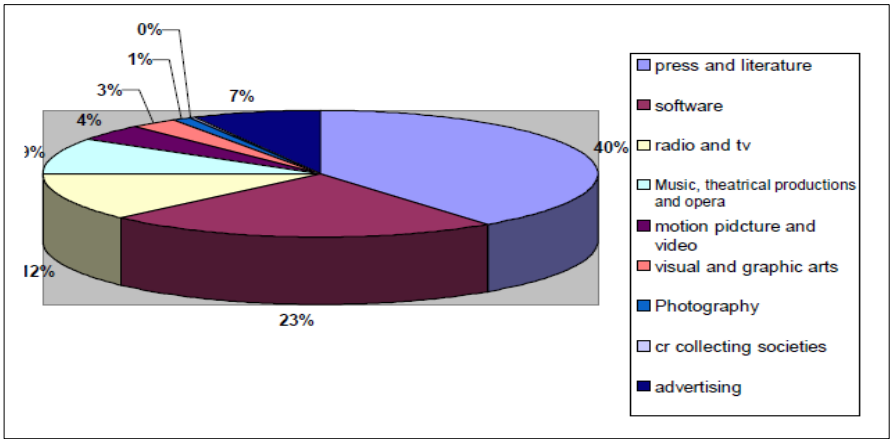
[75] The estimated total public expenditure is € 46.6 billion, varying from 0.5% to 1% of national GDPs. KEA, *The Economy of Culture in Europe*, 2006. Accessed January 28, 2013. http://www.keanet.eu/ecoculture/studynew.pdf.

[76] Although no comprehensive assessment at EU level exists, in the UK, for instance, private support represented around 5% of the total public support to culture in 2004. KEA (2006) – see presentation footnotes in previous studies GFK Consultancy, Study conducted for the German Federal Board of Performing Arts Sector, 2004.

the core of the company. We are going to explain and demonstrate why copyright is so important for the creative industries.

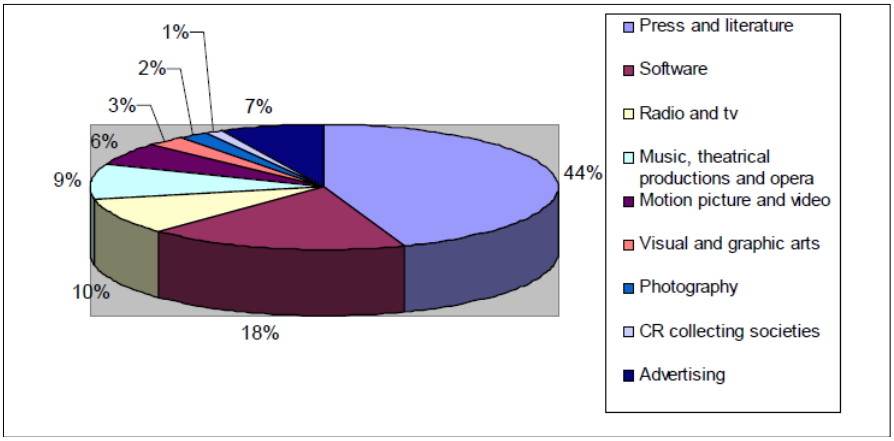
First of all, we can check which kind of companies inside the creative industries contributes more to the GDP. As we can see in the graphic, the press and literature in China contributes 40% to the GDP, afterwards comes the visual and cinema industry with a total of 23%, and in third place, we have radio and television contributing 12%.

Figure 2 Contribution to the PGD Industry



Source: WIPO.Nantong, China, January 13-14, 2011

Figure 3. Contribution to employment by Industry



Source: WIPO.Nantong, China, January 13-14, 2011

By looking at the above charts, we can analyze that 44% of employment belongs to the press and literature sector, while 18% belongs to the visual and graphic arts industry, and in the

third place comes radio and TV. We can check to make sure that this coincides with the previous graphic showing the GDP[77].

Thanks to copyright tool, we can control the exploitation of the product on the market. Without this tool to protect inventions, all findings would be copied when sold on the market. When it comes to musical performances, choreography, and theatre, this is very important, because the first showing, their work would lose its value because other competitors would have no fear of copying it without any scruple. Intellectual property law encourages creators and designers and is an incentive to create. The creator not only designs to commercialize his work, but often times is not even thinking about the profits, but rather thinking that his work will make history, and this must be protected. Therefore, many times it is for the act of pure innovation, rather than thinking solely for profit[78] [79] [80].

The creative industries are, therefore, not only economically valuable, but also function as a catalyst and provider of intangible value in other ways to the organizational processes, relationships, and dynamic and diverse economic sectors. These industries range from something as simple as designing clothing using local knowledge to something as complex and cutting edge as computer chips in Silicon Valley. In the creative economy, industry and services are increasingly merging. As mentioned by Pernille Askerud, to analyze the Asian situation: Increasingly, the cultural industry and information concerned new sectors of production and distribution (for example, production in Beijing or creative clusters entertainment in Shanghai)[81].

We have to remember Ramanathan and the politics consideration about the document of the PCC in 2002 that said:" we have to improve the socialist culture and attend the spiritual and cultural needs under the conditions of a market economy"[82].

Nowadays, UNESCO in an article tries to make us understand that for example, Hong Kong, (Special Administrative Region of China), and Singapore, have been rising in analyzing the creative industries sector in an effort to keep their economic dynamism. Both cities have produced detailed studies; for example, a study on Creativity Index, Hong Kong and Economic Contributions of Singapore's Creative Industries, of the role and scale of the creative economy, largely adopting the analytical models developed in the UK and adapting them to take account of their local specificities. Shanghai, the most high-profile of China's more rapidly modernizing cities, is well aware of the potential of the creative industries for economic growth and in 2006 planned to initiate a comprehensive city and district mapping exercise upon which future policy decisions will be based. Furthermore, Shanghai's Creative Industry Centre is currently conducting research in cooperation with the Shanghai Intellectual Property Administration into the creative industries sector as well asa research project on how to make full use of IPRs to promote the growth of creative industries. In order to harness the opportunities offered by the creative industries, governments first need to undertake thorough mapping and statistical research to better understand them[83].

[77] Gantchev, Dimiter. The role of the copyright in the creative industries. WIPO: China. 2011.21-32.

[78] Brian Fitzgerald, Copyright and the Creative Industries in China, http://eprints.qut.edu.au/2961/1/2961.pdf, Accessed on Jan, 23, 2013.

[79] Montgomery, Lucy; Fitzgerald, Brian F. (2006). Copyright and the Creative Industries in China. International Journal of Cultural Studies 9(3): 407-418.

[80] Ronan Deazley. Copyright in Historical Perspective, or Six Observations in Search of an Act. University of Glasgow.2010. Accessed on Jan, 23, 2013. Available in http://www.ipr2.org/storage/Deazley966.pdf.

[81] www.tdctrade.com/alert/cba-e0705e.htm Accessed January, 28, 2013.

[82] http://www.cityfringe.gov.uk Accessed January, 29, 2013.

[83] Art. UNESCO. Understanding Creative Industries Cultural statistics for public-policy making.7-8.

The Agreement on Aspects of Intellectual Property Rights Related to Trade (TRIPs Agreement) may promote a significant increase in the level of protection and enforcement of intellectual property rights in developing countries. The critical issue for the cultural and creative industries is that of the copyright and related rights, especially the need to increase national law copyright and institutions. The absence ofcollecting societies in many developing countries is a crucial problem. The issue of protection of traditional knowledge related to cultural expressions and folklore has not yet received much attention. It is expected that loopholes in the IPR regimes will be fixed internationally by the World Intellectual Property Organization (WIPO). The Development Agenda of WIPO should review the issues of IPRs to assure the interest of developing countries development issues related to intellectual property rights[84].

Copyright is a'bundle'of exclusive rights awarded by law to the authors of literary, artistic or musical works for a limited duration of time. Copyright protects the original expression of idea with the "soul".

Copyright law guarantees that the owner has the right to control the use of his work.

Copyright allows receiving remuneration for using the works (see Para.2, Art. 10, *CCL*).

We can define copyright as a set of economic and moral rights given to the authors to control the use of their works. It is a financial mechanism to compensate creators that is also the basic pillar for these kinds of industries and multinationals. We can say that copyright is in the creative markets in which the demand of these markets has specific characteristics, such as unpredictable consumption. There is a local and global trade through the copyright mechanism, they are income dependant and piracy has a huge impact on these industries, and that is why copyright is a necessary tool to protect the profits of these industries.

Besides, there are some problems that a creative industry has when one tries to enter into the market, some examples being low entry barriers, high fixed cost for creation and the low marginal cost of delivery, excess of supply, and the uncertainty of distribution of the products to the final customer. Likewise, the different products are a handicap, because they increase the cost in the production. They cannot generate economies of scale[85].

Conclusion

As a conclusion, we can say that the culture and the new Communications marketing is so important nowadays, but how can they project the new inventions, the new culture, and creations, without losing Chinese culture, or how can they innovate and develop a country without taking the risk of losing its culture and traditions? Through the legislation and copyright, the folklore is an issue that also needs be protected and is still not really researched.

China is developing its relationship with the rest of the world really fast. China has undergone historic changes. As a new, emerging nation, it will stay unswervingly on the road of peaceful development and unflinchingly implement the opening-up strategy that will lead to mutual benefit and a win-win outcome. Therefore, this path differs widely from the beaten track of the Big Powers throughout history, and this also represents the nation's contributions to the world.

Secondly, China can contribute to the world in differents aspects as: its historical culture, which is one of the unique cultures around the world that has continued unbroken for thousands of years. Also, China has a long standing culture of being very independent and unique, which is the sole culture around the world that has remained uninterrupted for thousands of years. Due to

[84] Edna dos Santos-Duisenberg.The entry into force of the provisions of intellectual property rights. UNCTAD, E-Newsletter, No. 5, May 2007.74.

[85] Giné, Jaume. China, del right to copyright. Economia exterior. Número 53. 2010.4-15.

the heavy influence of western culture on the world during the last few centuries, in general, there is a greater overall understanding of western culture throughout the world. Western culture refers to the culture of European origin. The term "Western culture" is used very broadly to refer to a legacy of social norms, ethical values, traditional religious belief and practice.To date, people in the world know very well the enormous contributions made by Western culture to the world, but no culture is perfect, there are always some shortcomings and disadvantages. Therefore, in a sense, the complex problems of the world have a lot to do with the shortcomings of Western culture.

Western culture is based on the civilization of Christendom, in which good and evil, beautiful and ugly things, and the legitimacy and heterodoxy are diametrically opposed to each other and cannot be reconciled.

The world, however, is vivid, colorful and richly-endowed, and it cannot be simply deemed as either black or white. People in China 2000 years ago put forth an outlook of harmony with differences as they came to realize that it was impossible to get rid of diversity, and began to recognize it and proceed to co-exist with it.

The globalization phenomenon allows information to spread extremely rapidly, and sometimes this creates the risk of losing traditions and customs. The function of the copyright is to protect the author's creativity. Naturally, copying something is not always a bad thing; however, from an economical point of view, it is normal that the owner and designer or author of the creation wants to be protected. For this reason, copyright incentivizes the creation and creativity of the work.

Europe is more culturally diverse and as a developed continent already has an artistic and literary culture that is consolidated. Here in Europe, they copy programs and buy copyrights to perform TV shows similar to those in the United States, but people have plenty of cultural products and exposure, so they can simply choose the medium of entertainment, for example," that suits them the best"

In addition to being an essential driver of cultural diversity in Europe, these industries which include notably architecture, archives and libraries, artistic crafts, audiovisual (such as film, television, video games and multimedia), cultural heritage, design, festivals, music, performing arts, publishing, radio and visual arts make up one of Europe's most dynamic economic sectors[86].

One of these industries is so dynamic and changes so fast that to invest in design is almost too risky for some of the new companies if they want to make profit in a long term. This industry is fashion, and one day it can be up and then follow down. They have to adapt extremely fast to the new market and environment, so the legislation is still developing and improving. Now, the designers do not have to go to the office to protect the design, or the artist does not have to go to the copyright office to pay a fee for the registration. If they can prove that the design or creation or picture is made by them, it is not necessary to register. This is a really good point to save the handwork and save money. Otherwise, there would be problems with fakes and plagiarism everyday in the new globalized market. The small and medium sized companies are fighting to survive everyday and they are constantly encountering difficulties and obstacles that they must overcome. The current economic crisis is also having an adverse effect on these industries, making it even more difficult for them to access the resources that they need to finance their activities and adapt to the new environment.

That is why The European Commission has elaborated the Green Paper (2010) to promote and encourage the entrepreneurial spirit in this industry. Perhaps, the main problem has always been that it has taken so long to prioritize and establish appropriate guidelines for the assistance and encouragement in this sector.

[86] Accessed February, 20, 2013.http://ec.europa.eu/culture/our-policy-development/cultural-and-creative-industries_en.htm.

Furthermore, as part of the implementation of the European Agenda for Culture:

- A Group of experts from Member States has been working on the topic since 2008. Its mandate is now focusing on the strategic use of EU support programs, including structural funds (in 2011); export and internationalization support strategies (in 2012-2013); and good practices on financial engineering for SMEs in cultural and creative sector;
- A Civil Society Platform set up in 2008 produced policy recommendations, in 2010 and is currently working on topics, such as financing and taxation; Regional cohesion; Digital environment; Mobility; and Education and skills[87].

In general terms we can conclude that both continents are working hard to promote the creative industry because this industry is not only a way to generate wealth, but is a tool to promote peace and tolerance between countries. Culture is a guarantor of peace and a basic component of the international relations. It is for that we need to promote it, to preserve and develop.

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[87]Accessed February 20, 2013. Green paper information: http://ec.europa.eu/culture/our-policy-development/cultural-and-creative-industries/green-paper_en.htm.

THE PRE-CONTRACT OBLIGATIONS REGARDING THE FRANCHISING AGREEMENT

Dan-Alexandru SITARU[*]

Abstract

The current paper puts into context the Government Ordinance no. 52/1997 regarding franchising with the new concepts of the Civil Code. Thus, under the old Civil Code there were no specific regulations that could be applied to a pre-contractual obligation of the parties. During any negotiation, because the parties sent each other a series of offers, counter offers, and in the end decided whether to agree or not, some parts of a professional secret, know-how, or any other important information for one or both might be revealed to the other. Under international laws, such as the one in France, or by using internationally established unwritten law, such as the Franchising Model Contract by the International Chamber of Commerce and Arbitration in Paris, such a disclosure of important or secret information is protected from future unauthorized usage by any party or affiliate if the contract is not signed. In the view of the new Civil Code, this stage in the development of an agreement, not yet binding, is now regulated and protected.

Keywords: *franchising, franchisor, franchisee, business model, professional secret*.

Introduction

The new civil code did not also include to its regulations the franchising agreement. Despite the same includes most of the civil and commercial agreements, the franchising agreement remains specifically regulated by the Govern Ordinance no. 52/1997 regarding the legal treatment of the franchising.

Under the law the franchising is a trading system based on continued collaboration between individuals or legal entities that are financially independent, by which a person named franchisor grants another person named beneficiary the right to operate or to develop a business, a product, a technology, or a service[1].

By encompassing the particularities set by the lawmaker the franchising may be comprehensively defined as the economic and legal operation by which a professional trader, the franchisor, being an individual or a legal entity, who is holding the title over tangible and/or intangible assets and the title over a successful business, allows another person or several persons, the franchisees (beneficiaries), to manufacture goods or trade them under their mark, using the know-how developed by the same, within a franchise network wherein the parties are independent from a legal perspective, but are operating the franchisable concept in a homogenous and collective manner.

As we stated in previous works[2] the conclusion of the franchising agreement involves going through three stages. The first of them, which also represents the subject matter of our study, is the pre-contract stage. The same is followed by the contract or proper stage, and after the expiry

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[1] The Govern Ordinance no. 52/1997 regarding the legal treatment of the franchising, published with the Official Journal of Romania (*"Monitorul Oficial al României"*), part I, no. 224 of the 30/08/1997, approved as modified by the Law no. 79/1998 (O.J. part I no. 147 of the 13/04/1998) and republished, with the texts being given a new numbering, with the Official Journal, part I, no. 180 of the 14/05/1998.

[2] Dan-Alexandru Sitaru, *Contractul de franciză în dreptul intern şi comparat* (The Franchising Agreement within the Domestic and Compared Law), Ed. Lumina Lex, 2007, Bucharest.

of the term set by the parties, or as result of a unilateral termination or of a cessation by fault of the agreement, respectively, for a period of maximum 5 years, the parties are bound by certain specific obligations such as the non-competition one. Such period subsequent to the cessation of the effects of the agreement is the post-contract stage.

Contents

1. The contents of the pre-contract stage

Based on the franchisor's right to choose and select their beneficiaries, they need to first conduct a market survey, choose the franchising method and form they shall apply within the new territory, check the competence and the professionalism of the potential future partners, all in accordance with the already existing franchising network, or in order to create a new one. For such issues to be possible to apply the franchisor needs to know the economic, social, and legal situation within the contemplated geographical area according to their requirements and with their economic interest. However, quite often, the franchisor would approach a beneficiary precisely in order to be able to enter a market where, on their own and directly, they could not have access.

Broadly, the pre-contract period consists of determining such elements, which are of essence for developing a franchising network[3], and which confer the importance and the necessity for such period. Such period is one of high legal importance as regards the rights and the obligations of the parties, being the stage of essence the future franchising agreement shall be built upon. This is the period when the information exchange occurs that shall, on one hand, allow the franchisor choose the best partner to entrust with the secret of the franchisable concept, and on the other hand allow the potential beneficiary (we shall call them so as they only gain the legal status of a beneficiary at the time the agreement is signed) check the reliability, the profitability, and the accuracy of the franchise network they are going to join, assess whether they could materially and professionally meet the requirements imposed by the franchisor, etc.

Summarising, both parties need to examine the convenience of the business they wish to conclude, and following the negotiations become convinced that they are making a choice being fully aware, i.e. to lawfully form their consent[4].

2. The obligation to inform

The key element during this phase is the one of the mutual obligation to inform. It arises from the article 2 paragraph 1 in the G.O. no. 52/1997, wherein it is stated that the purpose of the pre-contract phase is to allow the parties to form a decision to collaborate. It is common for all the franchise types and methods set out, being an obligation with a general nature. We shall discuss such obligation, and we shall examine its legal nature, its contents, and its penalty, each in its turn.

[3] For the definition of the franchising network please refer to Stanciu. D. Cărpenaru, *Tratat de drept comercial român* (Romanian Commercial Law Treaty), Ed. Universul Juridic, 2012, p. 584; Liviu Stănciulescu, VasileNemeş, *Dreptul contractelor civile şi comerciale în reglementarea noului Cod Civil* (The Civil and Commercial Contract Law as Regulated by the New Civil Code), Ed. Hamangiu, 2013, p. 593.

[4] Article 1,182 in the Civil Code, paragraph (1) The agreement is concluded by negotiation between the parties, or by the acceptance without reservations of an offer to contract. Paragraph (2) It is sufficient for the parties to agree upon the elements of essence of the agreement even though certain secondary elements are left to be agreed upon subsequently, or the determining of the same is entrusted to another person.

2.1. The legal nature of the obligation

The New Civil Code sets within the article 1,183 paragraph 1 that the parties have the freedom to initiate, carry on, and break the negotiations, and they may not be held liable for the failure of the same. Therefore, any legal act is preceded by a negotiation wherein the elements of the offer are debated and may be agreed upon or not by the parties involved. A significant part of such negotiation is represented by the mutual informing the parties are carrying on as regards their person, the object of the future act, and the incumbent rights and obligations, respectively.

The article 2 paragraph 2 and 3 in the G.O. no. 52/1997 sets the legal nature and the contents of the prior informing obligation that is especially incumbent on the franchisor. Unlike the Deontological Code of the French Franchise Federation, which was the inspiration source for the Romanian lawmaker, such article in the Romanian law did not also take over a final paragraph in the Code that expressly provided for that the list and the listing included by the paragraph 3 are not exhaustive. This is where the first issue arises from when determining the legal nature of the obligation to inform, namely to answer the question whether within the Romanian law such list is provided for in a limiting manner, or in a merely illustrative one.

In partial accordance with the doctrine, but in our opinion closer to the spirit of the law, the listing provided by the lawmaker, although expressly provided for, is however not limitative. Thus, it is consistent with the spirit of the law that certain clauses should be express, due to their importance, but we are not yet on the contract ground, but at the level of negotiations of nature to form the future contract consent. It is not an accident that the Romanian lawmaker chose to regulate such agreement as a mixed agreement, with clauses imposed by the law, but also with provisions expressly left at the discretion of the parties. In the case of the listing we are referring to, the lawmaker, being aware of the fact that within the Romanian law the mere obligation to inform may lead to penalties, has expressly regulated the contents of the obligation, but nothing prevents the parties from also debating and mutually communicating a series of other information. It is tempting to say that the law would be limitative in order to protect the franchisor, but this is not the case as they are expected to show a conduct that is specific for any professional trader, who should be able to cope with the competition, and adapt to the issues and the speed of the market activities.

An issue that arises when the laws in force are looked at appears to be the border, or the limit the obligation to inform should have.

To set a limit within the negotiations between the parties would be a serious interference by the lawmaker, which would be completely unjustified. It is also impossible for the lawmaker to quantify which information is, or is not, relevant and fundamental for the forming of the will of one of the parties. It is the duty of the franchisor, who is required to be an experienced trader, to best choose which partner they shall collaborate with, and as regards the beneficiary the same enjoys a series of legal provisions protecting them should they be a novice. Between the parties should exist, from the very beginning, within the spirit of the franchising agreement, a collaboration based on trust and good faith. Let us not forget that the future agreement shall have as a fundamental feature the fact it is concluded *intuit personae*, wherefrom arises the idea that both parties should act accordingly.

Another argument may also be brought for the idea that the list provided for by the law is not a limiting one, by construing it systematically. Thus, at the level of the whole law the obligations of the parties are the only ones provided for in a limiting manner, which is justified, while the other notions are defined with the mere purpose of clarifying a conceptual issue. The same is the case here, where the list within the paragraph 3 represents a clarification and at the same time a minimum of information that needs to be communicated by the franchisor, all for the purpose of protecting the beneficiary. Such fact however does not reduce the exigency of the fact that the failure to inform according to the paragraph 3 may entail penalties.

The paradox arising from such situation however devolves from the practice. On the theoretical level the things are clear, but when the two planes meet the following dilemma arises: how important is such information for the franchisor and whether the same are not subjecting themselves to a risk this way. Should they communicate more than the law provides for, they could transfer part of the secret of the franchisable concept. Let us assume that the beneficiary is acting in bad faith, and aims to fraud their good faith partner.

A limit may be set however, which is stated by the doctrine, which shows that the secrecy of the business, and the nature and the contents of the know-how, respectively, are limits for the extent of the obligation to inform. A certain "proportionality" of what is disclosed should be maintained in order to keep the secrecy of the fundamental elements.

While under the old legislation no legislative consecration existed as regards the good faith the parties are bound to show when negotiating an agreement, within the New Civil Code is regulated, for the first time, as a general rule, the requirement of good faith for the negotiations. Thus, according to the article 1,183 paragraph 2, the party entering a negotiation is bound to observe the good faith requirements. From this arises the legal obligation to negotiate upon the offer, the counteroffer, the refusal, or the possible acceptance, with firmness, seriousness, and within the spirit of the diligence of a good professional.

It is within the same law text, within the second thesis, that it is stated that the parties may not agree upon limiting or excluding such obligation. Therefore, the parties are free to conclude any additional agreement that would guarantee, for example, the confidentiality of the negotiations, namely to protect them from the situation described above when one party, as a rule the beneficiary, may only have the intention to obtain information, and not to conclude an agreement. They shall however never be able to derogate, by an express or tacit clause, from the requirement of good faith in conducting the discussions.

In the 3rd paragraph of the same article in the Civil Code the lawmaker states, generally, which the main deed or situation that would lead to a breaching of the obligation to observe the good faith negotiations is. Thus, it is against the good faith requirements, among other things, the conduct of the party that initiates or continues negotiations without the intention to conclude the agreement.

We feel that this law text comes to complete the previous paragraphs and perfectly fits the situation the old Civil Code was not covering. It was acknowledged the importance of the pre-contract phase, of the existence of the risk that by negotiations essential information may be disclosed without a possibility to hold liable the person taking advantage in bad faith by attending the negotiations without any intention to conclude the agreement.

It is also the New Civil Code that regulates, in order to avoid the situation previously described, the interdiction to disclose the confidential elements a person may become aware of during the negotiations. The obligation of confidentiality within the pre-contract negotiations is included to the article 1,184, which states that when information is communicated by a party during the negotiations the other party is bound not to disclose the same, and not to use the same for their own interest, notwithstanding that the agreement is concluded or not. The breaching of such obligation entails the liability of the party at fault.

Several important points result from this[5]. In the first place, the law does not require the parties to conclude a special agreement for the purpose of protecting the confidentiality of the information disclosed on the occasion of the negotiations. This, however, does not prevent the parties to, by their express will, conclude such an agreement. The Civil Code only covers the

[5] Please also refer to the comments on the article no. 1184 in the work: Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod Civil - Comentariu pe articole* (The New Civil Code – Comments by Articles), Ed. CH Beck, 2012.

situation where no such agreement was concluded, by expressly stating that a confidentiality clause is presumed between the parties irrespective of their expressed will.

In the second place, for such presumption to operate the opposed party should be notified about the confidential nature of the information they received. We feel that in the absence of such a notice the parties may apply the good faith principle, but the concerned party may not invoke, and may not impose the other party to be aware of the confidential nature. Even in the case of the franchising agreement, where arguments could be brought that both parties should have already been aware that what involves the franchisable concept is confidential, we feel the presumption of confidentiality may not be held in absence of a clear, specific, and prior notice.

Finally, the New Civil Code specially regulates the situation where one party considers a certain element to be of essence for the conclusion of the agreement. Such element of essence may lead to refusing to reach a valid agreement. Thus, according to the article 1,185, when during the negotiations one party insists that an agreement is reached upon a certain element, or upon a certain form, the agreement shall not be concluded until an agreement upon the same is reached.

The law text perfectly applies as regards the franchising agreement. Often the elements of the franchisable concept are not negotiable, the franchise network is strictly controlled and regulated by the franchisor, and any transgression may entail the exclusion from the same and interest damages. This is precisely why the lawmaker allows from the very beginning that the elements of the future agreement on which in the opinion of one of the parties the formation of the same essentially depends should be clearly delimited, and in the event of one of the same being refused the continuation of the negotiations may become pointless.

The second issue regarding the legal nature of the obligation to inform is to determine whether it is an obligation of means (of caution and diligence) or one of result[6]. Following the majority line of the doctrine we state that this is an obligation of means, with all the consequences arising from this fact.

In keeping with the spirit of the law and of the future agreement, we state that the obligation to inform should go two ways, namely both from the franchisor towards the beneficiary, and, to a smaller extent, from the beneficiary towards the franchisor. Doubtlessly, the main obligation is on the side of the franchisor, and it consists of the provision of concrete data regarding the financial conditions, the exclusivity clauses, the term of the agreement, the termination, the renewal, etc. This however does not mean that the franchisor should make the future beneficiary also understand the information. They are bound to use all diligence for those listed by the law to reach the beneficiary in a clear and correct manner, but not also explained or detailed.

It may be construed that such a detailing or attempt to explain would lead to exceeding the protection limit of the secrecy of the franchisable concept mentioned above, meaning that it would be an exaggeration to construe the article 2 paragraph 3 in the Ordinance to the effect that the franchisor should guarantee the result, i.e. the debtor should understand the information. The information should be intelligible and concrete, and only an emphasis may be accepted for the purpose of drawing attention on certain major elements such as the duties, the volumes of goods to be sold, etc. On the other hand, a passive attitude from the beneficiary of the obligation to inform may not be excused later, as they also have the obligation to choose who they can and wish to enter a legal relation with.

By reference to the requirements the offer to contract imposes under the Civil Code, namely to be specific and complete, we feel that the same are not breached. The legal nature of the offer to join a franchise network is limited to stating the general elements of the franchisable concept,

[6] Article 1,481 in the Civil Code (1) In the case of the obligation of result the debtor is liable to procure for the creditor the promised result. (2) In the case of the obligations of means, the debtor is liable to use all the required means in order to achieve the promised result.

and not to actually teaching the concrete elements to the beneficiary. Such stage shall be completed in order to observe the franchisor's obligation to provide technical support and information after the contract was signed, therefore during the contract stage.

As regards the term the obligation to inform should be fulfilled within, unlike the French legislation that requires a document to include all the information to be prepared and submitted within 20 days after the agreement was signed, the Romanian law does not set a specific term. The mere submission of the contract offer to be read does not work instead of the obligation to inform, notwithstanding that the same may include or not the list provided for by the G.O. no. 52/1997 unless the submission manner is specific and complete.

As regards the time the informing should take we feel that the same should be sufficient for the beneficiary to form their consent, being fully aware, as regards the conclusion of, and then the performance under the agreement.

2.2. The contents of the obligation

The contents of the information is expressly provided for within the paragraphs 2 and 3 of the article 2 in the G.O. no. 52/1997. Thus, the paragraph 2 provides for that the franchisor shall provide the future beneficiary with information to enable the same to participate, being fully aware, in the performance under the franchising agreement. Doubtlessly, the text once again shows the care of the lawmaker for the protection of the beneficiary. However, we feel that the same article may also be applied in order to protect the franchisor within the hypothesis that the same would have every interest to have the beneficiary join their network.

Concretely, the article 2 paragraph 2 sets the general requirement for the franchisor to provide all the information required for the formation of the future beneficiary's consent.

The article 2 paragraph 3 lists the categories of information the franchisor may discuss with the beneficiary[7]. We feel that the same, within the context of the old Civil Code, appeared to be the only information required and possible to be provided. The listing however is not limitative. Within the context of the New Civil Code, along with the regulation of the obligation of good faith during the negotiations, such listed elements are an orientation for the parties within the negotiations.

2.3. The penalty for breaching the obligation

As any legal obligation, the obligation to inform also needs to have a penalty attached.

The first issue we need to determine consists of determining whether the breaching of the obligation to inform may entail the civil contract liability, or the tort liability.

The agreement represents the manifestation of will arising from the offer to contract meeting the acceptance of the same. Or, in our case, since we are within the pre-contract period,

[7] The article 2 paragraph 3 provides for that: The franchisor undertakes to provide the beneficiary with information regarding:

- their acquired and transferable experience;
- the financial conditions of the agreement, namely the initial royalty or the network entry fee, the periodical royalties, the advertising royalties, the determining of the tariffs regarding the provision of services and of the tariffs regarding the products, the services and the technologies, in the case of the contract obligations to purchase;
- the elements enabling the beneficiary to calculate the forecasted result and to prepare their financial plan;
- the goals and the area of the granted exclusivity;
- the term of the agreement, the renewal, termination, assignment conditions.

For a detailed analysis please refer to Mihaela Mocanu, *Contractul de franciză* (The Franchising Agreement), Editura C.H. Beck, Bucharest, 2008; D.A. Sitaru, *the quoted work*, p. 47 and the following.

it may not be stated that a legal act was validly concluded. The pre-contract stage represents a negotiation in order to conclude a franchising agreement. This is equivalent within the Romanian law with the franchisor submitting an offer to contract and the negotiations with the potential beneficiary in order to have the same enter the franchise network. As a conclusion we identify as applicable, in the event of breaching the obligation to inform, the civil tort liability.

The civil tort liability is regulated by the New Civil Code within the article 1,349. From the contents of the same also arise the elements of such form of liability. The illicit deed may consist either of entering a negotiation without observing the good faith requirements[8], or of providing inaccurate or false information. The damage is the result of the wrong fulfilment, or of the failure to fulfil the obligation to inform, and of the initiation or continuation of the negotiations without the intention to conclude the agreement, respectively, and needs to be proven. The damage should be the direct result of the illicit deed, and the absence of a causality relation between the two elements may lead to the inexistence of the tort liability. Not in the last place, the fault also needs to be proven.

The New Civil Code, within the article 1,183 paragraph 4, brings to attention a special case. In the case where the party that initiates, continues, or breaks the negotiations against the good faith, as we examined above, shall be liable for the damage caused to the other party.

In such case it is about the party that either attends the negotiations without the intention to become legally bound but possibly with an illicit purpose, namely it is about that unlawfully breaks the negotiations. Such a person might be the one that took a legal commitment towards another person and continues the negotiations being aware that they could not reach the conclusion of a new act since they would then be breaching their first commitment.

In such special case, in order to determine such damage shall be taken into account the expenses engaged in order to conduct the negotiations, the renouncing of the other party on other offers, and other such circumstances.

It is very possible for the franchisor to make a series of expenses in order to be able to concretely negotiate with a potential beneficiary, these including for example the transport expenses, those generated by the ceremonial, etc. The lawmaker's solution to allow the party that was harmed as result of the conduct exercised in bad faith by the other party to claim damages is equitable. The most serious case is when one party, being in good faith convinced by the immoral and illicit conduct of the other party, renounces on one or several other offers regarding the same object the same agreement. We feel that it is imperative that, as regards the renouncing on other offers made by third parties, as the law text states, the same should regard the same issue brought to negotiation, and the party acting in good faith should have renounced on them because they felt, or had all the elements to feel that they had reached an agreement with the other party, which would have initiated, or would be continuing the negotiations without the intention to conclude the agreement.

Conclusions

The pre-contract stage has taken shape in view of the legislation, but not sufficiently. The lawmaker has covered part of the previous gaps, but for similarity with the international legislations a stricter determining of the concept, and of the applicable penalty especially, would have been required.

[8] Please also refer to the article 14 in the Civil Code, which provides for that: Any individual or legal entity should exercise their rights and fulfil their civil obligations in good faith in accordance with the public order and the good morals.

We are seeing this stage more and more often on various agreement categories, such as the exclusive distribution agreement, the agency agreement, etc., but within any of them it does not have such an important weight as within the franchising agreement. It represents the birth of the agreement, the time the basis for a long-term collaboration is set, since as it is already known the franchising agreement is concluded for at least the period required for the beneficiary to cover their expenses.

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ROMANIAN "FIDUCIA" AND GEORGIAN "TRUST" (MAJOR TERMINOLOGICAL SIMILARITIES AND DIFFERENCES)

Irina GVELESIANI[*]

Abstract

Globalization - a complex system of innovation, internationalization and rapidly growing interdependence – plays the greatest role in the formation of today's world. It enters different spheres of human life and stipulates the uniformity of economy, law, business and even, political life. In the framework of global processes, a lot of changes can be seen in the legal systems of European countries. The given paper discusses the formation of the Romanian "fiducia" and the Georgian "საკუთრების მინდობა" (sakutrebis mindoba – means "trust") under the influence of Anglo-American "trust". The term "trust" generally nominates an institution of Anglo-American law, which is irreplaceable in the cases when the real owner of the property must be substituted by the nominal one (trustee) for carrying out civil relationships. This concept originated in the English Common law, but has been constantly rejected by the European continental legal systems (Civil law). The main obstacle laid in the fact, that Anglo-American legal system was based on the duality of ownership, which was almost unacceptable for the continental law-governed countries. However, in the recent years, the growing importance of the American capital markets popularized the utilization of "trust" and stipulated its insertion in some "rigid" European jurisdictions. Moreover, some world countries have already indirectly allowed mechanisms similar to the "trust". Among them are Romania and Georgia. The given research is dedicated to the precise description of the Romanian and Georgian "trust instruments". It singles out major terminological units and underlines the fact that newly-established mechanisms have to undergo several stages for turning into faithful reflections of the original model of "trust".

Keywords: *globalization, fiducia, Georgian, Romanian, trust.*

Introduction

The concept "globalization" has rapidly crept into the consciousness of contemporary society and has acquired different interpretations. According to Merriam-Webster dictionary: globalization means the development of an increasingly integrated global economy marked especially by free trade, free flow of capital, and the tapping of cheaper foreign labor markets[1]. It is an inevitable phenomenon in human history that's been bringing the world closer through the exchange of goods and products, information, knowledge and culture[2]. Globalization refers both to the compression of the world and the intensification of consciousness of the world as a whole[3]. The existence of competing definitions of global processes indicates to the complexity of the given phenomenon. Some scholars speak about globalization of economy and culture, while others indicate to the law or politics. However, according to the existed data, globalization can be regarded as a complex system of innovation, internationalization and rapidly growing interdependence, which plays the greatest role in the formation of today's world. It comprises almost all spheres of life and aims at the creation of the "boundless" globe.

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[1] Merriam-Webster dictionary. Accessed January 2, 2013, http://www.merriam-webster.com/dictionary/globalization.

[2] Globalization. Accessed January 3, 2013, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:23272496~pagePK: 51123644~piPK:329829~theSitePK:29708,00.html.

[3] Malcolm Waters, Globalization, accessed January 12, 2013, books.google.ge/books?isbn=0415238544.

The given paper discusses globalization as an ongoing process, which changes the contours of law and creates new global legal mechanisms. One of them is the "trust" – a unique institution characterizing Anglo-American law, which occurred in response to the need to find solutions and to protect promises which had no binding affect, but which should have been compiled according to the equity principles: a good-faith and respecting one's word[4]. The concept of "trust" originated in English Common law during the Middle Ages. It was defined as a fiduciary relationship in which a person, called a "trustee", held title to the property for the benefit of another person. The agreement that established a "trust" consisted of three main elements: a "**grantor**" (also called a "**creator**", a "**donor**" or a "**settler**"), a "**trustee**" and a **"beneficiary**".

In the beginning of the 19th century, "trust" was established in the American business sphere. It acquired great significance, especially, through mutual and pension funds. The growing importance of its utilization in the American business law has influenced some European countries. However, the unique institution of "trust" has been constantly rejected by the continental legal systems (civil law). The main obstacle laid in the fact, that Anglo-American law was based on the duality of ownership, which was almost unacceptable for the continental law-governed countries.

The given research tries to answer the demands of the modern epoch. It describes the appearance of the European modifications of "trust", singles out major concepts presented in the Romanian and Georgian "trust mechanisms" and underlines their importance in today's globalized world. The given research is a presentation of the new outlook via relying on already existed small number of works, which are dedicated to the development of "trust-like" mechanisms of the world.

ROMANIAN "FIDUCIA" AND GEORGIAN "TRUST" – NEWLY ESTABLISHED MODIFICATIONS OF ANGLO-AMERICAN "TRUST"

The establishment of modifications of Anglo-American "trust" – this is a major challenge of today's Europe. Many European countries are trying to answer the demands of modern epoch via establishing "trust-like" mechanisms in their legal systems and business spheres.

It's worth mentioning, that the relationships similar to "trust" appeared in Roman law in the 1st-3rd centuries A.D. Under a fiduciary contract: one person (principle) transferred property to another (fiduciary) on the basis of a certain condition (fidei fiduciae causa), which obliged him (her) to use the property in accordance with the terms of the contract and to return it immediately after the emergence of the conditions specified in the contract[5].

However, according to the historical data, the original form of trust appeared in the English Common law in the Middle Ages. This irreplaceable institution derived from a system employed in that era known as "use of land" or "uses". The history of the emergence of "trust" states, that during knights' lengthy absence, their estates needed protection and preservation. For that reason, each knight transferred his legal ownership to a third party (a close friend) under a special agreement – the estate ought to be transferred back upon the knight's return. This transfer empowered the transferee to manage the "acquired" ownership and to enforce the rights of the estate against all parties while the owner was away. The given transference procedure preceded and at the same time, stipulated the emergence of today's institution of "trust", which is based on the duality of ownership (the property resulting from the legal estate is divided into the property of a trustee and the equitable interest – the property of a beneficiary). A "trust instrument" (a trust contract) is usually created inter vivos or on death at the direction of an individual (such type of a

[4] Luminița Tuleaşcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journl/ SU11/ REBE-SU11-A13.pdf.

[5] Tariel Zambakhidze, "Trust (Historical Review)", Samartali (2000): 59.

trust is called a "testamentary trust"). He (she) obligates certain persons to use and to protect entrusted property for the benefit of others. Therefore, an ordinary Anglo-American "trust" consists of three main elements:

- A "***trustor***" - a person who creates the "trust" (also called a "creator", a "grantor", a "donor" or a "settler").
- A "***trustee***" - a person or a legal entity which holds legal title to the trust property. Trustees have many rights and responsibilities. They vary from trust to trust depending on their type;
- A "***beneficiary***" – a beneficial (or equitable) owner of the property. It's worth mentioning, that a "grantor" can be even a "beneficiary". In this case, the "trust" involves a simple delegation of responsibilities.

Trusts are usually created orally or in a written form. An "oral trust" (a "parol trust") presents the grantor's spoken statement. It is an agreement formed between a grantor and a trustee without the usage of a written instrument. Generally, trusts of real property require a written form, while the trusts of personal property can be created orally[6]. In order to be valid, each trust has to meet three major certainties (the given requirement goes back to some words of Lord Langdale (1840)[7]):

1. The certainty of intention;
2. The certainty of subject-matter, which can be subdivided into:
   a) The certainty of what property is to be held upon trust;
   b) The certainty of the extent of the beneficial interest of each beneficiary;
3. The certainty of beneficiaries (in case of private trusts) or of objects (in case of non-charitable "purpose" trusts without human beneficiaries - i.e. trusts of imperfect obligation). This requirement does not apply to charitable trusts if there is a general charitable intention[8].

Since the beginning of the 19th century the institution of trust has become popular in the American business sphere. It has offered several economic and legal advantages, especially, through mutual and pension funds. At the end of the 20th century, the process of globalization stipulated the "internationalization" of trust mechanism. The starting step of this process was the conclusion of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1 July, 1985) and its ratification by 12 countries (March, 2011). The evolution of regulations of trust at the European level directly pointed to the tendencies of the inclusion of this institution into the national laws of the EU member states. Moreover, the adoption of the Hague Convention was an obvious starting point of the unification of the laws of the European countries. However, the implementation of the given institution into the civil law jurisdictions has met several obstacles, namely:

- The continental law countries have been characterized by the lack of the concept of the duality of ownership i.e. by the absence of the concept of property division in ownership by law (right enjoyed by the trustee) and ownership in equity (right enjoyed by the beneficiary) and, therefore, by the existence of the principle according to which there must be only one owner at the time[9];

[6] Oral trust law and legal definition. Accessed January 4, 2013, http://definitions.uslegal.com/o/oral-trust/.

[7] The three certainties, Wiley Online Library. Accessed January 5, 2013, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1940.tb02728.x/pdf.

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- The continental law countries have been characterized by the singleness of a person's patrimony: 1. each person has a patrimony; 2. each patrimony belongs to someone; 3. one person has only one patrimony[10].

Despite such obstacles, legal systems of some European countries underwent the process of modernization, which stipulated the creation of several modifications of trust, for instance, the institution of "fiducia" appeared in the newly created Civil Code of Romania, which entered into force on 1 October 2011.

According to Article 773 of the New Civil Code, "fiducia" is the legal operation whereby one or more grantors (in Romanian *constituitori*) transfer(s) various patrimonial rights or a group of such patrimonial rights, present or future, to one or more trustees (in Romanian *fiduciari*), who administer those with a given purpose, to the benefit of one or more beneficiaries (in Romanian *beneficiari*). These rights constitute an autonomous patrimony, separate from the other rights and obligations in the fiduciary's own patrimony[11]. Therefore, fiducia is a legal relationship oriented on the transference of present and future rights. It consists of three major elements:

- A "***constituitori***" - a person or a legal entity which creates "fiducia";
- A "***fiduciari***" - a person or a legal entity which holds legal title to the trust property. A "fiduciari" can be represented only by credit institutions, investment companies, insurance and reinsurance companies, investment management companies, public notaries and attorneys at law;
- A "***beneficiari***" – a beneficial owner of the property.

"Fiducia" must be expressly established by law or by authenticated contract. The contracting parties - a constituitori, a fiduciari and a beneficiari – make an agreement, which connects them by a common economic purpose. A "fiducia" is usually registered at the Electronic Archive of Security Interests in Personal Property. In order to be valid, it must explicitly state the following elements:

- the rights subject to transfer;
- the duration of transfer (not to exceed 33 years);
- the identity of the grantor, trustee and beneficiary;
- the purpose of the fiducia;
- and the extent of the trustee's management and disposal powers[12].

Therefore, a study of the New Romanian Law reveals the similarities and differences of the Romanian "fiducia" and Anglo-American "trust". Major differences between these legal institutions can be listed in the following way:

1. the "trust" divides trustor's ownership into the property of a trustee and the property of a beneficiary – an equitable interest, while "fiducia" divides and at the same time, separates the trust property from a trustee's individual property. Therefore, the Romanian law discusses a trust property and a trustee's individual property as two separate units;
2. the creation of a "trust" requires a trustor's intent presented orally or in a written form. For the creation of a "fiducia", a ***constituitori*** enters into a written and notarized contract with a ***fiduciary;***

[10] Valerio Forti, "Comparing American Trust and French Fiducie", The Columbia Journal of European Law Online (2011), accessed January 10, 2013, http://www.cjel.net/online/17_2-forti/.

[11] Luminiţa Tuleaşcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journl/ SU11/ REBE-SU11-A13.pdf.

[12] Trusts under Romania's new civil code, fiducia. Accessed January 10, 2013, http://www.hr.ro/digest/ 201203/digest.htm#contents0.

3. the "trust" can be subject to a mortis causa deed, while "fiducia" is never subject to it. Therefore, the Romanian legal system is not familiar with the concept of a "testamentary trust".

It's worth mentioning, that during the end of the 20th century and in the beginning of the 21st century, the modifications of the institution of "trust" appeared not only in the Romanian law, but in other civil law jurisdictions. Among them is the Republic of Georgia. At the end of the 20th century Georgia adopted a new civil code, which significantly differed from the Soviet legislation (for several decades Georgia had been governed by the Soviet law). The newly established civil code was enriched with new concepts and terminological units indicating to the modernization of Georgia's legislation. One of the newly appeared Georgian institutions was "საკუთრების მინდობა" (sakutrebis mindoba), which has been regarded as a modification of Anglo-American "trust". However, a precise study of the Georgian "საკუთრების მინდობა" reveals major differences from its Common Law "predecessor".

Articles 724-729 of "The Civil Code of Georgia" present the essence of "trust" and the parties participating in trust relationships: a "trustor" (საკუთრების მიმნდობი / sakutrebis mimndobi) and a "trustee" (მინდობილი მესაკუთრე / mindobili mesakutre):

- ***"საკუთრების მიმნდობი"*** is a person or a legal entity which creates a "trust". At the same time, it is a person or a legal entity which is a beneficial owner of the property;
- ***"მინდობილი მესაკუთრე"*** is a person or a legal entity which holds legal title to the trust property.

Trust relationships take a form of a "trust contract" (საკუთრების მინდობის ხელშეკრულება / sakutrebis mindobis khelshekruleba). Under this contract: the principle (trustor) transfers the property to the trustee, who accepts and manages it in compliance with the principle's interests[13]. The specificity of the Georgian "საკუთრების მინდობა" presents the right of ownership in a "split" form: some rights of the owner – the management and the disposition of the property – belong to one person (trustee), while other rights – receiving income and profit from the exploitation of the property - belong to another (trustor)[14]. The motive of a "trust contract" can be the owner's wish to delegate the authorities of management ("to get rid of " the load of management) in order to profit from the exploitation of the property. In any case, the ownership must be entrusted in accordance with the trustor's interest. This interest may imply making profit, increasing the property, managing and maintaining the ownership, etc.

A precise study of the Georgian Civil Code reveals, that a trust contract must be created only in a written form. Oral trusts are unacceptable. The ownership is usually managed by the trustee at the risk and expense of the "trustor". In terms with third persons a trustee enjoys the owner's rights:

1. The trustee is bound to manage the property held in trust in his own name, but at the expense and risk of the trustor;

2. The trustee enjoys the owner's entitlement in relations with third persons. If the trustee, contrary to the interests of the trustor, is not acting in the same good faith as in managing his own affairs, he (she) will be obligated to compensate the damage thereby arisen[15].

A transferee is even entitled to make any kind of deal. However, he (she) has no legal rights to sell the property unless the agreement between the parties provides otherwise.

[13] The Civil Code of Georgia (Tbilisi: Bona Causa, 2002), 180.
[14] The Commentary of the Civil Code of Georgia (Tbilisi: Samartali, 2001), 416-417.
[15] The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 180.

Therefore, a study of the new Civil Code of Georgia reveals the similarities and differences of the Georgian "საკუთრების მინდობა" and Anglo-American "trust". The major differences between these legal institutions can be presented in the following way:

1. the creation of a "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "საკუთრების მინდობა", a trustor ("საკუთრების მიმნდობი") enters into a written and notarized contract with a trustee ("მინდობილი მესაკუთრე");
2. the Anglo-American "trust" can be subject to a mortis causa deed, while the Georgian "საკუთრების მინდობა" is never subject to it. Moreover, the Georgian legal system is not familiar with the concept of a "testamentary trust";
3. the "trust" nominates beneficial owners of the property ("beneficiaries") or simply implies the delegation of authorities in behalf of the "trustor" himself (herself). "საკუთრების მინდობა" considers only a simple delegation of authorities of management in behalf of "საკუთრების მიმნდობი" and underlines the fact, that the Georgian legal system identifies the concept of "trustor" with the concept of "beneficiary". Moreover, the term "beneficiary" has no Georgian equivalents.

Conclusions

All the above mentioned enables us to conclude, that today's global processes stipulate closer contacts of human societies and combine modes of living of their representatives. Globalization enters into different spheres of life: politics, economy, business, etc. It even changes the contours of law and creates new global legal institutions and norms. The given paper presented a study of Anglo-American "trust" and its European modifications – the Romanian "fiducia" and the Georgian "საკუთრების მინდობა". A comparative analysis of these institutions revealed the following:

- the Anglo-American "trust" and the Romanian "fiducia" consist of three major elements: the owner of the property ("trustor"; "constituitori"), the transferee ("trustee"; "fiduciari") and the beneficial owner of the property ("beneficiary"; "beneficiari"). The Georgian legal system identifies the concept of "trustor" with the concept of "beneficiary". Therefore, the term "beneficiary" has no Georgian equivalents;
- The creation of "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "fiducia" and "საკუთრების მინდობა", a trustor enters into a written and notarized contract with a trustee ("მინდობილი მესაკუთრე");
- The Anglo-American "trust" can be subject to a mortis causa deed, while the Romanian "fiducia" and the Georgian "საკუთრების მინდობა" are never subject to it. Moreover, the Romanian and Georgian legal systems are not familiar with the concept of a "testamentary trust".

Therefore, the Romanian and Georgian laws have already indirectly allowed mechanisms similar to the Anglo-American "trust". However, it's obvious, that the resulting instruments do not present a faithful reflection of the original model. Further researches in the field of the development of "trust-like" mechanisms throughout Europe will fulfill the picture of the expansion of the utilization of "trust" and vividly depict the impact of globalization on the legal spheres of different countries. Therefore, the given study may play an important role in the solution of one of the urgent problems of today's world.

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REPARATION OF THE MORAL PREJUDICES IN ROMANIAN LABOR LAW

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Abstract

Recent decisions issued by national labor Courts contain interesting references to the problem of the moral prejudices' reparation (especially suffered by the employee). During the application of Romanian Labor Code - Law no. 53/2003[1], the Courts offered a poor practice regarding the above mentioned problem. Usually, the employees' claims having as object the material reparation of a moral prejudice caused by the employers were rejected. The Courts considered that the claims were not founded, because the employees did not prove the irregularity and / or the existence of a moral prejudice. The present paper is trying to identify the situations (as categories) which confer the employees the right to ask for the moral prejudices' (material) reparation and the procedural mechanism in order to obtain a favorable solution (especially from the point of view of the necessary evidence).

Keywords: *labor law, employee, employer, liability, moral prejudice, material reparation, labor court, court case, evidence.*

Introduction

The juridical liability of the labor individual contract's parts is one of the most sensitive issues regarding the labor relation. Romanian Labor Code stipulates four categories of labor contract parts' different liability – disciplinary (art. 247 – 252), patrimony (art. 253 – 259), contraventional (art. 260) and criminal (art. 261 – 265). From these categories, only the disciplinary liability is a Romanian Labor Law specific form of liability[2].

The possibility to determine the occurrence of a moral prejudice for one or the other contractual party exists in case of each form of liability, but the most cases are linked to the disciplinary and patrimony liabilities.

It is important to observe the framework of discrimination regulation (the principle of the equal treatment for all employees and employers) – art. 5 from Romanian Labor Code, Government Ordinance no. 137/2000 on the prevention and punishment of all forms of discrimination[3] and Law no. 202/2002 on equal opportunities and treatment for women and men[4].

Observing these regulations, it is possible, in principle, to identify situations which imply a moral prejudice for one of the labor contract part, caused by the unfulfillment of one or more specific obligations.

The labor individual contract's party who claims the moral prejudice and its material reparation by the other part has to address to the Labor Court in order to obtain a favorable

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[1] Republished in the "Official Gazette of Romania", 1st part, no. 345 of 18 May 2011.

[2] See I.T. Ştefănescu, *Theoretical and Practical Paper for Labor Law,* Second edition,Universul Juridic Editor, Bucharest, 2012, p. 725; Al. Ţiclea, *Paper for Labor Law*, Sixth Edition, Universul Juridic Editor, Bucharest, 2012, p. 777-778.

[3] Published in the "Official Gazette of Romania", 1st part, no. 431 of 2 September 2000.

[4] Republished in the "Official Gazette of Romania", 1st part, no. 150 of 1 March 2007.

decision. The trial will follow the special rules of Labor Jurisdiction (art. 266 – 275 from Labor Code and art. 208 – 216 from Law no. 62/2011 on Social Dialogue[5]).

Art. 266 from the Romanian Labor Code disposes that the object of the labor jurisdiction is to solve labor conflicts concerning the conclusion, execution, amendment, suspension, and termination of individual or, as applicable, collective labor contracts stipulated in the present code, as well as the requests concerning the legal relationships between social partners, set forth under the Labor Code (and Labor legislation).

The cases having as object the (material) reparation of the moral prejudice are included in the labor jurisdiction, because they are often related to the execution or the termination of the individual labor contract.

For both theoreticians and practitioners in Labor Law, it is important to determine the specificity of this kind of cases, at least the one regarding: the conditions for the occurrence of the party's liability and special limits of liability, the determination of the moral prejudice, the prove of the prejudice, the reparation of the prejudice.

1. A) Art. 253 Paragraph (1) from Romanian Labor Code stipulates that the employer indemnifies the employee, pursuant to the norms and principles of contractual civil liability, if the latter has undergone material or moral damage because of the employer's fault during the performance of his job duties or while performing a job-related activity.

In case of employee's patrimony liability, art. 254 Paragraph (2) from Labor Code stipulates that the employees are patrimony liable, according to the norms and principles of contracting civil liability, for the material damages caused to the employer because of their fault and in relation to their work.

The first conclusion is regarding the different solution regarding the status of the two individual labor contract's parties: while the employers are possibly liable for both material and moral prejudice, the employees are liable *only for the material prejudice* caused to their employer[6].

The multilateral protection of the employees had determined such solution, which represents a limitation of their liability in relation with the employers. It is a positive discrimination, which does imply the following observation: the moral prejudice is possible to be suffered by the employer as a consequence of an employee's action, but *the employer doesn't have the right to claim its reparation*. If the parties of the contract agree to generalize the liability conditions (in order to determine even for the employee to respond for the moral damages caused to the employer), such contractual clause is null, based on the provisions from the art. 38 Labor Code: employees may not waive the rights acknowledged to them by the law; any transaction the aim of which is to waive the rights recognized by the law to employees, or to limit such rights shall be null.

In conclusion, only the employees are able to ask the reparation of the moral prejudice caused by the employer.

B) The regulation of the patrimony liability (art. 253 – 259 from Romanian Labor Code) establishes a particular form of civil contractual liability. The provisions of the Romanian Civil Code – Act no. 287/2009[7] – are the common law for the patrimony liability. Art. 278 Paragraph 1 from Romanian Labor Code stipulates that the provisions of Code are completed by the other provisions in the labor legislation and, unless inconsistent with the typical labor relationships stipulated in the Code, *the provisions of the civil legislation*.

[5] Republished in the "Official Gazette of Romania", 1st part, no. 625 of 31 August 2012.
[6] See I.T. Ştefănescu, *op. cit.*, p. 773.
[7] Republished in "Official Gazette of Romania", 1st part, no. 505 of 15 July 2011.

So, in the Romanian Civil Code will be founded the specific provisions regarding the employer's liability in case of a moral damage caused to their employees.

Art. 1350 paragraph 1 from Romanian Civil Code stipulates that any person has to fulfill its contractual obligation. When the person, without any excuse, doesn't fulfill his/her obligation, he/she will be responsible for the prejudice caused to the other part of the contract and is obliged to repair that prejudice (paragraph 2).

Art. 1531 paragraph 3 from Romanian Civil Code stipulates that the creditor has the right to ask the reparation of the moral damage, but this damage has to be certain (art. 1532 paragraph 1 Civil Code).

As a general rule, the creditor has to prove that he had suffered a moral prejudice and this prejudice is certain.

2. A. The dynamic of labor relations shows that the most of the cases when the employees are entitled to ask from their employer the (material) reparation of the moral damages are linked to:

- Discrimination, the equal treatment for all employees and employers, the equal opportunities and treatment for women and men regarding the execution of the individual labor contract;
- Termination of the individual labor contract, especially in case of dismissal;
- Labor health and safety;
- Disciplinary liability, when the employer applies a disciplinary sanction to the employee.

B. As a specific rule in the labor court procedure, art. 272 from the Romanian Labor Code stipulates that the employer shall be responsible for providing evidence in labor conflicts, being obliged to submit evidence in his defense by the first day of trial.

By exception, when the employee is claiming for the reparation of the moral prejudice, the above mentioned rule doesn't apply. The employee has the procedural obligation to prove the existence of the entire employer's liability conditions:

- Existence and the nature of the prejudice; regarding the moral prejudice, this kind of damage
- Fact that the prejudice is certain;
- Fact that the prejudice is the direct consequence of an unjustified or culpable action of the employer;
- Estimate value of the material reparation and its determination.

C. There is no legal framework to quantify the material value of moral prejudice's reparation. The judge has the freedom to appreciate the amount that expresses the reparation value, independent of the amount asked by the employee. It is possible to have a huge difference between the amount claimed by the employee (by example, 100,000 Euros) and the amount accepted by the Court (1,000 Euros). This fact doesn't transform the employee's claim in an abusive one, because:

- the employee has the freedom to estimate the value of the moral prejudice (and is important to notice that the court cases having as object aspects of the labor relations are free of stamp tax);
- the courts are free to appreciate the value of the moral damage's material reparation, when the conditions of the contractual liability are fulfilled.

3. In the situations mentioned above, at the 2nd point of this paper, regarding the cases when the employees are entitled to ask from their employer the (material) reparation of the moral damages, the moral prejudice is determined by the injury caused to the person (to the employee).

This negative consequence which is the object of the moral prejudice is regarding the harm of the personal rights of the person. The object of these rights is regarding the life of the person, its health, corporal integrity, honor, dignity, social and/or professional status of the employee.

The moral prejudice could represent the death of the employee (as a result of an accident related to his work or activity), the injury or the harm suffered by the employee, the decrease of the professional or social reputation of the employee, the injury of another personal employee's attribute which define the human condition[8].

In case of death of the employee, its successors could claim the material reparation of the moral damage they had suffered. Because of the death of the employee, its successors lose an important material and moral support. They are obliged to modify their life conditions. The successors have the right to obtain the full cover of their prejudice. This right is obtained directly by them (as assurance, by example), or by the effect of the inheritance. In case of inheritance, the rights of the victim are transferred to the successors. These rights were born between the moment of the accident and the one the death occurred. The right of moral prejudice's reparation is born directly in the successors' patrimonies when they prove that this kind of prejudice was determined by the loss of the person who had provided them material and moral support.

In case of the employee physical integrity's or health's harm, the prejudice could by material and moral also. In moral form, the prejudice consists in losing or decreasing the work capacity, or losing or decreasing the work benefits (wage and other form of remuneration).

4. Once the moral prejudice is born, the way it should be repair is, as a rule, also moral. But, the prejudice's victim has also the right to estimate the value of the moral prejudice. So, there is no any incompatibility between the forms of the reparation. The moral prejudice's victim has the possibility to choose between the two forms of reparation. Of course, the interest of the victim – the employee – is to determine a higher material value of his moral damage, accepted by the Court.

Anyway, the author of the moral prejudice (the employer) and the victim of the prejudice (the employee) could agree an amiable solution having object the amount's determination which they evaluated the prejudice. In this case, the agreement is legal and the provisions of art. 38 from the Romanian Labor Code are observed.

When the prejudice is covered by an assurance, the victim has the right to claim any difference between the amounts he consider the prejudice is valued and the one he received through assurance.

5. One recent decision of a Court case offers new interesting elements regarding the way of perception by the national Courts of the matter we are analyzing.

In February 2008, the parties had signed the individual labor contract. The employee had occupied the position of TV presenter at a local specialized TV network.

The employer had the initiative of termination the individual labor contract. The employer had issued the individual dismissal decision (its first decision) in April 2009. The employee asked the Court (Bucharest Tribunal, Section no VIII, Labor and Social InsurancesConflicts) to dispose the cancellation of the decision and to oblige the employer of reinstatement the employee in his former workplace.

We mention that the Labor Code – in Section no. 7 ("Control of and sanctions for unlawful dismissals") from the 5th Chapter ("Termination of the individual labor contract") – stipulates the consequences of the dismissal decision's cancellation.

Art. 78: "The dismissal ordered in non-compliance with the procedure stipulated by the law is struck by absolute nullity".

Art. 79: "In the event of a labor conflict, an employer may not resort, before a court of law, to other de facto or de jure reasons than the ones stated in the dismissal decision".

Art. 80:

[8] See M.N. Costin, C.M. Costin, *Civil Law Dictionary from A to Z*, 2nd Edition, Hamangiu Editor, Bucharest, 2007, p. 771.

- Paragraph (1): "If the dismissal has not been based on good grounds or has been unlawful, the court shall order its cancellation and force the employer to pay a compensation equal to the indexed, increased and updated wages and the other rights the employee would have otherwise benefited from".

- Paragraph (2): "At the employee's request, the court having ordered the cancellation of the dismissal shall restore the parties to the status existing before the issuance of the dismissal document";

- Paragraph (3): "In case the employee does not request the reinstatement in the situation previous to the issuance of the dismissal document, the individual labor contract shall be rightfully terminated at the date when the judgment remains final and irrevocable".

By the decision issued by the Court in April 2010, the employee's complain was partially accepted. The Court decided that the employee has to be reinstatement in the former workplace and the employer to pay the compensation, but it was rejected the claim having object the moral prejudice (the employee had asked for an amount of 10,000 euros as material reparation of the moral prejudice caused by the unilateral act of dismissal).

After the appeal issued by the employer was rejected by the Bucharest Court of Appeal (in February 2011), the employer had sent an address (issued in July 2011) to the employee inviting him to come at work starting with the date of 19th of July 2011.

But, the employer did not modify the organizational structure of its position in order to reestablish the position occupied by the former employee. The reinstatement was only formal, because at the beginning of August 2011, the employer had issued the second individual dismissal decision (at 3rd of August 2011).

This second time, the employee asked the Court to dispose the cancellation of the second individual dismissal decision and to oblige the employer to pay 15,000 - euros (in lei equivalent, at the National Bank of Romania's official exchange rate in the day of the effective payment of the amount).

The Court – Bucharest Tribunal, Section no VIII, Labor and Social Insurances Conflicts – had accepted the claim of the employee and had obliged the employee to pay a "record" amount of 3,000 - euros as material reparation of the moral prejudice caused by the employer through its second individual dismissal decision[9].

Regarding the moral prejudice, the Court had mentioned that based on art. 253 Paragraph (1) from Labor Code, the employer is obliged to repair the material and/or moral prejudice caused to its employee because its fault.

The Court had retained that an individual dismissal ordered by the employer in non-compliance with the conditions and procedure stipulated by the law is able to determine by itself to the employee a moral prejudice. This moral prejudice consists in:

- Losing the work place occupied by the person based on an individual labor contract with unlimited period of execution is able to affect the employee's stability previsions; it is well-known that the labor is done by the employee in order to cover the living necessities;

- Lock of an occupation, of a workplace based on an individual labor contract, in a society which promotes the active living and obtaining of the living means by work is able to induce to the dismiss person a social inferiority feeling and an image prejudice in relation with the other members of society.

Such moral damage is emphasized by the particular fact that the employee, as a consequence of a previous court case in relation with the same employer, had obtained a favorable decision which was not respected by the employer.

[9] Bucharest Tribunal, Section no VIII – Labor and Social Insurances Conflicts, Decision no 9250 of 2nd November 2012.

The moral prejudice is the direct consequence of the employer's unlawful and guilty actions, consisting in the unfulfillment of the contractual obligations. The employer's guilt in the matter of contractual liability is a relative presumption and the employer did not invoke any cause in order to exclude or to reduce the guilt. Furthermore, such manner of action proves that the employer had acted with direct intention, which represents the most serious form of guilt. The employer had wondered and accepted the consequences of its action, its will being to not allow the employee to work.

Conclusion

The legal framework of the reparation of the moral prejudice in the Romanian Labor Law is determined by two categories of legal provisions: the one stipulated in the Labor Code (art. 263 Paragraph 1) and the second stipulated in the Civil Code (art. 1350, art. 1531 Paragraph 3).

Most of the cases when the employees are entitled to ask from their employer the (material) reparation of the moral damages are linked to discrimination, the equal treatment for all employees and employers, the equal opportunities and treatment for women and men regarding the execution of the individual labor contract; termination of the individual labor contract, especially in case of dismissal; labor health and safety; disciplinary liability, when the employer applies a disciplinary sanction to the employee.

Once the moral prejudice is born, the way it should be repair is, as a rule, also moral. But, the prejudice's victim has also the right to estimate the value of the moral prejudice. There is no any incompatibility between the forms of the reparation. The moral prejudice's victim has the possibility to choose between the two forms of reparation.

If the creditor and the debtor did not agree about the way or the amount of the reparation, the Court is able to verify the fulfillment of liability conditions and the amount of reparation.

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DEVELOPMENT OF THE ENVIRONMENTAL SUBSIDIZATION IN THE EU AND HUNGARY*

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Abstract

The recent study deals with the subsidy issues of environmental policy through the analyses of the problems of regulation in the EU and Hungary. Among economic regulators subsidies have got to the focus of literature analyses only recent days. From the perspective of subsidies the author is primarily concerned with direct subsidies but the broad range of indirect subsidies (tax allowances, tax exemptions) are also sketchily dealt with. The fundamental target of environmental policy is to decrease environmentally harmful activities and to subsidize environmentally effective activities. In order to reach this target the policy of the EU has a significant role, as the Hungarian domestic subsidy scheme is based on EU subsidies almost absolutely from the aspect of sources. The study gets to the conclusion, through the display of different subsidy forms, that no efficient environmental policy can be achieved without a properly regulated subsidy policy.

Keywords: *environmental subsidy, financial subsidy, environmental policy, EU subsidy, budgetary policy, protection of environment.*

1. Introduction

Economics among other economic regulators dealt with the issue of environmental taxation a long time ago but subsidies just get in to the focus of analysis recently. An important principle of economics and environmental politics states that the polluter should pay[1] for the harm caused thus achieving social-economic optimum. In terms of economics a twofold problem emerges concerning the subsidies. It is the failure of the regulation if the polluting activity receives subsidies but also if such activities which produce positive externalies are not supported by the state with enough subsidies. So the basic aim of the environmental policy is the stopping of environmentally harmful subsidies and the providing of environmentally useful subsidies[2]. Particularly the environmentally harmful subsidies raise more problems in order to enforce an effective state subsidies policy from the aspect of achieving the aims of environmental policy[3].

There are various forms of direct financial subsidies but the forms of indirect subsidies are almost inexhaustible. Such as the partial regulation, the insufficient control, tax exemptions, tax allowances, the undervalued usage of natural resources. The harmonization of the European Union took significant steps in this issue.

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[1] About the principle, see Csilla CSÁK: Thoghts about the problems of the enforcement of the "polluter pays" principle, European Integration Studies, 2011/1, p. 27-35.

[2] Károly KISS: Zöld gazdaságpolitika, BKÁÉ, Budapest, 2005. p. 171-172.

[3] Károly KISS: Tiltandó támogatások – környezetvédelmi szempontból káros támogatások a magyar gazdaságban, L'Harmattan, Budapest, 2006. p. 13-17. The author approaches the environmentally harmful subsidies from the side of activity, in other words subsidies given to environmentally harmful activities are counted as environmentally harmful subsidies. About the EU's environmental policy, see CSÁK: Environment Policy. In: Zoltán ANGYAL (Ed.): Public Policies of the European, Editura Universitatii "Petru Maior", Târgu-Mureş, 2008. p. 143-147.

Therefore subsidy issues can be interpreted in an international, EU and national level.

The Hungarian subsidy system has a strong link with the European Union's subsidy system, because the European Union handles the issue of environmental protection with high priority and the subsidy programs available to Hungary grew considerably in number. Consequently the subsidies and improvements financed purely from Hungarian sources significantly decreased in number. The significance of environmental policy is more and more increasing compared to other EU policies and the rest of the EU policies are taking into consideration the environmental effects. The community's environmental policy fundamentally influences the environmental policy of certain Member States moreover numerous environment-related measures will not materialize without the Community's environmental regulation[4].

2. The subsidy scheme of the European Union

The EU regulation[5] defines the concept of subsidy[6]. Those direct financial contributions are rated as subsidies that are allocated from the state's budget without valuable consideration (quid pro quo) and finances the functioning of such organizations which aim to help the achievement of the purposes of the European Union's certain policies or to serve a general European interest or to help the achievement of objectives of certain policies[7] of the European Union[8]. Jurisprudence uses broad construction to define the concept of subsidy since all economically esteemed benefits are listed under this conceptual range. Besides the direct subsidies the following are listed hereamong others: the usage of infrastructure with favorable conditions, loans provided with preferential conditions, lower taxes and tax reliefs[9].

Subsidies can take 4 financial forms[10]:

- refund of specified proportion of the actually incurred, accountable expenses;
- lump sum, which covers the expenses of the enforcement of the measures or the expenses vital to the functioning;
- lump sum financing, which covers previously determined certain types of expenses;
- combined financing (combinations or connections of the previously mentioned forms).

The European Union provides subsidies in various forms; the range of environmental subsidies is one type of them.[11]

[4] Ákos KENGYEL: Az Európai Unió közös politikái, Akadémiai Kiadó, Budapest, 2010. p. 306.

[5] About the EU's environmental law see Stuart BELL – Donald MCGILLIVRAY: *Environmental law*. Oxford University Press, New York, 2008, p. 170-221; Nancy K. KUBASEK – Gary S. SILVERMAN: Environmental Law. Pearson Prentice Hall, Upper Saddle River, 2008, p. 439-440.

[6] Zoltán NAGY: A közpénzügyi támogatási jogviszony a közjogi és magánjogi szabályozás metszetében, Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, Tomus XXX/2. (2012.) p. 342 cf. Zoltán NAGY: Adó - és társadalompolitikai szabályozás hatékonysága a környezetvédelem területén. Pázmány Law Working Papers, 2012/9 p. 1-9.

[7] See e.g. about the Common Agricultural Policy JACK, Brian: Agriculture and EU Environmental Law, Ashgate, Farnham, 2009, p. 91-108; János Ede SZILÁGYI: Common Agricultural Policy. In: Zoltán ANGYAL (Ed.): Public Policies of the European, Editura Universitatii "Petru Maior", Târgu-Mureş, 2008. p. 88-95.

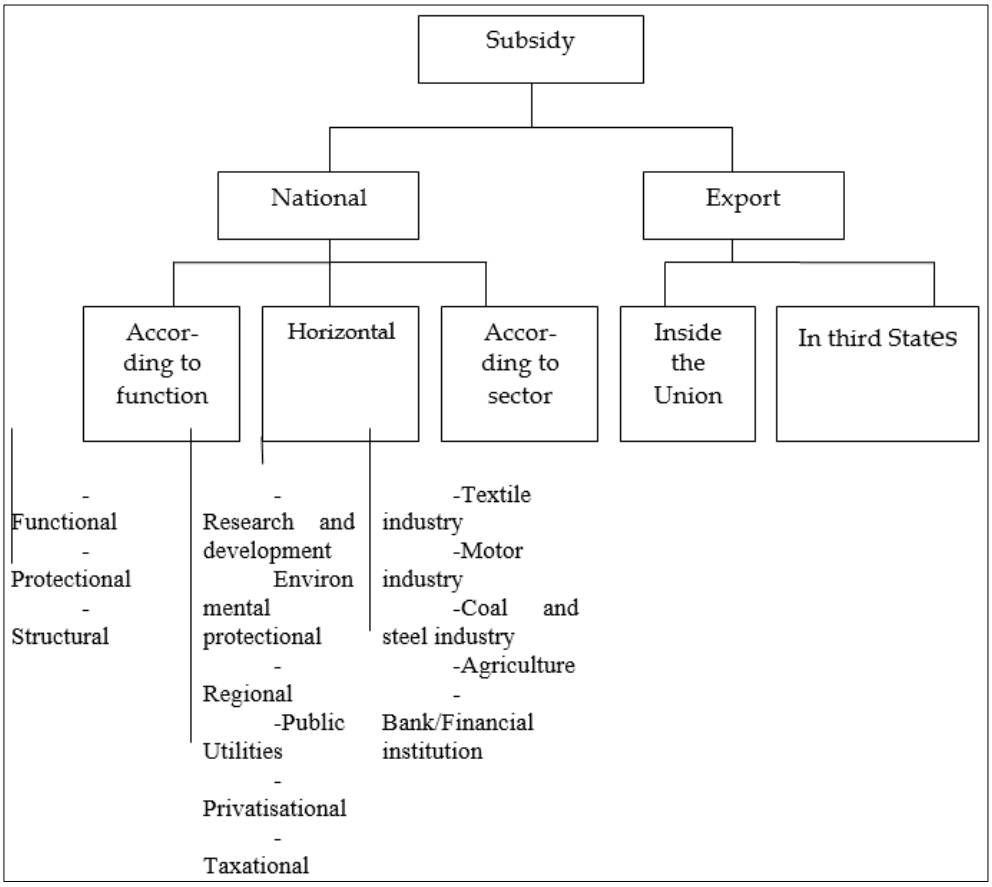
[8] Zsolt HALÁSZ: Az Európai Unió költségvetésének szabályozása, PhD thesis, Miskolc, 2010, p. 161.

[9] KENGYEL (2010.): op. cit. p. 61-62 cf. István OLAJOS: A közjogi szerződés, mint a támogatásokkal kapcsolatos jogalkalmazás egyik útja, Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, Tomus XXX/2., Miskolc University Press, Miskolc, p. 503-514.

[10] HALÁSZ (2010.): op. cit. p. 161.

[11] Tamás KENDE – Tamás SZŰCS (Ed.): Bevezetés az Európai Unió politikáiban. KJK-Kerszöv. Kft., Budapest, 2005. p. 247 cf. István OLAJOS: Környezetvédelmi szempontok érvényesülése az

Forms of subsidies in the EU[12]



Subsidies for theprotection of the environment can be provided only if they are necessary for the protection of the environment and for the sustainable development on condition that, these subsidies have no disproportionate negative effects on the competition conditions and the development[13].

One can differentiate between three kinds of environmental subsidies[14]:

- investment;
- horizontal;
- functional subsidies.

The investment subsidies have the biggest significance (investments to meet environmental standards, to encourage the usage of energy saving, renewable energy, to enhance the recultivation of polluted industrial areas, etc.)[15] The Member States exploit increasingly the EU regulations on

agrártámogatásokban. In: SZILÁGYI (Ed.): Környezetjog II. volume, Ágazati környezetvédelem és kapcsolódó területei, Novotni Kiadó, Miskolc, 2008. p. 89-97.

[12] Source: Kende-Szűcs (2005.).

[13] KENDE – SZŰCS (2005.): cf. p. 279.

[14] KENDE – SZŰCS (2005.): cf. p. 279.

[15] KENDE – SZŰCS (2005.): cf. p. 281.

state subsidies for environmental purposes. However it is important to highlight that a significant amount (according to estimations 53%) of state subsidies are among environmental tax exemptions[16].

The subsidies for the protection of the environment went through a special pathway of development on the field of EU regulation and financing. The EU did not establish a separate Environmental Protection Fund but there were attempts to do so, these attempts failed in the beginning of the 1980's. According to literature the EU raised funds to two pillars of sustainable development but not for the third, protection of the environment. If every Member State had resources to handle environmental problems, there would be no need for such a fund. In financial management there is always few money, so the momentarily less painful topics are pushed into the background so as theprotection of the environment. At the same time establishing such a fund would raise a problem, namely that the Member States would ensure the protection of the environment only to the extent of the EU sources[17].

In the absence of an environmental protection fund, the EU uses to finance the protection of the environmentthe already existing funds such as the Regional Fund and the Cohesion Fund or rather special financial sources are also helping theprotection of the environment such as the Solidarity Fund and the LIFE Program[18]. On the basis of the scale of environmental subsidies the history of regional policy can be divided into three phases[19]. Between 1957 and 1975 there were no environmental subsidies, at most in certain cases. From 1975 to 1993 environmental protection was financed by certain sources of the European Regional Development Fund. Serious steps were taken to finance the subsidies of protection of the environment since 1993, the first step of which was the establishment of the Cohesion Fund[20]. Nowadays the most significant sources of the subsidies are the Regional Fund and the Cohesion Fund. According to the Commission 10% of the Regional Development Fund and 50% of the Cohesion Fund were spent on environmental purposes. The Regional Fund aimed to finance several specific environmental investments but in many cases the projects, financed by the regional policy, which would not come truewithout this financial help are harmful to the environment (highway, infrastructural projects)[21].

The Cohesion Fund did not work on the basis of programs until 2006 but provided funds for special transport and environmental related projects. Since 2007 it does not support projects but the Member States get subsidies for the enforcement of their own programs[22]. Literature shows

[16] Euro Astra Internet Magazin 2008/05/21, www.euroastra.info/mode/13187. (08 07 2011).

[17] Ludwig KRÄMER: Az Európai Unió környezetjoga, Dialóg Campus Kiadó, Budapest-Pécs, 2012. p. 163 The EU established funds to economic problems (Agricultural Fund, Regional Fund, Cohesion Fund) and social problems also (Social Fund).

[18] János Ede SZILÁGYI: Bevezető az Európai Unió gazdasági és társadalmi politikájába. In: István OLAJOS (Ed.): A gazdasági és társadalmi kohézió politikája az Európai Unióban és Magyarországon, Novotni Alapítány Miskolc, 2009. p. 7-42; see furthermore István OLAJOS: Cohesion Policy. In: Zoltán ANGYAL (Ed.): Public Policies of the European, Editura Universitatii "Petru Maior", Târgu-Mureş, 2008. p. 129-143.

[19] András KISS: Az európai uniós környezetvédelmi támogatási rendszer értékelési módszertana a Magyarországi Kohéziós Alap projektek vizsgálata alapján. PhD thesis, Budapest, 2009. Kornygazd.bme.hu/ doktori ertekezes Kiss Andras p. 20-25 (05 10 2012).

[20] KISS (2009.): op. cit. p. 26-40.

[21] KRÄMER (2012.): op. cit. p. 165 The decree on Regional Fund mentions the possibility to finance the fields of environmental projects, such as water supply, water and waste management, lagooning, preventing of desertification and the preventing and stopping of environmental pollution.

[22] KRÄMER (2012.): op. cit. p. 165-166 The Cohesion Fund shall finance among other things the priorities designated to the Community's environmental policy. The author highlights the fields of energy efficiency, renewable energy sources and transportation methods. The Cohesion Fund's regulations are put

us that the regional policy moves into a direction, where the Member States will get a lump sum of money and they decide how to use it according to the national priorities approved by the Commission, therefore the financing of the environmental policy depends on the place of its priority in the certain Member State's national policy[23].

The Solidarity Fund was founded as a result of natural disasters in 2002. The aim of the Fund is to intervene in case of such natural or industrial disasters which has serious consequences on the environment or the economy[24].

The subsidies financed by the Funds do not cover all fields of the protection of the environment that is why the EU founded a special financial measure with the aim to protect the environment within the framework of the LIFE program, which was established in 1992 in order to help the Member States' environmental activities. The LIFE+ program applies to the time period between 2007 and 2013 and it concentrates the subsidies first of all to three main fields[25]:

- nature and biodiversity;
- environmental policy and management;
- information and communication.

Public law and private law organizations and also private persons can have a share in the financial measures of the LIFE+ program. It aims to work out the Community's environmental protection policy and to enforce the Community's environmental regulations[26]. Literature mentions several problems in connection with the program. One of them is that the Member State are endeavor to share equally among each other the available sources, therefore the Commission do not have the option to define priorities for special projects[27].

3. Environmental subsidies in Hungary

The question of the protection of the environment should play a more and more important role in the Hungarian system of public finances. The environmental policy is trying to give an answer to the problems emerged by the development of the professional policy, the legal and economical regulation, the policy of assistance or subsidy and the institutional conditions. This issue requires one the one hand independent public task supply and finance in the public finance management and on the other hand the environmental aspects of certain public tasks own bigger and bigger significance. Beside certain acts the former Constitution and the new Basic Law also creates the bases of environmental financing which clearly shows the significance of the protection of the environment[28]. The management of the public finances affects the environmental

down in the 1084/2006/EC and in the 1083/2006/EC regulations. László MIKLÓS (Ed.): A környezetjog alapjai, SZTE ÁJK JATE Press, Szeged, 2011. p. 47.

[23] KRÄMER (2012.): op. cit. p. 166.

[24] KRÄMER (2012.): op. cit. p. 164.

[25] László MIKLÓS (Ed.): A környezetjog alapjai, SZTE ÁJK JATE Press, Szeged, 2011. p. 45-46 The LIFE (2000-2006) finances were regulated by the EC Regulation 1655/2000, while the LIFE+ (2007-2013) was established by the EC Regulation 614/2007.

[26] MIKLÓS (2011.): op. cit. p. 45.

[27] KRÄMER (2012.): op. cit. p. 167.

[28] László FODOR: Környezetvédelem az Alkotmányban, Gondolat Kiadó, Budapest, 2006. p. 43; László FODOR – Ágnes BUJDOS: Right to Environment and Right to Water in the Hungarian Fundamental Law. In: Veronika GREKSZA (Ed.): Right to water and the Hungarian Protection of Fundamental Rights, University of Pécs Faculty of Law Centre of European Research and Education, Pécs, 2013, p. 52-59 (to appear); see furthermore Anikó RAISZ: A Constitution's Environment, Environment in the Constitution, Est Europa – La Revue, 2012/Special edition 1, p. 37-50; and CSÁK – RAISZ: Legal framework of environmental Law for agricultural production – Rapport national for Hungary, European Congress on Rural Law, 11–14 September 2013 Lucerne (Switzerland), p. 2-6, http://www.cedr.org/

management both on the field of public revenues (environmental taxes, other charges, fines etc.) and on the field of public expenditures (costs of specialised agencies, subsidies). Public revenues and public expenditures are closely related to each other as the scope of tax reliefs and tax exemptions are considered as state subsidy. Tax policy issues are closely related to support policy issues on the field of public revenues as environmental taxes provide sources to finance public expenses and subsidies.

The questions of subsidy policy can be interpreted on a central, governmental and local administration level. Both international conventions and the regulation of the European Union affect this field but the significance of the EU regulation is determinative in the Hungarian legislation. Among the two subsystems of the state finances – from the source aspect of subsidy policy questions – the significance of the central subsystem can be highlighted unambiguously. Of course the environmental management of local governments is not negligible but the local governments appear primarily as the users of environmental subsidies as the expenses of the maintaining and development of local protection of the environment and nature are financed from state subsidies and from their own revenues of which the central budgetary subsidies constitute a significant part[29].

The management of state finances is realized through the state budget which reviews the system of public revenues and public expenditures in an annual breakdown. The significant part of environmental tasks can not be achieved through one budgetary circle that is why it is necessary to draw up a long-term purpose system which affects the budgetary policy and which will be materialized as a public task on an annual level in the all-time Act on the state's budget. Such proposal package is the National Environmental Protection Program which contains a long-term purpose system.

The National Environmental Protection Program III. (2009-2014) concentrates on the problem of sustainable development and systematizes the aims and tasks aiming at the protection of the environment. It points out that the isolated problems coming from the interference into the natural capital appearing only on a local or regional level became global problems and thus the coordination of the tasks of environmental policy is important on both national and international level.

In order to uphold sustainable development for the present and future generations the followings should be secured: the environmental conditions required for a reasonable human life and the opportunity to enforce the constitutional right for a healthy environment. Such a consumer culture should be constructed which would base on the economical use of the natural resources.

The new program is dealing with the detailed analysis of the tax and subsidy policy on the field of environmental protection. It can raise problematic issues that the separation of the accounting and the targeted usage of environmental revenues is not fully guaranteed. The government is expending not in all cases the money coming from these revenues on aiding the renewal of renewable resources or the decreasing of emergent pollution. The program is evaluating the utilization of subsidies on the basis of the experiences and facts of the previous years. It can be stated that the efficiency of subsidies and its environmental achievements are

congresses/luzern/pdf/Commission_II_Hongrie.pdf; and RAISZ – SZILÁGYI: Development of agricultural law and related fields (environmental law, water law, social law, tax law) in the EU, in countries and in the WTO, Journal of Agricultural and Environmental Law, 2012/12, p. 110-112; Marcel SZABÓ: The New Concept of the Constitutional Protection of Water Bases. In: Veronika GREKSZA (Ed.): Right to water and the Hungarian Protection of Fundamental Rights, University of Pécs Faculty of Law Centre of European Research and Education, Pécs, 2013, p. 14-18 (to appear).

[29] László MIKLÓS (Ed.): Környezetjog, SZTE ÁJK JATE Press, Szeged, 2008. p. 64 cf. János ZSUGYEL (Ed.): A közpénzügyek nagy kézikönyve, Complex Kiadó Kft., Budapest, 2009. p. 65.

barely known except of regional development subsidies. Literature also criticizes the efficiency of the subsidy policy. According to the literature subsidies are of low economical efficiency as the subsidies are bound to particular technologies and products so they do not generate interest towards other, more favorable solutions.[30] Another problem is that the subventions spent on the reduction of environmental pollution lead to the overproduction of the supported polluting product or stuff.[31] Moreover there are voices which claim that subsidies generate counter-selection in the long term, the interfering state causes the lagging behind of its economy[32]. Nevertheless the governmental environmental policy prefers subsidies.

The National Environmental Protection Program also points out the efficiency of the direct and indirect (tax reliefs, exemptions) state subsidies on the basis of the experiences of the previous time period. The program raises as a positive experience that the subvention of renewable energy sources on the field of primary energy sources (natural gas) resulted in savings and reduced the carbon dioxide emission. The usage of natural resources under their value or the absence of real pricing which is realized on the fields of energy subsidies, mining allowance discounts and agrarian subventionscan be evaluated as a negative experience on the other hand. However the effects on environmental protection can be evaluated not only on the basis of such targeted subsidies but in general certain state subsidies have also environmental effects. State subsidies, given to investments (motor industry, electronics) connected to foreign working capital, are also have environmental effects which among economical and social effects are also important. On the one hand new investments introduce and spread economical and precise environmental management systems but on the other hand their area reservation, transportation demand and accelerated formation of waste materials have a negative effect on the environment.

The central budgetary policy essentially determines the framework of state and economic activities which have an effect on the condition of the environment. If the budgetary policy does not support with its specific instruments the regulation of environmental protection, alone it is not able to influence those state and economic activities which have an effect on the condition of the environment. Therefore the all-time state budgetary proposal has to take into account the viewpoints of sustainability, in order to make the budgetary policy greener it is necessary to accept and pass certain measures[33].

"Series of green measures" in favor of the protection of the environment[34]:

- the budgetary subsidies of economical activities causing environmental pollution should be reduced, and ceased in the long run;
- environmentally positive activities should be aided (e.g.: brown field investments);
- the rates of value added tax and excise duty should be differentiated in the case of products with lower environmental loads (lower tax rate);
- the tax and contribution charges of work should be reduced;
- ecologically sustainable investments should be aided (e.g.: energy efficiency investments concerning buildings);
- revision of big state investments (e.g.: transportation investments);
- support of environmental research and development;
- increased protection of soil (raise of the contribution to land protection);

[30] György HERICH: Nemzetközi adózás, Penta Unió Kft., Pécs, 2006. p. 484.

[31] Joseph E. STIGLITZ: A kormányzati szektor gazdaságtana, KJK-Kerszöv Kft., Budapest, 2000. p. 255.

[32] KENDE - SZŰCS (2005.): cf. p. 209.

[33] Dóra Ildikó CSERNUS: Ajánlások a költségvetéshez. In: A jövő nemzedékek országgyűlési biztosának beszámolója, Országgyűlési Biztos Hivatala, Budapest, 2010. p. 251-252.

[34] CSERNUS (2010.): op. cit. p. 253.

- greening of public procurement with the integration of an environmental criteria system.

Literature emphasizes that the green reform of the state budget, the greening of the budget must not generate new payment liabilities, the aim is the rearrangement of the revenue and expenditure appropriations of the budget in order to raise sources for the accomplishment of environmental programs without the raising of the state dept[35]. International experiences point out that economy activating packages of certain states handle the issue of environment as a strategic issue.

Long term environmental issues are materialized in the all-time act on the budget. The structure of pubic revenues and public expenses in the central budget shows us the budgetary appropriations concerning environment. It is very clear from the budget that the financing of environmental projects are done significantly from EU sources, compared to this the Hungarian subsidies are insignificant. The potential decrease or cessation of EU sources would further harden the maintenance of environmental tasks. In the future we have to reckon with the broadening of the tasks which will necessitate the redeployment of budgetary sources or the increment of environmental taxes. Both will force the makers of the budgetary policy and decision makers to face a different challenge[36].

Environmental subsidies went through a specific development and were granted from various sources[37]. The Central Environmental Protection Fund (Központi Környezetvédelmi Alap) was one of these significant financial funds which functioned on the basis of the earlier regulation as an isolated national fund. Product fees and various environmental fines meant the income of the Fund. The Fund ceased to existas an isolated national fund in 1999 and the environmental target appropriation took over its place from which investments, programs, activities, measures aiming the protection of the environment and the nature were financed. The Water Management Fund (Vízügyi Alap) was founded as an isolated national fund to support water management tasks which was also ceased in 1999 and the water management target appropriation took over its tasks. The income of water management authorities became the revenues of the Fund and the target appropriation, the main part of these revenues were used on tender support. The central government also provided sources for the local governments to perform their environmental tasks. Tied subsidies, targeted subsidies and subsidies connected to waste management served as such among others. In target subsidies the fields of investments connected to drinking water, sewage investments, development of sewage system and waste management were emphasized over the yearsaccording to the varying target marking. Currently among thetargets of the earmarked subsidy system we can find no environmental investment at all. The local self-governments received sources from the target subsidies for environmental purposes on the fields of sewage system investments, supply of drinking water, investments on the improvement of the quality of the drinking water. The most significant sums for these purposes have been spent on them in between 2002 and 2006. The subsidies given to aid waste management have been spent on the development of the settlement's solid waste public services. The subsidies meant a bigger amount of sources between 2001 and 2006 but from 2007 the central budget provided no source for these purposes.

[35] CSERNUS (2010.): op. cit. p. 253.

[36] József FEILER: Az éghajlatváltozással kapcsolatos teendőink. In: A jövő nemzedékek országgyűlési biztosának beszámolója. Országgyűlési Biztos Hivatala, Budapest, 2010. p. 250.

[37] KISS (2009.): op. cit. p 47-66 The presentation of the historical evolution is based on the dissertation.

Literature raised several problematic issues in connection with the domestic environmental subsidies which point out the confliction of the practice of subsidy providing[38]:

- different system of criteria in tendering;
- absence of the coordinated usage of the sources;
- absence of endorse of environmental efficiency;
- shortcomings in the examination of economical efficiency;
- no control system was formed;
- there is no efficient monitoring system.

The utilization of the European Union's subsidy sources – shaped to the budget of the EU – is planned to a 7 years long period of time. Hungary with joining the EU became the participant of these programs. The purposes and programs along which the subsidies will be used were set out in the National Development Plan II., the New Hungary Development Plan and today it is set out in the New Széchenyi Plan.

The strategic aims of the plan[39]:

- the formation of a solidary and coherent society;
- the improvement of the competitiveness of the country;
- the strengthening of the knowledge-lead and reviving society;
- enforcing the principle of sustainable development.

The last strategic question is in the same time the horizontal EU principle on environment which main point is that in the process of awarding the subsidies the environmental considerations have to be endorsed.

The environmental objectives of subsidy policy:

- environmental considerations have to be incorporated in the process of decision making;
- the appropriate balance between the satisfying of human needs and the feasible environmental status have to be guaranteed;
- natural resources have to remain useable for a long time
- the protection of the existing natural resources;
- ensuring healthy environment for communities.

Besides securing the environmental aspects of subsidy policy, environmental purposes were formulated as concrete programs. The New Hungary Development Plan (Új Magyarország Fejlesztési Terv) launched development programs on both national and EU level on 6 highlighted areas (economic development, transportation development, environmental and energetic development, social renewal, regional development, state reform)[40].

The New Széchenyi Plan also covers 6 areas (healthcare industry, greeneconomic development, enterprise development, science-innovation, employment, transportation development). The greeneconomic development program marks multiple fields among its development purposes such as campaigns encouraging sustainable life-style, recultivation of local solid waste dumps, environmental development, environment related information technology development and regional development based on renewable energy.

Primarily the Environment and Energy Operative Program (Környezet és Energia Operatív Program) is concerned with subsidy issues[41] which contains in a long term (7 years) strategic document the evaluation of the environmental conditions, the direction of development, the

[38] KISS (2009.): op. cit. p. 58.

[39] ZSUGYEL (2009.): op. cit. p. 954.

[40] ZSUGYEL (2009.): op. cit. p 954.

[41] 36/2012 (VI.8.) NFM rendelet a Környezet és Energia Operatív Program prioritásaira rendelt források részletes szabályairól és egyes támogatási jogcímeiről.

analyses of the necessity for investments and the coordination of the EU subsidy policy. The program is materialized in action plans for two yearsperiod, as these action plans constitute the basis of the tenders.

It is the general purpose of the EEOP (KEOP) to enhance sustainable development with a more efficient, ecological usage of the natural resources and with solving environmental protection water management tasks[42].

The strategic purposes of the EEOP (KEOP):

- strengthening the protection of the environment through certain water management tasks concerning the protection of the environment;
- development of environmental infrastructure taking into consideration the objectives of sustainability;
- efficient and ecological usage of the natural resources;
- the protection of natural and cultural heritage of underprivileged regions[43].

The program determines the main guidelines for development as priority axes. The program comes into being on the basis of the before mentioned guidelines by tender invitations.

The earlier occurred natural disasters and scientific researches also drew attention on the climate changes. The topic got to the focus of international climate summits and conventions and thereby the emission of gases responsible for the greenhouse effects which are regarded as the main reason for the changes. In this way in both international and national level measures shall be taken in order to protect the climate and to reduce the emission of gases responsible for the greenhouse effects.

Those states that possess quota surplus are authorized to realize the non-used parts of their quota according to the 17. Article of the Kyoto Protocol on international emission trade.[44] The main point of the Green Investment Scheme (GIS) is that the revenues coming from the sale of quote surplus should be spent on measures protecting the climate and by this achieving supplementary emission reduction[45]. The GIS is the first instrument of the domestic climate policy which is born not because of the burden of reception of the EU regulations but it is a fully domestic initiative[46]. The GIS was established among the firsts in 2008 in Hungary and because of the accurate quota management the environmental diplomacy could have accounted 28 billion forints income on behalf of the budget. The purposes and the concrete materialization of the Program happen through the tender scheme within the framework of subroutines. It deploys the focus on the energy efficiency of buildings which is because of the carbon dioxide emission related to buildings gives 30% of the total domestic emission[47].

[42] See e.g. SZILÁGYI: Water public utilities and the legal provisions on price of water, Journal of Agricultural and Environmental Law, 2012/13, p. 92-94; and SZILÁGYI: Affordability of drinking water and the new Hungarian regulation concerning water utility supplies. In: Veronika GREKSZA (Ed.): Right to water and the Hungarian Protection of Fundamental Rights, University of Pécs Faculty of Law Centre of European Research and Education, Pécs, 2013, p. 84-94 (to appear).

[43] About the international relevance of common herritage see e.g. RAISZ: Water as the Nation's Common Heritage in the Frame of the Common Heritage of Mankind. In: Veronika GREKSZA (Ed.): Right to water and the Hungarian Protection of Fundamental Rights, University of Pécs Faculty of Law Centre of European Research and Education, Pécs, 2013, p. 95-96, 99-103 (to appear).

[44] Judit BARTA – Miklós HEGEDŰS – Zoltán SZABÓ: Kvótagazdálkodás Koppenhága után, GKI Energiakutató Kft., Budapest, 2010. p. 13.

[45] BARTA – HEGEDŰS – SZABÓ (2010.): op. cit. p. 19.

[46] CSERNUS (2009.): op. cit. p. 260.

[47] www.kvvmfi.hu (12 8 2012).

Literature raises critical voice[48] in connection with the GIS but the start of the program should be evaluated positively and the quota management became an important element of the scheme of subsidy policy.

4. Summary

The efficiency, social and economical necessity of environmental subsidies divide professionals working in the scientific and practical area. Indeed, more problems occur in connection with subsidies, in this way on the field of environmental subsidies also. In favor of sustainable resource management it is inevitable to reduce the usage of energy and the increase in the usage of alternative energy sources. Of course the best energy is the one which is not used, namely that energy saving has key importance. The forming and development of such a scheme on a significant level is unimaginable without the effective and powerful contribution of the subsidy policy, particularly there where the population is not able to reach such an outcome on its own.

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MINISTERIAL LIABILITY IN THE ROMANIAN CONSTITUTIONAL SYSTEM

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Abstract

What seems relevant to us for highlighting in this study is the approach of the ministerial liability within the Romanian constitutional and legal system starting with the first document of constitutional value, namely the Developing Statute of the Paris Convention of 1858 until today,that is the Constitution of Romania, revised in 2003 and republished. Having in view that this is a generous study topic covering over 150 years of constitutional and legal evolution of ministerial liability in Romania, it is necessary to specify from the very beginning the need of a diachronic approach of this topic by identifying all Romanian Constitutions that have regulated the constitutional system during this period of time. Moreover, we have to specify that, during this period of time, Romania has experienced several forms of governance, namely monarchy, people's republic, socialist republic and semi-presidential republic. With this approach, the proposed study opens a complex and complete yet not exhaustive vision in the current scope of the ministerial liability. It is also the reason why the study begins with preliminary considerations in which the terminology used in the content of the study is justified. Following a key-scheme, there are successively examined the two major parts of the study, namely the general theory regarding the concepts of ministerial responsibility and liability and the Romanian constitutional, legal and doctrinaire milestones of the ministerial liability.

Keywords: *liability, responsibility, constitution, statute, monarchy, republic.*

1. Introduction

The object of the scientific undertaking shall be circumscribed to the scientific analysis of its two major parts, namely: 1. responsibility and liability – the general theory; 2. Romanian constitutional, legal and doctrinaire milestones of the ministerial liability, which cover, in a doctrinaire, constitutional and legal approach, the scope of the study regarding the ministerial liability within the Romanian constitutional system.

In our opinion, the field under analysis is important for the constitutional doctrine, for the doctrine of Administrative Law and for the general theories of Law, because with this scientific undertaking, we intend to establish, through a diachronic and selective approach, a complex and complete yet not exhaustive reflection of the entire current scope of the ministerial liability. In order to entirely yet not exhaustively cover the scope of study, the relevant preliminary specifications shall be followed by the theorisation of the concepts of liability and responsibility from the point of view of the doctrines of the general theory of Law. This topic of the ministerial liability has been addressed in accordance with a logical scheme of the analysis of the contributions of Romanian and foreign authors in the field of the general theory of Law and with the contribution of the author and of other authors to the theorisation of the ministerial liability starting with the first document of constitutional value of 1858 until today.

From the point of view of the integral yet not exhaustive coverage of the scope of ministerial liability, a logical scheme has been introduced, regarding the diachronic and selective approach of the evolution of constitutional regulations on ministerial liability, including the indication of government forms specific to the Romanian State for each Constitution enacted in accordance with the particularities of each form of governance.

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With this approach, we intend to identify the theoretical, constitutional and legal sources of Law regarding the ministerial liability within the Romanian constitutional system.

Even if the ministerial liability turns back to the enactment of the first Romanian Constitutions, the theoretical interest in resuming it results from the fact that, in the already existing dedicated literature, some theoretical aspects of the ministerial liability have not always been paid due attention.

Moreover, in the relevant literature under consideration, in our opinion, the complex and complete yet not exhaustive reflection of the entire Romanian constitutional evolution of the ministerial liability is not examined in a diachronic approach.

In addition, the study turns into a comparative value the evolution of constitutional and legal regulations in a diachronic approach regarding the ministerial liability,specific to the successive forms of governance covered by the Romanian State, namely monarchy, people's republic, socialist republic and semi-presidential republic.

2. Responsibility and liability – The general theory

2.1. Preliminary considerations

At the beginning of this study, some preliminary specifications appear as being necessary, given the fact that summarising the normative content of Art. 109 of the Romanian Constitution, as republished[1], established by the constituents, is entitled *Liability of the Members of Government*, and the same Art. 109 para. (3) includes the following specification: The cases of liability and the penalties applicable to the Members of Government are regulated *by a law on ministerial liability*. In our opinion, some terminological specifications are necessary as concerns the two terms, namely *responsibility* and *liability*.

2.2. Concept of responsibility

2.2.1. Addressed at general level by the Explanatory Dictionary of Romanian Language[2], the term „responsibility" has the following meanings: *the obligation to be responsible /accountable for something; conscience and responsibility; task, responsibility assumed by somebody*.

2.2.2. Addressing it *from the point of view of the general theory of Law*[3], we find the term "*responsibility*" examined *as a fundamental principle of Law*.

In supporting this theory, responsibility is regarded as a social phenomenon; *it expresses an action of commitment of the individual in the process of social integration*. Being closely related to a person's action, *responsibility appears as being intimately correlated with the ruling system*.

Although traditionally *the concept of responsibility* has been placed absolutely *in the area of Morals*, more recent research studies highlight the need of outlining this concept also in the area of Law.

It is also specified that social responsibility appears under various forms: *moral, religious, political, cultural, juridical responsibility.*

[1]*** The Constitution of Romania, as revised in 2003, was published in the Official Gazette of Romania, Part I, No. 767, of the 31st of October 2003.

[2] Vasile Breban, *A Small Dictionary of Romanian Language*, (Bucharest: Enciclopedica, 1997), 568.

[3] Nicolae Popa, *The General Theory of Law*, (Bucharest: Actami, 1998), 123-125. The author *defines the Law* as being the assembly of rules assured and guaranteed by the State, aimed to organise and discipline the human behaviour in the main relations within the society, in an environment specific to the manifestation of the co-existence of freedoms, defence of essential human rights and establishment of the spirit of justice.

Starting from the idea that the *Law should not be regarded and assessed only from the point of view of the possibilities its has to intervene post festum, in the area of the bad things already done – a moment when a penalty is imposed, the author mentions that it has the possibility, through the content of its prescriptions, to contribute to the establishment of a cultural attitude of the individual towards the law, an attitude that presupposes a concern assumed for the integrity of social values defended by legal ways, which implies the phenomenon of responsibility*.

2.2.3. Addressing it also from *the point of view of the general theory of Law*[4], we mention that the term "*responsibility*" is examined as a *social phenomenon* and as *a fundamental principle of Law*. In author's opinion, the responsibility *appears as a social phenomenon*, since it expresses an action of commitment of the individual in the context of social relations and, eventually, responsibility *is assuming liability* for the outcome of the social action of a person.

Starting from these considerations, responsibility is defined as a fundamental principle of Law, which should be understood as being *the conscious linking of the individual to the values and norms of the society, because the degree of responsibility ultimately indicates the status of legality in a State and it is closely related to the overall progress of the society*. In addition, the author specifies that *the law may create the feeling of responsibility as a state of mind in the conscience of target individuals*.

2.2.4. Analysing the idea of responsibility from *the point of view of the positive Law*[5].

As concerns the positive Law, they specify that, as it is usually understood, it comprises rules alleged as being Law, even when they do not always actually have this capacity. *These rules hence show what the target persons are entitled to do, or not*. Human actions are assessed from the point of view of the Justice. Juridical, general or individual rules are thus established. Their peculiarity is that *they do not automatically impose themselves as a law of the nature, they are breakable*; they therefore presuppose the character of rational beings of the target individuals and, consequently, their moral freedom.

Starting from these rational notions, they specify that the *idea of person* is thus established, in the form of a specific reality, to whom rights and obligations can be assigned.

The idea of subjective Law cannot be conceived further *thanbeing correlative to the idea of obligation, a person's right meaning only the obligation of other person(s) to observe it*, and a person's obligation means only the right of other person(s) to demand its observance. *In its turn, the idea of obligations leads to the idea of responsibility*. Consequently, a right or an obligation includes the generic idea of object of a provision.

2.2.5. Analysing the idea of responsibility from the point of view of the pure theory of Law[6].

We notice that the author examines *the responsibility* from the point of view of *the relation between juridical obligation and responsibility*, which, in our opinion coincides with the notion of *responsibility according to the Romanian Law*.

From the point of view of the pure theory of Law, the author *examines the concept of responsibility in close correlation with the juridical obligation*. This correlation is based on the idea that *the individualsare obliged to the conduct prescribed by the social order*. In other words, an individual *has the obligation to adopt a certain conduct* when it is prescribed by the social order. Saying that the conduct is prescribed, and saying that *an individual is compelled to such a*

[4] Ion Dogaru, *The General Theory of Law*, (Craiova: Sitech, 1998), 121.

[5] Mircea Djuvara, *Rational Law, Sources and Positive Law*, (Bucharest: ALL, 1995), 502-504. The author also specifies: the reasoning of the positive Law therefore appears in the form of a discursive thinking, which uses all special logical categories of the rational Law; these *categories derive from the ruling character of the logical idea of Justice*.

[6] Hans Kelsen, Théorie pure du droit, (Paris: Dalloz, 1962), 157-170.

conduct, and *that s/he is compelled to behave that way, these are synonymous expressions*. It comes out that, since the juridical order is a social order, *the conduct to which an individual is compelled from juridical point of view is a conduct that must take place*, directly or indirectly in relation to another individual.

We are probably used to separate the juridical rule from the juridical obligation, and say that *a rule establishes a juridical obligation*. But we must understand well that *the juridical obligation related to a certain conduct, far from being a juridical standard differing fromthe juridical rule imposing that conduct, is that juridical rule itself.*

The statement according to which *an individual is obliged from juridical point of view to a certain conduct* is identical with the statement according to which a *rule prescribes a defined conduct for a certain individual*. In addition, the juridical obligation has a general character as well as an individual character, just like the identical juridical rule.

*2.2.6.*Turning into value the above-mentioned issues, we retain the following components of the concept of responsibility, which we regard as essential in covering the scope of its content:

a) the concept of responsibility is studied, as it comes out from the issues presented above, from the general theory of Law, the theory of positive Law and the pure theory of Law.

b) the notion of responsibility is addressed as a fundamental principle of Law. However, starting from the premise that the Constitutional Law is a one of the branches of the unitary Romanian Law, as a main branch of the unitary Romanian Law, in our opinion, we can address the notion of *responsibility as a general principle of constitutional rank* established by the fundamental law of Romania. We support this analysis with the provisions of Art. 1 para. (5) of the Constitution of Romania, as republished, which proclaims: *In Romania, observing the Constitution, its supremacy and the laws is compulsory*. We have to mention that this general principle was introduced in the content of the fundamental law after the revision of 2003.

c) starting from the *definition of positive Law, which comprises all regulations in force within a State*, and from the *relation between the juridical obligation and the responsibility* established by positive Law, and mentioned above.

d) from the point of view of the general theory of Law, positive Law and pure theory of Law, the subject of Law is the subject of a juridical obligation or the subject of law. In this approach, it comes out that *asubject of law can only be a person entitled to rights and obligations*.

e) we will define the *responsibility as a general principle of constitutional rank, according to which observing the Constitution and all regulations in force in Romania is an obligation for all subjects of law, individuals and public authorities*.

2.3. The concept of liability

2.3.1. Addressed at general level by the Explanatory Dictionary of Romanian Language[7], the term "responsibility" has the following meanings: *a) the fact of being responsible; responsibility; the obligation to account (morally or materially) for the fulfilment or failure to fulfil actions. b) a consequence of the intentional failure to fulfil an obligation*.

2.3.2. Addressing it *from the point of view of the general theory of Law*[8], we find that the notion of *liability* is examined *in terms of juridical liability*.

Starting from the idea that *the Law could not act before the dangerous fact is done*, the author mentions the following: *in order to link the functioning of juridical liability*, as an institution specific to the Law, to the general purposes of the juridical system, there must be a

[7] Vasile Breban, *op. cit*. 551.
[8] Nicolae Popa, *op. cit*. 323-326.

belief that the law – the right law, the fair law - *may create the feeling of responsibility in the conscience of its targets, as a state of mind.*

At the same time however, the lawmaker pays attention every time also to the *possibility of breaching the rule by non-conform conduits*. Through his fact, the author specifies, *the person who breaches the provisions of juridical rules touches the rule of law, s/he disturbs the good and normal development of social relations, s/he affects the legitimate rights and interests of his community members, s/he endangers the co-existence of freedoms and social balance*.

Since those who break the rule of law can only be human beings, these are the reasons why they must be liable.

In this regard, the focus is put on penalty, as a reparatory measure. From this point of view, the author specifies that *the juridical responsibility is a juridical constriction relation*, and*the penalty is the object if this relation*.

2.3.3. Addressing it also from *the point of view of the general theory of Law*[9], we notice that the notion of responsibility is examined in terms of juridical liability. The author highlights the fact that *responsibility in general and juridical liability in particular can only be understood when the individual is in a conscious relation with the values and norms of society since, eventually, the status of legality itself is a reflection of the degree of her/his liability*.

Underlining the fact that *juridical liability*and*penalty* are two faces of the same social phenomenon, they are different because the first – *the juridical liability* – is the juridical framework for the latter – *the penalty*. It is also considered that *the functioning of juridical liability*, as an institution specific to the Law, and the correlation of this institution with the general scope of the juridical system, are closely related to the belief that the law is right, it is fair.

2.3.4. Addressing it *from the point of view of the positive Law*[10], we retain that, in juridical terms, in our opinion, the author has in view the following hypotheses:

a) starting from the *notion of Law*, they consider that its rules *essentially comprise the idea of right and obligation*. Not all the rules of law so defined are included, in practice, in the positive Law. *The positive Law, namely the applied law*, comprises a very limited number of rules, as compared to all possibilities of juridical rules, which exist at a certain moment.

b) as concerns the *juridical relation*, we retain the following remarks: 1) among persons, by juridical action, regarding a certain object, *a certain specific relation is established*. This relation is essential and it is different from the other elements of the relationship. *The entire Law is therefore built on obligations, which are its simplest elements*. 2) since the juridical relation is normative, it represents a commandment, namely an order, moreover, they think all legal provisions represent such a commandment. 3) the juridical relation implies the idea of obligation. 4) the juridical commandment is breakable. 5) as concerns the right-obligation relation, they think it is absolute. 6) the idea of juridical relation leads to the idea of penalty. The penalty is applied by the State. 7) the juridical penalty is the second element of the positive Law.

2.3.5. Addressing it from *the point of view of the pure theory of Law*[11], we notice that the author examines *the juridical responsibility in terms of relation between juridical obligation and penalty*, which, in our opinion, coincides with *juridical liability in the Romanian Law*.

If we conceive the *Law as a restrictive order*, we cannot say that *a given conduct is objectively prescribed by Law* and that it can therefore be *regarded as being the object of a juridical obligation*, unless a juridical rule *attaches to the contrary conduct the penalty of a restrictive action*. Starting from the idea that *juridical obligation* is nothing but *the positive rule* that prescribes individual's conduct, by *attaching a penalty to the contrary conduct*, under these

[9] Ion Dogaru, *op. cit*. 267-269.
[10] Mircea Djuvara, op. cit. 40-42, 213-224, 302.
[11] Hans Kelsen, op. cit. 157-170.

circumstances, the individual is *compelled* from juridical point of view *to the conduct so prescribed*, even when the representation of the rule does not *create in him/her any kind of impulse* towards that conduct.

Moreover, to the extent to which the positive Law consecrates *the principle according to which ignoring the law makes no exception as concerns the penalty established by Law*, individual's obligation exists even if s/he has no idea about the juridical rule aimed to oblige her/him, in other words, if s/he does not know it. In this context, the responsibility is for guilt and for outcome.

*2.3.6.*Turning into value the above paragraphs, we retain the following components of the concept of liability, which we regard as essential in covering the scope of its content:

a) as mentioned above: the lawmaker pays every time attention also to *the possibility of breaking the rule by non-compliant conducts*. As the author specifies, *the person who breaches the provisions of juridical rules* by her/his action *affects the rule of law, disturbs the good and normal existence of social relationships, affects legitimate rights and interests of the people around her/him, endangers the co-existence of freedoms and the social balance*.

b) furthermore: if we conceive *the Law as a restrictive order*, we cannot say that *agiven conduct is objectively prescribed de jure*, and that it therefore *be regarded as being the object of a juridical obligation*, unless a juridical rule *attaches the penalty of a restrictive action to the contrary conduct*. We start from the idea that *juridical obligation* is nothing but the *positive rule* that prescribes individual's conduct *by attaching a penalty to the contrary conduct*.

3. Romanian constitutional, legal and doctrinaire milestones of ministerial liability

3.1. *The developing statute of the Convention of 7/19 August 1858*[12]

From the systematic examination of the normative content of the Statute, we retain the following issues for this study: a) the Statute, in our opinion, can be regarded as a Constitution, given the provisions of Art. XVII, which stipulate that: All public officers, with no exception, upon their designation, *have to swear observance of the Constitution and laws of the country and faith to the God*. b) The Statute includes no provision on ministerial liability.

3.2. *Constitution of Romania of 1866*[13]

We have to mention right from the beginning that the Fundamental Law of Belgium of 1831 was a source of inspiration for the Constitution of Romania of 1866.

The systematic examination of the constitutional text reveals that the core of the ministerial liability is found in the normative content of the following articles:

a) Art. 92: *The person of the King is inviolable*. *His Ministers are accountable.* No act of the King can be enforced unless it is counter-signed by a Minister who consequently actually becomes liable for that act.

b) Art. 100: In no case *can a verbal or written order of the King exempt a Minister from liability*.

c) Art. 101: Each of *the two Assemblies as well as the King are entitled to accuse the Ministers and refer them to the High Court of Cassation and Justice*, who is the only one entitled to judge them in united Sections, except what will be stipulated by laws as concerns *theexercise of civil action and the offences committed by Ministers beyond the exercise of their powers*.

[12] Ioan Muraru and Gheorghe Iancu, *Romanin Constitutions*, Texts. Notes. A comparative presentation, (Bucharest: Actami, 2000), 7-14.

[13] *Ibidem*, 31-59.

Charges against the Ministers *can only be pressed by a majority of two thirds of the present Members*. *A law* introduced in the first session shall determine *thecases of responsibility, the penalties applicable to the Ministers and the manner of prosecution against them*, both as concerns the accusation admitted by the national representatives and as concerns the prosecution by the injured parties. The accusation initiated by the national representatives against the Ministers shall support itself. The prosecution initiated by the King shall be conducted through the public ministry.

d) Art. 102: Until the law mentioned in the previous Article is made, *The High Court of Cassation and Justice has the power to characterise the offence and determine the penalty*. However, the penalty cannot exceed detention, without prejudicing the special cases indicated by the penal laws.

e) Art. 103: The King can only forgive or reduce the penalty decided for Ministers by the High Court of Cassation and Justice *after the request of the Assembly who pressed charges*.

Turning into value the constitutional provisions mentioned in the Articles above, we retain mainly the following constitutional rules on ministerial liability:

a) by proclaiming the inviolability of the person of the King, the liability is transferred to his Ministers, through the counter-signing of the official acts issued by him, acts that obtain a compulsory juridical power by being counter-signed.

b) verbal or written order of the King cannot exempt a Minister from liability.

c) either the King or the two Assemblies have the right to press charges against Ministers. Charges are pressed by vote of the 2/3 majority of the number of members of the two Assemblies. The prosecution initiated by the King shall be conducted through the public ministry. The High Court of Cassation and Justice has the competence to judge in reunited Sections.

d) A law introduced in the first session shall determine the cases of responsibility, the penalties applicable to the Ministers and the manner of prosecution against them.

e) The King can only forgive or reduce the penalty decided for Ministers by the High Court of Cassation and Justice after the request of the Assembly who pressed charges.

Regarding the ministerial responsibility, Professor Constantin Dissescu[14]*, contemporary with the Constitution of Romania of 1866, specifies the following:*

a) Ministerial responsibility is one of the bases of our constitutional system; it guarantees *King's inviolability*.

b) Ministerial responsibility is legitimate, right and necessary. It is *legitimate*, because there is nothing more rightful than the responsibility of each person for her/his actions within the State. The positive law, the entire social and political organisation is based on this idea, according to which the individual is free, and *the principle of human freedom leads us to the principle of responsibility*. It is *right*, because nobody can be compelled to be a Minister unwillingly. Since a minister counter-signs an act, s/he therefore acknowledges that s/he understands the utility and legality of that act. It is*necessary*, because only in this way we can ensure observance of the laws and Constitution. It is a natural fact against which nobody can complain.

3.2.1. Law of the 2nd of May 1879 on ministerial responsibility[15]

From the systematic examination of the normative content of the law, we retain mainly the following issues: a) the law comprises three parts: responsibility, judgment procedure, and rules on prescription. b) the first part, entitled *Responsibility* establishes the actions and facts for which

[14] Constantin Dissescu, *Constitutional Law*. (Bucharest: The printing house of SOCEC & Co. Bookstore, LTD, 1915), 826-842.

[15]*** Law of the 2nd of May 1879 on ministerial responsibility was published in „The Official Gazette - Journal of Romania", No. 98 of the 2nd of May 1879.

the Ministers are responsible while exercising their mandate. According to the law, the responsibility can have a penal, civil or delictual nature. c) the judgement procedure comprises mainly the crimes and offences committed by a Minister and the previous authorisation of the Chambers and, if applicable, also of the King, for referral to the court and initiation of the penal instruction and preventive detention, also for civil liability towards the State. d) as concerns the prescriptions, the Common Law provisions are maintained.

3.3. *Constitution of Romania of 1923*[16]

The systematic examination of the constitutional text reveals that the core of ministerial liability is found in the normative content of the following articles:

a) Art. 87: The person of the King is *inviolable. His Ministers are accountable.* No act ofthe King *can be enforcedunless it is counter-signed by a Minister who consequently actually becomes liable for that act*.

b) Art. 97: In no case *cana verbal or written order of the King exempt a Minister from liability*.

c) Art. 98: *Each ofthe two Assemblies as well as the King are entitled to request Ministers' prosecution and refer them to the High Court of Cassation and Justice*, who is the only one entitled to judge them in united Sections, except what will be stipulated by laws as concerns the exercise of civil actionof the injured party and as concerns the crimes and offences committed by Ministers beyondthe exercise of theirpowers. *Charges against Ministersby the Lawmaking Bodies* can only be pressedby a majority of two thirds of thepresent Members. The instruction shall be conducted by a commission of the High Court of Cassation, consisting of five members randomly drawn in united Sections. This commission has also the power to qualify the facts and decide prosecution or non-prosecution. The defence before the High Court of Cassation and Justice *shall be conducted through the public ministry*. The law on ministerial responsibility determines the cases of liability and the penalties applicable to the Ministers.

d) Art. 99: *Any party affected by a decree or order signed or counter-signed by a Minister, which breaches an express text of the Constitution or of a law, may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered.*Either during the judgment or after the establishment of decision, the Minister may be summoned before the ordinary courts, upon the request of the State, following the vote of one of the Lawmaking Bodies, *for civil liability for the damage alleged or suffered by the State*. Minister's illegal action does not exempt from joint liability the public officer who counter-signed, unless s/he had warned the Minister in writing.

Turning into value the constitutional provisions mentioned in the Articles above, we retain mainly the following constitutional rules on ministerial liability:

a) the ministerial liability itself is comprised in Articles 98 and 99 of the Constitution of Romania of 1923, which, in our opinion, have undergone essential changes, as compared to Articles 101, 102 and 103 of the Constitution of Romania of 1866. These changes are as follows:

b) according to Art. 98, the penal instruction shall be conducted by a commission of the High Court of Cassation, consisting of five members randomly drawn in united Sections. This commission has also the power to qualify the facts and decide prosecution or non-prosecution. In addition, the defence before the High Court of Cassation and Justice *shall be conducted through the public ministry.*

c) in accordance with Art. 99, *any party affected by a decree or order signed or counter-signed by a Minister, which breachesan express text of the Constitution or of a law, may demand*

[16] Ioan Muraru and Gheorghe Iancu, op. cit., 63-91.

financial compensations from the State, in accordance with the Common Law, for the prejudice suffered. Under these circumstances, either during the judgment or after the establishment of decision, the Minister may be summoned before the ordinary courts, upon the request of the State, following the vote of one of the Lawmaking Bodies, *for civil liability for the damage alleged or suffered by the State*.

d) as concerns the joint civil liability, according to the same Article, Minister's illegal action does not exempt from joint liability the public officer who counter-signed, unless s/he had warned the Minister in writing.

3.4. *Constitution of Romania of 1938*[17]

The systematic examination of the constitutional text reveals that the core of ministerial liability is found in the normative content of the following articles:

a) Art. 44: The person of the King is *inviolable. His Ministers are accountable.* The Acts of State ofthe Kingshall be counter-signedby a Minister who *consequently becomes liable for those acts. The exception is the designation of the Prime Minister, which shall not be counter-signed.*

b) Art. 70: The King and any Assembly *may request Ministers' prosecution and referral to the High Court of Cassation and Justice*, who is the only one entitled to judge them in united sections. As concerns *theexercise of civil action by the injured party* and as concerns the crimes and offences committed by them beyond the exercise of their powers, they are subject to the Common Law rules. *Lawmaking Bodies' decision to prosecute Ministers* shall be made by a majority of two thirds of the present members. *The instruction shall be conducted by a commission of the High Court of Cassation and Justice, consisting of five members* randomly drawn in united sections. This commission has also the power to qualify the facts and decide prosecution or non-prosecution. *The defence before the High Court of Cassation and Justice shall be conducted by the* Public Ministry. The Law on Ministerial Responsibility determines the cases of liability and the penalties applicable to the Ministers. *Ministers of Justice who have left the office* cannot act as lawyers for one year. *Out-of-office Ministers* cannot be members of the Managing Boards of a company with which they signed contracts during the next three years.

c) Art. 71: *Any party whose rights have been affected by a decree or order signed by a Minister, by breaching an express text of the Constitution or of the laws in force,* may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered.

Turning into value the constitutional provisions mentioned in the Articles above, we retain mainly the following constitutional rules on ministerial liability, which have undergone changes, as compared to the similar regulations in the Constitution of Romania of 1938:

a) according to Art. 44, the designation of the Prime Minister by the King is exempted from being counter-signed.

b) there are new rules included in the content of Art. 70, as follows:

b.1. as concerns the exercise of civil action by the injured party and as concerns the crimes and offences committed by them beyond the exercise of their powers, they are subject to the Common Law rules. b.2.) Ministers of Justice who have left the office cannot act as lawyers for one year. b.3.) Out-of-office Ministerscannot be members of the Managing Boards of a company with which they signed contracts during the next three years.

[17] Ioan Muraru and Gheorghe Iancu, op. cit. 65-118.

c) a new rule is included in the content of Art. 71, according to which: Any party whose rights have been affected by a decree or order signed by a Minister, by breaching an express text of the Constitution or of the laws in force, may demand financial compensations from the State, in accordance with the Common Law, for the prejudice suffered.

3.5. ***Constitutions of the People's Republic of Romania of 1948 and 1952***[18]

The systematic examination of the constitutional texts of the two Constitutions reveals the following: a) the core of ministerial responsibility is found in the normative content of Art. 73 of the Constitution of the People's Republic of Romania of 1948, in the following form: *The Ministers are liable for their penal facts committed while exercising their powers*. *A special law shall establish the manner of prosecution and judgement for Ministers.* b) The Constitution of the People's Republic of Romania of 1952 does not include constitutional rules on ministerial responsibility.

3.6. ***The Constitution of the Socialist Republic of Romania of 1965, as subsequently re-published***[19]

The systematic examination of the constitutional texts reveals that the ministerial liability was formulated as follows: *The Ministers and the leaders of other central bodies of the State Administration are liable before the Council of Ministers for the activity of the bodies they lead*.

3.7. ***Constitution of Romania of 2003***[20]

The systematic examination of the constitutional text reveals that the core of ministerial liability is found in the normative content of Art. 109, a content summarised under the title *Liability of the Members of Government*. The above-mentioned Article 109 establishes the following three relevant constitutional rules:

Para. (1) The Government is politically liable only before the Parliament for their entire activity. Each Member of Government is politically liable together with the other Members for Government's activity and for their actions.

Para. (2) Only the Chamber of Deputies, the Senate and the President of Romania are entitled to demand penal prosecution for the Members of Government for facts committed while exercising their powers. When penal prosecution is requested, the President of Romania may order their suspension from office. Referral of a Member of Government leads to her/his suspension from office. Competent for judgement is the High Court of Cassation and Justice.

Para. (3) The cases of liability and the penalties applicable to the Members of Government are regulated by a law on ministerial responsibility.

Turning into value the above-mentioned constitutional provisions, we retain mainly the following constitutional rules regarding the liability of the Members of Government:

a) *As concerns the constitutional system of political liability*

a.1. we find out that, if the marginal title of the article under analysis is *Liability of the Members of Government*, the content of the text of Art. 109 para. (1) refers to the *political liability of the Government only before the Parliament* for their entire activity. Government's political liability only before the Parliament can be explained by taking into consideration the provisions of Art. 103 para. (3) of the Constitution, according to which *„Government's agenda and list are*

[18] Ioan Muraru and Gheorghe Iancu, op. cit., 123-138 şi 143-164.

[19] *Ibid*em, 169-198.

[20]*** The Constitution of Romania, as revised in 2003, was published in the Official Gazette of Romania, Part I, No. 767, of the 31st of October 2003.

debated by the Chamber of Deputies and Senate, in a common sitting. *The Parliament grants full confidence to the Government by the vote of the majority of Deputies and Senators",* and of Art. 85 para. (1) of the Constitution, according to which „*the President of Romania designates a candidate for the position of Prime Minister and appoints the Government based on the confidence vote granted by the Parliament"*. We notice that the appointment of the Government by the President of Romania is based on the confidence vote granted by the Parliament.

Also regarding Government's political liability, the second thesis of Art. 109 para. (1) of the Constitution establishes the rule according to which: *Each Member of Government is politically liable jointly with the other Members for Government's activity and actions*.

In our opinion, the joint liability is imposed since, in accordance with the provisions of Art. 103 para. (2) of the Constitution: „The candidate for the position of Prime Minister, within 10 days after designation, shall demand *Parliament's confidence vote for Government's agenda and entire list"*.

a.2. The political liability subsumes also the other manners of parliamentary control established by the Constitution, as part of the relations between Parliament and Government, as concerns: 1). the information provided to the Parliament (Art. 111), 2). The questions, inquiries and simple motions (Art. 112),3). the censorship motion (Art. 113), 4). the commitment of Government liability (Art. 114).

The most severe penalty, established for Government's political liability, is *dismissal*underthe circumstances established by the provisions of Art. 110 para. (2) of the Constitution, according to which: „*The Government is dismissed when the Parliament withdraws the confidence they granted or when the Prime Minister is in one of the cases stipulated at Article 106, except being revoked, or s/he finds it impossible for herself/himself to exert her/his powers for more than 45 days*".

b) *As concerns the constitutional system of penal liability*

b.1. the constitutional system of penal liability of the Members of Government is established by the normative content of Art. 109 para. (2) thesis I of the Constitution, which, as concerns *the penal liability* of the Members of Government, it specifies that: „*Only the Chamber of Deputies, the Senate and the President of Romania are entitled to request penal prosecution of the Members of Government for the facts committed while exercising their powers*".

b.2. according to Art. 109 para. (2) thesis II of the Constitution, *"When penal prosecution is requested, the Presidentof Romania may order their suspension from office"*.

b.3. according to Art. 109 para. (2) thesis III of the Constitution, *"Referral to the court of a Member of Government incurs her/his suspension from office"*.

b.4. according to Art. 109 para. (2) thesis IV of the Constitution *"The High Court of Cassation and Justice has the competence for judgement"*.

3.7.1. Law 115/1999 – Law on ministerial responsibility[21]

In applying the constitutional provisions comprised in the normative content of Art. 109 para (3), which establishes: *"The cases of liability and the penalties applicable to the Members of Government are regulated by a law on ministerial responsibility"*, the Law 155/1999 was enacted, as amended, republished. The systematic analysis of the normative content of the law reveals that it is structured into four Chapters, from whose content we retain the following selective issues for this study:

[21]*** Law 115/1999 - *Law on ministerial responsibility*, republished, in „The Official Gazette of Romania", Part I, No. 200 of the 23rd of March 2007.

a) Chapter I, entitled General Provisions, comprises the following general principles applicable to its entire normative content.

a.1. In our opinion, justified in the second section of the study on responsibility, Art. 1 of the *Law consecrates the principle of responsibility*, which establishes the following general juridical obligation for Government and its Members: *The Government, in its entirety, and each of its Members are compelled to fulfil their mandate by observing the Constitution and the laws of the country, as well as the Governing Plan accepted by the Parliament*.

This principle is an application and a development of *the constitutional principle of responsibility*, proclaimed in Art. 1 para (5) of the Constitution of Romania, republished, and it consecrates the following fundamental principle applicable within the Romanian State: *„In Romania, observing the Constitution, its supremacy and the laws is compulsory"*.

As concerns observance of the Constitution and its supremacy, the constitutional doctrine specifies as follows: *„Observance of the Constitution and the other normative rules is a general obligation for all subjects of right, both public authorities and citizens"*[22].

a.2. enlarging on the constitutional principles from Art. 109 para (1) of the Constitution, it establishes the general principles regarding Government's political liability in the content of Art. 2, Art. 3 and Art. 4 of the law.

a.3. by extending the responsibility of the Members of Government, in accordance with Art. 5 of the law, a general principle is established, according to which: „Besides political liability, *the Members of Government may be also liable from civil, penalty-related, disciplinary or penal point of view*, as appropriate, according to the relevant Common Law, unless this law includes derogatory provisions".

a.4. in addition, in the content of Art. 6 of the law, *the understanding of the wording Members of Government* is established.

b) Chapter II of the law establishes the Penal Responsibility of the Members of Government.

c) Chapter III of the law establishes the Procedure for Penal Prosecution and Judgement of the Members of Government.

d) Chapter IV of the law, entitled Final Provisions, establishes additional procedure rules.

4. Conclusions

The main purpose of the study on ministerial liability within the Romanian constitutional and legal system, specific to the forms of governance covered by the Romanian State, namely monarchy, people's republic, socialist republic and semi-presidential republic, has been achieved. The main directions of study for achieving the proposed objective were as follows:

1. Theorisation of the concepts of responsibility and liability from the point of view of the Explanatory Dictionary of Romanian Language and of various branches of Law having as an object of study the above-mentioned concepts. This section comprises two parts.

In the first part of the study, the constitutional regulations containing these two concepts are identified. The first part of the section is dedicated to the theorisation of the concept of responsibility.

The main Romanian and foreign documentation sources used for theorising the concept of responsibility were as follows: the Explanatory Dictionary of Romanian Language, the general theory of Law, the theory of positive Law, and the pure theory of Law.

[22] Coordinators Ioan Muraru and Elena Simina Tănăsescu, *The Constitution of Romania, Remarks by articles*, (Bucharest: C.H. Beck, 2008), 18.

The Explanatory Dictionary of Romanian Language defines the responsibility as an obligation to be accountable and as a liability assumed by a person. The general theory of Law examines the responsibility as a fundamental principle of Law, which is a social phenomenon that expresses an action of commitment of the individual in the process of social integration. The theory of positive Law examines the responsibility, as it is usually understood, namely as rules indicating what the target persons have the right to do, or not. The pure theory of Law examines the concept of responsibility in close correlation with the juridical obligation. This correlation is based on the idea that the individuals are compelled to have the conduct prescribed by the social order.

The second part of the section is dedicated to the theorisation of the concept of liability, using the same information sources as in the first section. The Explanatory Dictionary of Romanian Language defines the liability as an obligation to account for the fulfilment or failure to fulfil certain actions and as a responsibility. The general theory of Law examines the liability from the point of view of juridical liability.

The theory of positive Law examines the liability by starting from the idea of subjective Law that cannot be further conceived unless it is correlated with the idea of obligation, a person's right meaning only the obligation of other person(s) to observe it. In its turn, the idea of obligations leads to the idea of responsibility.

The pure theory of French Law examines the juridical responsibility from the point of view of the relation between juridical obligation and penalty, which, in our opinion, coincides with the juridical liability in the Romanian Law.

2. The Romanian constitutional, legal and doctrinaire milestones of ministerial liability comprise, in a diachronic and selective approach, the analysis of the entire scope of evolution of the concept of ministerial liability within the Romanian constitutional system.

The second part of this study begins with the identification of regulations on ministerial liability, in the normative content of the first document of constitutional value in Romania, namely the Developing Statute of the Paris Convention of 1858.

Following a pre-set scheme, there are identified all regulations on ministerial liability in the Romanian Constitutions enacted in Romania until nowadays, together with their revisions, as well as in the relevant secondary laws. In addition, the constitutional doctrine related to Romania's constitutional evolution during the mentioned period of time is quoted.

The two parts of the study can be regarded as a contribution to the extension of research studies on ministerial liability within the Romanian constitutional system, which cover over 150 years of constitutional and legal evolution in Romania.

Furthermore, we specify that the above-mentioned study opens a complex and complete yet not exhaustive vision on the area under analysis.

Given the selective approach of the ministerial liability, the key-scheme proposed may be multiplied and extended to other relevant subsequent studies, given the vastness of the area under analysis.

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FEATURES OF THE UNWRITTEN SOURCES OF EUROPEAN UNION LAW

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Abstract

There are three sources of European Union law: primary law, secondary law and supplementary law. Besides the case law of the Court of Justice, supplementary law includes international law and the general principles of law. It has enabled the Court to bridge the gaps left by primary and/or secondary law. International law is a source of inspiration for the Court of Justice when developing its case law. The Court cites written law, custom and usage. General principles of law are unwritten sources of law developed by the case law of the Court of Justice. They have allowed the Court to implement rules in different domains of which the treaties make no mention.

Keywords: *European Union; EU law; unwritten sources; case law of the Court of Justice; general principles of law.*

1. Introduction

The sources of European Union law are specific ways by which the rules of conduct deemed necessary in the European structures, become rules of law by a will agreement of member states[1]. Narrowly, the preponderance of EU law sources, from quantitative point of view, is given both by the establishing treaties (as primary, principal sources) and by other rules contained in the documents (acts) adopted by the Union institutions in the implementation of these treaties (as derived, secondary sources).

More broadly, however, EU law is: all the rules (of law) applicable in EU legal order, some of them even unwritten; the general principles of law or the jurisprudence of the Court of Justice; the rules of law whose origin is outside the Union legal order, originating from external liabilities of the Communities, of EU, respectively, and the complementary law derived from conventional acts concluded between the member states, for enforcing the Treaties. Further, we shall analyze, in synthesis, the features of the unwritten sources of European Union law.

2. General principles of EU law[2]

Special attention, within the unwritten sources of EU law, should be paid to the general principles of law, because they have a considerable contribution to the process of establishing EU law. Established by the Luxembourg Court of Justice case law, the general principles of law are an important factor in strengthening and developing the EU legal system; this is possible due to their essential characteristic, namely the need to be consistent with the specificity of this legal system unique in the world.

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[1] Dumitru Mazilu, *"Integrare Europeană. Drept comunitar şi Instituţii Europene"*, Lumina Lex Publishing House, Bucharest, 2000, p. 69.

[2] For details, see Mihaela Augustina Dumitraşcu, "*Dreptul Uniunii Europene şi specificitatea acestuia*", Universul Juridic Publishing House, Bucharest, 2012.

Starting from the classification provided by the doctrine in the field[3], we shall further present and analyze the general principles of EU law, in the following structure:

- fundamental rights;
- principles specific to EU law;
- principles derived from the national legal systems of member states.

A. Fundamental rights. The fundamental rights are all those essential and inalienable rights of the human being, valid in all circumstances and without any possibility of derogation. In the EU context, this formula is used as a synonym for the phrase "human rights" and covers a wide range of rights, including economic rights, similar to those recognized by the Constitutions of member states or international conventions, in general and the European Convention on Human Rights, of November 4, 1950, in particular.

Under art. 6, par. (1) TEU[4], following changes brought to the Treaty of Lisbon, the Charter of Fundamental Rights has the same legal value as the Treaties, although this legal instrument is not really a treaty, not being ratified by the member states. The Charter is not incorporated in the Treaty, but it is attached by means of a provision referring to that document. Among novelties introduced in this field, we see that the former "principles" become "values" in the Treaty of Lisbon and, for the first time, the rights of minorities are mentioned. Thus, art. 2 TEU, as amended by the Treaty of Lisbon states that the Union is founded on values of respect for the human dignity[5], freedom[6], democracy, equality[7], rule of law[8], as well as on the respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. As shown in the "Explanations on art. 52 of the Charter", Member states wished to emphasize the distinction between rights and principles. In order to

[3] Denys Simon, *„Le Système juridique communautaire* ", 2nd Edition, PUF, Paris, 2000, pp. 251-255. The author classifies the general principles of EU law, as follows: fundamental rights; principles deriving from the European Union's quality of subject of international law, and the structural principles. In the same vein, see also Jean-Marc Favret, *"Droit et pratique de l'Union Européenne "*, 3rd Edition, Gualino Editor, Paris, 2001, pp. 237-242. According to Favret, general principles of EU law are classified as: general principles deduced from the nature of the Union, general principles derived from national legal systems, fundamental rights, and principles of international law.

[4] Article 6 (1) The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties. Provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Rights, freedoms and principles from the Charter shall be interpreted in accordance with the general provisions from Title VII of the Charter governing its interpretation and implementation and with due regard to the explanations referred to in the charter, that set out the sources of those provisions.

(2) The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. The Union's competences, as defined in the Treaties, shall not affect the membership.

(3) Fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

[5] New specification introduced by the Treaty of Lisbon.

[6] Interesting to note is that in English, the Treaty of Lisbon replaces the term *"liberty"* (referring to rights) with *"freedom"* (referring to principles).

[7] New specification introduced by the Treaty of Lisbon.

[8] Specification made also by ECJ in its jurisprudence, *Environmental Parties - Les Verts vs. European Parliament*, 1986, 294/83: "Community based on the rule of law".

prevent future judicial activism[9] of the Court of Justice, member states considered that the principles would be implemented by legislative and executive acts, when that thing[10] is wanted and would be known only in the interpretation of those provisions and by the jurisprudence referring to their legality[11].

From the point of view of its legal obligation, it should be mentioned that even before obtaining legal value, the Court of Justice had recognized the principle of respect for fundamental rights as part of the general principles of law protected by the Court. In this respect, the Court has recognized since 1969 "the fundamental human rights enshrined in the general principles of Community law whose compliance is provided by the Court"[12], following that, in 1974, this aspect to be developed, as follows: "As the Court has already stated, the fundamental rights are included in the general principles of law whose compliance is provided by the Court". To ensure protection of these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member states, and therefore it can not accept measures incompatible with the fundamental rights recognized and guaranteed by the Constitutions of those states. The international instruments on the protection of human rights to which member states have cooperated or acceded, can also provide guidelines that need to be taken into account in Community law"[13].

Under the Treaty of Lisbon, there are two sources regarding the human rights, namely: the Charter, under art. 6, par. (1) TEU[14], with legal value of treaty and, under art. 6, par. (3) TEU[15], the European Convention for the Protection of Human Rights and Fundamental Freedoms, as general principles of EU law.

Under art. 6, par. (2) TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but the Union's competences, as defined in the Treaties, shall not be affected by the membership. As for the accession to the Convention, "Protocol no. 8 on art. 6, paragraph (2) TEU" was annexed to the Treaty of Lisbon.

Regarding the content of the Charter, it contains in a single text, for the first time in EU history, all civil, political, economic and social rights of European citizens, as well as of all people living on the Union's territory. These rights are divided into six chapters as follows: dignity, freedom, equality, solidarity, citizenship, justice.

The Charter, unlike the European Convention on Human Rights, covers a broader protection field, beyond civil and political rights, referring to other issues, such as the right to good administration, workers' social rights, and protection of personal data or bioethics. In addition, the Charter takes into account the political rights of EU citizens which, by definition, cannot be included in the Convention.

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[9] *"The Lisbon Treaty"*, European Institute, Leiden University, Law Faculty, The Netherlands, March 19, 2008 (http://media.leidenuniv.nl/legacy/lisbon-treaty-summaries.pdf), p.33.

[10] Article 52 par. (2) Charter.

[11] Article 52 par. (6) Charter.

[12] Section 7 of ECJ Judgement of November 12, 1969, *Stauder*, 29/69.

[13] Section 13 of ECJ Judgement of May 14, 1974, *Nold*, 4/73.

[14] "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties. Provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing its interpretation and implementation and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

[15] "Fundamental rights, as guaranteed by the European Convention and as they result from the constitutional traditions common to the member states represent general principles of Union law".

The Charter resumes some rights, not explicitly outlined in the Convention of 1950 and, on the other hand, it provides a more detailed definition of certain rights (for example, the right to an effective judicial appeal that must be exercised before an independent judge, the appeal being possible for the defence of all rights protected by this law, even if it does not concern fundamental rights; the right to marry, which no longer considers the classical concept, but recognizes other ways to found a family; the right not to be on trial or punished twice, after a trial and for the same offence which applies not only within the same State, but also between the jurisdictions of several member states).

EU institutions must comply with the rights enshrined in the Charter. The member states have the same obligations when they implement EU law. The Court of Justice must guarantee the proper application of the Charter. Including the Charter in the Treaty does not modify the Union's competences, but it provides enhanced rights and greater freedom to citizens.

We **conclude** by stating that the Charter of Fundamental Rights is an expression, at the highest level, of a democratically established political consensus on what today must be regarded as a catalogue of rights, catalogue that is part of EU legal order. The acquisition by the Charter of Fundamental Rights, of binding legal force, can be considered as the fulfilment of the promise of Brussels officials to put citizens at the heart of the European Union activities.

B. The specific principles of EU law

A number of various principles fall within this category, sharing the intrinsic, essential link to EU legal system, meaning that it marks its specificity in relation to other legal systems, of state or international. These include: the principle of institutional balance, the principle of conferral, with multiple consequences on the entire EU system, but also the principle of subsidiarity and proportionality.

*a. The principle of institutional balance.*With the ratification of constituent treaties, member states have decided to transfer part of their competences to the European Union. At EU level, they are exercised by institutions provided by treaties, institutions receiving specific tasks in the decision making, execution and control process. According to EU Treaties, each institution "acts within the powers conferred by (...) the Treaty"[16]. We are, therefore, facing a separation of powers between institutions, separation which, however, cannot harmonize with the model proposed by Montesquieu in the eighteenth century. Thus, the existing institutional machinery does not allow the separation of the legislative, executive and judicial powers. The European Parliament does not have the same powers of a national parliament, meaning that it does not have a real legislative power. The Council participates to the legislative function, as well as to the executive function, the latter being shared with the European Commission. However, even if the division of powers is not the same as in the national constitutional law, the role of this division might be comparable to that provided by the classical principle of separation of powers. It is about the need to avoid concentrating all powers in the hands of one body in order to prevent an abusive, arbitrary use of these powers.

It should be noted that, at EU level, most of the functions are concentrated in the Council, institution with an intergovernmental structure. This is because, the Union, despite its specificity, remains an international organization, and the authors of the Treaties have established an important role for the member states in EU structure. However, the powers conferred on other institutions tend to counterbalance those conferred on the Council in order to enable the Union, in the exercise of its powers, to take into account all the interests involved - those of the states represented by the Council, but also those of European citizens represented by the democratically

[16] Art. 13 par. (2).

elected body, namely the Parliament; the Union's interest, manifested in the independent institution - the Commission -, and the public interest in complying with the law, provided by the Court of Justice.

The principle of institutional balance combines two essential components, namely[17]: the separation of powers, respectively of tasks of institutions concerned, on the one hand and the collaboration, cooperation between institutions, on the other hand.

The first component presupposes the impossibility of delegation, transfer, acceptance or conferral of competences, from one institution to another. This separation requires the obligation of each institution not to obstruct the performance of tasks, by the other institutions. Consequently, no institution must be blocked to perform its duties. In this case, the principle of the favourable behaviour reciprocity is reflected.

This principle does not exclude, but rather involves the collaboration between institutions, in order to achieve the objectives proposed.

b. The principle of conferral. According to provisions of the Treaties, each institution shall act within the limits of powers conferred by the Treaty.

The principle of conferral can be understood as a translation into EU law, of the specialty principle of international organizations. This follows from the fact that, like all international organizations, the Union is an entity established by the member states and does not share with them, the quality of fundamental subject of international law.

Under art. 5 of the Treaty on European Union, "the separation of the Union's competences is governed by the principle of conferral". "Under the principle of conferral, the Union shall act only within the limits of competences conferred on it by the member states, in the Treaties, to achieve the objectives set out therein. Competences not conferred on the Union by the Treaties remain the domain of the member states"[18].

The importance of the principle of conferral is determined by the types of competences regulated by EU treaties. In this respect, the nature and characteristics of competences are reflected in the process of conferring them. Thus, we can distinguish two situations. In the first case, EU competences do not replace state powers. They remain, but will be surrounded by EU fundamental legal rules. In this situation, the EU institutions will have the task to exert a double action: on the one hand, to prescribe in accordance with treaties, rules that would detail and customize the limits set by them and secondly, to ensure compliance with those limitations, by the member states.

In the second case, the competences of the Union are intended to replace state powers. In this situation, the EU institutions have legislative powers, more important than those of the member states, due to the Community dimension of actions, having thus, the task to enact common rules, for the enforcement and execution of which, the member states acquire the quality of Community authorities (such situation is encountered, for example, in joint policies).

Under art. 3 of the Treaty on the Functioning of the European Union, "the Union shall have exclusive competence in the following areas:

(a) the customs union;

(b) establishing rules regarding competition, necessary for the functioning of the internal market;

(c) the monetary policy for member states whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

[17] Augustin Fuerea, *"Manualul Uniunii Europene"*, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p 87.

[18] For details, see Augustin Fuerea, *"EU legal personality and areas of competence according to the Treaty of Lisbon"*, ESIJ no. 1/2010 ("Lex ET Scientia International Journal").

(e) the common commercial policy", but also for "concluding an international agreement when its conclusion is provided in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in the case when it may affect common rules or alter their scope". In all these cases, "only the Union may legislate and adopt legally binding acts, the member states being able to do so only if so empowered by the Union or for the implementation of the Union's acts".

Further, the Treaty sets out the areas in which the Union shall share competence with the member states, namely: (a) the internal market; (b) the social policy, for aspects defined in this Treaty; (c) the economic, social and territorial cohesion; (d) the agriculture and fisheries, excluding the conservation of marine biological resources; (e) the environment; (f) the consumer's protection; (g) the transportations; (h) the trans-European networks; (i) the energy; (j) the area of freedom, security and justice; (k) common safety objectives concerning public health matters, for aspects defined in this Treaty".

The following provisions are added to these above mentioned: "In the areas of research, technological development and space, the Union shall have competence to carry out activities, and in particular to define and implement programs, without the exercise of that power to prevent member states from exercising their own competence. In the areas of cooperation for development and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy, without the exercise of that competence to result in the member states' deprivation of the opportunity to exercise its jurisdiction. Also, "The Union and the member states may legislate and adopt legally binding acts in this area. Member states shall exercise their competence to the extent where the Union has not exercised it. Member states shall again exercise their competence to the extent where the Union has decided to cease exercising it".

Protocol 25 on the exercise of shared competence, contains a provision to the unique article, according to which "if the Union develops an action in a certain area, the scope of the exercise of competence covers only those elements regulated by that Union act, and therefore does not cover the whole area".

Declaration no.18 concerning the delimitation of competences complements everything that we have described above, meaning, "in accordance with the division of competences between the Union and the member states, as provided in the Treaty on European Union and the Treaty on the Functioning of the European Union, any competence not conferred on the Union by the Treaties remains the domain of the member states. When the Treaties confer on the Union, competences shared with the member states in a specific area, the member states shall exercise their competence to the extent where the Union has not exercised its competence or has decided to cease exercising it. The latter situation may arise when the relevant EU institutions decide to repeal a legislative act, especially to ensure better constant compliance with the principles of subsidiarity and proportionality. The Council may request, at the initiative of one or more of its members (representatives of member states) and under article 241 of the Treaty on European Union, to submit proposals for repealing a legislative act".

In addition to these provisions, comes art. 6 TFEU, which, among other things, lists areas where the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the member states, as follows:

(a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, professional training, youth and sport; (f) civil protection; (g) administrative cooperation".."The legally binding Union acts adopted under the provisions of the Treaties relating to these areas shall not entail the harmonization of laws, regulations and administrative provisions of member states. The scope and conditions for exercising the Union's competences are established by provisions of the Treaties relating to each area".

c. The principles of subsidiarity and proportionality. Under art. 5 of the Treaty on European Union, the exercise of the Union competence is regulated by "the principles of subsidiarity and proportionality". According to the principle of "subsidiarity, in areas which are not within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but they can be better achieved at Union level due to the dimensions or effects of the proposed action". In addition to these provisions, there are to be found also those listed in art. 4, paragraph (1) TEU, namely: "any competence not conferred on the Union by the Treaties remains the domain of the member states".

d. Principles derived from national legal systems of the member states. Expressly provided by art. 340 par. (2) TFEU[19], in the context of extra-contractual liability, the general principles of law of the Member states are often used in the reasoning of ECJ judgements. Without making a simplistic comparison of national systems of law, but rather a synthesis which helps the Court to adopt the best solution in this case[20], the Luxembourg Court established, at EU level, a set of common principles inspired by the law of the member states, among which, by way of example: the principle of appeal against any decision of a national authority denying a right under the treaties[21], the right to defence[22], the principle of legal security[23], the principle of good faith[24], the principle of equality before the regulation[25], the principle of withdrawal of administrative acts[26].

According to Takis Tridimas[27], the two national legal systems that have had the greatest influence in setting EU administrative law and therefore, the general principles of law, are the French and German systems; the reasons are of course, of historical nature. We shall, further, present some conclusions reached by the author during the study of the influence of German, French and English legal systems on the general principles of law, as sources of EU law. Thus, the author notes[28] that the German influence was present in creating the principles of proportionality, legitimate expectation and protection of fundamental rights. The French system also had a major influence, its public law tradition being the strongest in Europe, and the French administrative law has been a model for other countries on the continent. Examples of such influences for EU law are: the action for annulment and the organization of the Court of Justice, after the State Council model. Unlike the German and French influence, the English system did not have a significant impact on EU law and, in particular, on the development of law principles. This fact is explained by the relatively late entry of Great Britain and Ireland in the European Communities (1973) and, therefore, its absence in the period of establishing the EU law. However, we must notice the major influence on procedural safeguards that the Luxembourg Court case law has had. Findings highlighted by Takis Tridimas, following his short study are that: no system of law can claim an overwhelming influence on EU law. Also, according to the author mentioned,

[19] "In matters of extra-contractual liability, the Union is required to pay, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or by its servants in the performance of their duties".

[20] Takis Tridimas, *"The General Principles of EU Law"*, 2nd edition, Oxford EC Law Library, 2006, pp. 20-21.

[21] ECJ Judgement, May 15, 1986, Johnston v. Chief Constable of the Royal Ulster Constabulary, 222/84.

[22] ECJ Judgement, January 27, 1987, *Verband der Sachversicherer v. Commission*, 45/85.

[23] ECJ Judgement, June 16, 1993, *France v. Commission*, C-325/91.

[24] ECJ Judgement, March 22, 1961, *S.N.U.P.A.T. v. Haute Autorité*, 42/59.

[25] ECJ Judgement, November 12, 1969, *Stauder v. Stadt Ulm*, 29/69.

[26] ECJ Judgment, July 12, 1957, *Algera e.a. v. Assemblée commune*, 7/56, 3-7/57.

[27] Takis Tridimas, *op. cit*., p. 24.

[28] Ibid.

the influence occurs in both directions, the national legal systems being profoundly influenced by jurisprudential developments at EU level, leading thus to a *jus communae* that develops and evolves constantly.

3. Case-law of the Luxembourg Court

The influence of the case law on the development of EU law is considerable, which is explained by the fact that the Union faces a system of law in the process of developing[29]. At the same time, with the purpose of ensuring compliance with the law, the Luxembourg Court of Justice was asked not only to accurately define the law, but also to cover gaps by a creative, praetorian jurisprudence; the law has often prefigured the legislative evolution.

The Court of Justice is not a source of EU law in the sense known by the *common law* legal system, the judicial decisions not having *erga omnes* effect. Solutions given by the Luxembourg Court of Justice are required on how to interpret the provisions of EU law. So, although we cannot say that EU law is a "case law", we opine that the interpretation and application of EU law in accordance with the Treaties are possible only through the jurisprudence of the European Court of Justice.

It is also appropriate to remember that Treaties provide for the ECJ, as the main role, to ensure compliance with law in the interpretation and application of the Treaties. Thus, Treaties provide the possibility of initiating an action in interpretation, with prior title. Interpretation is useful, especially if EU law, in many respects, contains either gaps or provisions having general character or unclear aspects about the meaning of a provision.

The usefulness of ECJ judgements is obvious in situations where some definitions for terms used in the Treaties and whose content was not determined enough, had to be given; we can take as example, the explanations on "charge having an effect equivalent to customs duties", "measures having equivalent effect to quantitative restrictions", "worker", "priority of Community law in relation to the member states", "autonomy of Community law" etc. Thus, according to the Court, the charge having an effect equivalent to customs duties means "any fee, regardless of its name or application, which, imposed on a product imported from a member state in order to exclude a similar national product has, by the price change, the same effect on the free movement of goods as a customs duty and can be regarded as a charge having equivalent effect, regardless of its nature and form"[30].

Since the concept of "measures having equivalent effect to quantitative restrictions" is not defined in the Treaty, the Court of Justice had the mission to clarify it. Therefore, the Court formulated the *Dassonville* judgement[31], opinion according to which "all trading rules imposed by the member states which may hinder directly or indirectly, actually or potentially, the intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions"[32]. Subsequently, in the *Cassis de Dijon*[33] judgement, the Court extended this notion ruling that "a measure can be considered as having equivalent effect even without discrimination between imported and internal goods. In particular, the technical regulations of the importing state imposed on goods from other member states, can be considered as an equivalent measure, if not justified, because imported goods are penalized by the obligation to make changes in prices. The absence of Community harmonization cannot be used to justify this attitude, where it effectively

[29] Augustin Fuerea, *op. cit*., p. 147.

[30] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm.

[31] ECJ Judgement, July 11, 1974, *Dassonville*, 8/74.

[32] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm.

[33] ECJ Judgement, February 20, 1979, Rewe / Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 120/78.

prevents the freedom of movement. Thus, the Court established the principle according to which any product legally manufactured and marketed in a member state, in accordance with fair and traditional rules and manufacturing processes existing in that country should be allowed on the market of any other member state. This is the principle of mutual recognition by member states of those rules, in the absence of harmonization"[34].

The Treaty on the Functioning of the European Union establishes the free movement of workers, but does not define the term, which is why once again, the Court must cover the gap. By corroborating interpretations offered in several judgements[35], it results that, in the sense of EU law, worker is any person who performs work under an employment contract and for which he/she receives remuneration; the following aspects are not important: the legal nature of the contract, the remuneration amount, the contract duration, the time spent at work (full or part time); what is important is that the finality represents an economic activity.

4. Common law

In public international law, common law is particularly important and is the oldest source of both international law and law, in general[36]. International common law is, therefore, under art. 38, par. 1 letter b) of the Statute of the International Court of Justice, annexed to the UN Charter, "proof of a general practice accepted as law". Customary process elements are: the common law should be a general practice, relatively long and uniform considered by states as expressing a rule of conduct with legally binding force.

The common law is an unwritten source and can be defined, in the light of EU law, as a practice followed and accepted, becoming legally binding, a practice that adds or modifies the primary or secondary/ derived EU legislation. It must be said that EU law does not include customs in the sense described above with reference to customary international law. Contrary to public international law, where it represents a fundamental source of law, the custom is quasi-inexistent in EU law[37].

As arguments for what we have earlier stated, we present the following:

- firstly, there is a special procedure for amending the Treaties; it does not exclude the possibility of a custom, but sets some demanding criteria that such practice must meet in order to be applicable;

- another obstacle would be that the validity of any action of the institutions is checked in relation to the Treaties, and not to their practice, which means that from the point of view of Treaties, common law cannot be created in any case, by the Community institutions; at most, the member states can do this, and even assuming that – only under the strict fulfilment of conditions mentioned.

However, certain repeated practices that are part of the texts of EU Treaties, could have the propensity to form, on a long term, customary rules. The Court of Justice did not exclude that possibility, recalling that "in any case, a mere practice cannot prevail over the rules of the Treaties"[38]. A practice *contra legem* could not in any case be a source of law. On the contrary, a practice *praeter legem* which might intervene to complete texts of treaties in order to resolve an

[34] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm.

[35] ECJ Judgement, July 3, 1986, *Lawrie-Blum*, 66/85; ECJ Judgement, March 23, 1982, *Levin*, 53/81; ECJ Judgement, May 31, 1989, *Bettray*, C-344/87 etc.

[36] Raluca Miga-Besteliu, *"Drept internațional public"*, Volume II, C.H. Beck Publishing House, Bucharest, 2008, p 68.

[37] L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, *„L'Union Européenne"*, Dalloz Publishing House, 2000, p. 78.

[38] ECJ Judgement, August 9, 1994, *France v. Commission*, C-327/91.

unexpected aspect, could lead to the creation of customary rules. It is, thus noteworthy that, at Community level, one single custom is, for now, in the process of being created: it is the practice of resorting increasingly more often to informal agreements[39] established between EU institutions.

5. Conclusions

The unwritten sources are considerably important among sources of EU law. It is up to the EU legal order to receive the unwritten law, consisting mainly of the Luxembourg Court of Justice case law, among other sources[40]. To this ability, it corresponds that not less remarkable, of the Court of Justice establishing the law.

The exercise by the Court, of this regulatory mission becomes singular, in particular, by using the methods of dynamic interpretation, as well as by widely resorting to general principles of law.

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[39] Not to be confused with inter-institutional agreements.

[40] The imprecise, incomplete character of general rules contained in the Treaties; the rigidity of primary law due to the cumbersome procedure for revision; the inertia of secondary law resulting from blockages in the Council.

BRIEF CONSIDERATIONS ON THE DISCIPLINARY LIABILITY OF THE MAGISTRATES

Elena Emilia ŞTEFAN[*]

Abstract

The recent amendments in the applicable law on the disciplinary liability of the magistrates have induced many debates regarding the increase of holders that own the right to initiate the disciplinary action against a magistrate and also regarding the area of disciplinary offenses. The conferring of the status of holder of the disciplinary action to the Minister of Justice, the President of the High Court of Cassation and Justice and to the General Attorney of the Prosecutor's Office of the High Court of Cassation and Justice, has conferred us the opportunity to present the impact of these legislative amendments on the legal environment.

Therefore, the theme proposed through this study will be done by presenting the relevant legislation and the relevant constitutional jurisprudence.

Keywords: *magistrate, disciplinary liability, Constitutional Court, Minister of Justice, Superior Council of Magistracy.*

Introduction

In several texts of the Constitution the notion of public office or service is introduced, and therefore the notion of officer[1]. The legal system of public office also includes its liability, whose purpose is the suppression of errors made by public officials, which represents only one of the liability purposes[2]. In this context of public servants, in the doctrine was stated that: "legal liability applies to the magistrates too, being obvious that, in a democratic society, the magistrate can not be under the protection of absolute immunity when he seriously breaks the obligations of impartiality and fairness"[3].

In the case of the magistrates, the multiplication of facts that may represent misconducts, made them furthermore face a situation that can no longer be ignored, namely, the magistrates, the judges, the public servants in general, may interfere at some point in time with a possible disciplinary action promoted against their activity. Therefore, here is the fact, at least theoretically but also practically, the disciplinary action against a magistrate is a predictable action within the context of the legislative amendments, but also undesirable in the activity of a magistrate.

1. The holders of the disciplinary action against a magistrate

In our opinion a controversial issue that will raise many problems in practice is related to the amendments to the legal system al the liability of the magistrates. Thus, the amendments to

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[1] Rodica Narcisa Petrescu, „*Drept administrativ" (Administrative Law),* Hamangiu Publishing House, Bucharest, 2009, p. 522.

[2] Dana Apostol Tofan, „Instituţii administrativ europene", (European Administrative Institutions), C. H. Beck Publishing House, Bucharest 2006, p. 184.

[3] I. Leş, „Organizarea sistemului judiciar românesc", (The Organization of the Romanian judiciary system), C. H. Beck Publishing House, Bucharest, 2004, p. 211.

Law no. 303/2004[4] on the status of the judges and prosecutors are on: the extending of the disciplinary offenses area; the increase of the holders of the disciplinary action; the amendment of legal provisions that regulate the disciplinary sanctions applicable to judges and prosecutors, including the introduction of disciplinary sanction of suspension from office for a period of up to 6 months, the definition of the exertion of the function with serious disregard or bad faith; the introduction of the condition of good repute as a requirement of access and office sustentation.

Concerning the exception of unconstitutionality on new amendments on the law regarding the status of the judges and prosecutors, the status of the magistrates and the law on the Superior Council of Magistracy,[5] Romanian Constitutional Court, through the decision no. 2/2012[6], was rendered a judgment on its constitutionality, as we would briefly present it, *a point of view that we disagree*. The criticism has been focused on several issues, but we will analyze only those concerning the conferment of the status of holder of disciplinary actions to the Minister of Justice, the President of the High Court of Cassation and Justice and the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Thus, the criticism refers to the conferment of the status of holder of disciplinary actions by including together with the Judicial Inspection represented by the judicial inspector, the Minister of Justice and the President of the High Court of Cassation and Justice in case of misconduct committed by judges, and the status of holder of disciplinary actions to the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice, for disciplinary violations committed by prosecutors. Essentially, the criticism of unconstitutionality in this respect points out that these amendments determine the decrease of the autonomy of the Judicial Inspection, it is violated the independence of law and of the principle of the separation of power owing to the fact that they allow the executive to have an influence on the triggering of the mechanism of the disciplinary liability of the magistrates and in this case we refer to the provisions of art. 44, paragraph 3-5 of Law no. 317/2004.

The Romanian Constitutional Court considers that the law is constitutional owing to the fact that, we must distinguish between the participants to the disciplinary procedure and the disciplinary research court, so in this case we refer to the Superior Council of Magistracy. In its jurisprudence[7], the Constitutional Court states that "a dimension of the Romanian state is represented by the constitutional law accomplished by the Romanian Constitutional Court (…), its role being to ensure the supremacy of the Constitution, as a fundamental law of the state of law. Thus, in accordance with art. 142 (1) of the Constitution, the Romanian Constitutional Court is the guarantor for the supremacy of the Constitution".

In order to support our arguments, contrary to the view of the Romanian Constitutional Court, we will present below the relevant legislative texts, both form the Romanian Constitution and from the two laws in question. According to art. 3 letter c) of Law no. 317/2004: "The President of the High Court of Cassation and Justice, representing the judiciary, the Minister of Justice and the General Attorney of the Prosecutor's Office attached to the High Court of

[4] Law no. 303/2004 on the status of the judges and prosecutors published in the Official Gazette no. 576/2004.

[5] Law no. 314/2004 on the Superior Council of Magistracy, published on the Official Gazette no. 599/2004.

[6] The Constitutional Court Decision no. 2/2012 on the objection of unconstitutionality of the provisions of Law for the amendment and supplementing of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 131/2012.

[7] The Decision of the Romanian Constitutional Court no. 727/ 2012, published in the Official Gazette no. 477/12.07.2012.

Cassation and Justice are members of the Superior Council of Magistracy" and according to art. 4 (1): "the Members of the Superior Council of Magistracy shall be elected among the judges and prosecutors appointed by the President of Romania".

As regards the Minister of Justice, the designation and appointment procedure is closely related to the executive. Thus, according to the provisions of the revised Constitution, the Minister of Justice may eventually hold the function of minister:

a) through the procedure of forming a new Government, as a member on the list of the members to be of the Government, proposed by the candidate for prime minister and voted by the Parliament, in block together with the rest of the proposed ministers, procedure called "the investiture of the Government".

b) or due to the vacant position by "Government reshuffle", when the Minister of Justice is proposes by the Prime Minister and appointed by decree of the President.

In connection with the Superior Council of Magistracy, as shown, the Minister of Justice is a member of the Superior Council of Magistracy. Basically, the method of appointment and his status as a member of the Superior Council of Magistracy, the law conferring the right to take disciplinary action against a magistrate is, in our opinion, an obvious breaking of the separation of powers by mixing the executive in the judiciary, affecting also the independence of law. We therefore agree with the criticism of unconstitutionality in what concerns the Minister of Justice, holder of the disciplinary action, being obviously, as stated previously, the political character of this institution.

As regards the President of the High Court of Cassation and Justice, although he is part of the judiciary, he is appointed by the President of Romania and member of the Superior Council of Magistracy. In our opinion, the President of the High Court of Cassation and Justice, when exerting the disciplinary action against a magistrate, he cannot be considered impartial if the judge is considered guilty in the disciplinary procedure, he will appeal the measure taken by the Superior Council of Magistracy, the appeal will be solved by the High Court of Cassation and Justice, the panel of 5 judges, it is said the same court that, indirectly through its president, has triggered the disciplinary action. Furthermore, as what concerns the Minister of Justice, we state that by this appointment is violated the principle of the independence of law, we argue that if the President of the High Court of Cassation and Justice, holder of the disciplinary action, this contradiction between his status and the legal attributions is very visible, leading to questioning his impartiality.

The third holder of a disciplinary action against a magistrate is the General Attorney of Romania. We state that the General Attorney of Romania (judiciary power), according to the Romanian Constitution, appointed by the President of Romania (executive power!!!) on the proposal of the Minister of Justice (executive power!!!), with the opinion of the Superior Council of Magistracy, depends on the executive power, politically influenced, so that when exerting the disciplinary action against a prosecutor, he determines the violation of the separation of powers and of the law state. Moreover, according to art. 132, paragraph 1 of the Constitution", prosecutors operate according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice". Can it be in this case about impartiality or independence since the status of the prosecutors provides the hierarchical control and their subordination to a member of the executive power, namely the Minister of Justice?

In our opinion, the holders of the disciplinary action, as presented above, once they have triggered the disciplinary action, we are no longer interested in the position of the Superior Council of Magistracy in those concrete cases, in this case disciplinary court, in the scope of solving the disciplinary action, owing to the fact that the prejudice has already been produced by promoting the action. These considerations above lead us to believe that the decision of the Constitutional Court through which the amendment of the law system of the disciplinary liability of the magistrates was considered to be constitutional, is not inspired.

As shown in the Report[8] on the Superior Council of Magistracy activity in 2012, "although the legislative amendments occurred during 2012 concerning the holders of the disciplinary action have displeased the judiciary as a whole, is to be reported that, by the end of the year, the Minister of Justice has not used the legal privilege that has been conferred to him". The same report points out that, in disciplinary matter, the Department for judges in disciplinary matters delivered by the end of 2012 a total number of 16 decisions and the Department for prosecutors a total number of 9 decisions.

2. The extending of the disciplinary offenses area

The disciplinary liability of public servants is defined in art. 77^1 of the republished law no. 188/1999, according to which: "the guilty violation by the public servants of their public office duties and of the professional and civic conduct provided by the law, represents a disciplinary misconduct and results in their disciplinary liability"[9]. In the doctrine of the administrative law, the disciplinary offense represents the act committed with guilt by the public servant through which he violates the obligation arising from the report of public office or in connection to it and which affects his socio-professional and moral status[10]. Coming back to the magistrates, according to art. 99 of Law no. 303/2004, amended in 2012, a large number of actions are considered to be disciplinary offenses[11].

The new legislative amendments are focused, in case of the disciplinary offenses, on a number of actions related to the moral conduct of the person who acts as a magistrate, actions that may prejudice the prestige of law. For example, *in case of the magistrates, the disciplinary offenses* may be: the events affecting the honor and professional integrity or the reputation of law, committed when exerting or outside of the exerting of duties; the violation of the legal provisions on incompatibilities and prohibitions on judges and prosecutors; *undignified attitudes* while exerting their duties of service, *the unjustified refusal to perform a service duty;* the failure of the prosecutor to comply with the provisions of the superior prosecutor, given in writing and in accordance to the law*; the repeated failure* and for attributable reasons of the legal provisions regarding the solving without delay of all the mattes or the *repeated delay of works,* for attributable reasons; *the total lack of motivation* of the prosecutor's judicial judgments or actions; the use of *inappropriate expressions in the prosecutor's judicial judgments or actions* or the motivation which is manifestly contrary to the legal reasoning, likely to affect the prestige of law or the dignity of the magistrate office. Also, in the case of disciplinary offenses is situated *the failure of the Constitutional Court decisions, too or of the decisions of the High Court of Cassation and Justice* in the solving of appeals for the convenience of law; the exerting of office with *bad faith or serious inadvertence.* We can note that after a long time, there are defined in this area the notions of *bad faith or serious inadvertence.*

In the recent jurisprudence of the Superior Council of Magistracy it has been noted that, "in order to find the serious inadvertence, it is necessary for the judge to show a conduct of violation of some basic professional duties, with serious consequences for the accomplishment of the act of law. The Department observes from the administrated probation in question that there

[8] The Report on the Superior Council of Magistracy activity in 2012, http://www.csm1909.ro/csm/index.php?cmd=24, accessed on February 16 th 2013.

[9] Rodica Narcisa Petrescu, *quoted work*, p. 562.

[10] Verginia Vedinaş,"*Drept administrativ*",*(Administrative Law),* Universul Juridic Publishing House, Bucharest, 2009, p. 487.

[11] Law no. 24/2012 for the amendment and the completion of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 51/2012.

are accomplished the conditions required by the law because the defendant judge has flagrantly violated the procedural rules, by not preparing the device of the judgment, in the cases in which he has disposed the termination of debates, being obvious to any judge that takes part in the solving of a case, the obligation of drawing the minute, as a result of the deliberation"[12]. In another disciplinary case, it is noted that "the guilt of the defendant prosecutor G. V. G. and takes the form of the bad faith and arises from the fact that he has unduly disposed the taking over of a criminal case from a Prosecutor's Office local drive, if the prosecutor of the case had concluded the criminal investigation and had started the drafting of the indictment."[13] "If there is charged the misapplication of the procedure rules as a result of their interpretation by a judge, he cannot be liable of disciplinary liability, as it is not a serious violation of the procedure rules"[14], it is noted in a case. "In order to be a prejudice, the violation has to be unquestionable and to be lacked of any justification, elements that have not been revealed in this case, yet. Thus, there is noted from the probation material in question that the legal requirements to attract disciplinary sanction are not accomplished owing to the fact that the judgment given by the defendant judge in the case is not the expression of the serious inadvertence in exerting the office, by disregarding the legal provisions on the notification of the court (…) but it reflects the interpretation of the defendant judges for the probation material in question"…

As shown in the Report of the Superior Council of Magistracy in 2012, "between 01.01.2012-25.05.2012 (until the abolition of the commissions for discipline), the *Commission for Discipline for judges* has ordered the disciplinary investigation in 19 cases and the Commission for Discipline for prosecutors has ordered the disciplinary investigation in 6 cases and after the abolition of the commissions for discipline, the disciplinary investigation has been ordered by the judicial inspectors in 4 files. As of 24.05.2012 the disciplinary investigation has been ordered by the *judicial inspectors*. Thus, the judicial inspectors have ordered the commencement of the disciplinary investigation in 16 cases.

At the same time, the Report of the Superior Council of Magistracy activity in 2012 has also revealed some abnormalities in the activity of the magistrates. For example, it is reminded the difficulty of complying with the deadlines of drawing the works, in the context of a large number of vacancies for inspector and staff, the finding of the fact that some legal provisions contained in Law no. 317/2004 on the Superior Council of Magistracy refer to concepts which are not sufficiently well defined. In this context, it was noted that "the notion of good reputation does not meet the requirements of foresee ability of the law, not being correlatively provided the desirable behavior of the magistrates in exerting their duties, thus they objectively do not know which parts need circumscribe their behavior in order to enjoy the good reputation".

Conclusions

As we have proposed, this study has brought into discussion a topical issue in terms of the disciplinary liability of the magistrates, namely legislative amendments on the extension of the holders of the disciplinary action. At the same time the study has conducted a brief presentation of the amendments on the disciplinary offenses, by presenting a selection of several cases solved by the Superior Council of Magistracy. In what concerns the holders of the disciplinary action, although the Constitutional Court has described as constitutional the law that has provided these

[12] Decision no. 10J/2012, The Department for judges – the disciplinary matter, http://www.csm1909.ro/csm/linkuri/03_09_2012__51190_ro.pdf, accessed on 16.02.2013.

[13] Decision no. 7P/2012, the Department for prosecutors – disciplinary matter, http://www.csm1909.ro/csm/index.php?cmd=0301&tc=s, accessed on 16.02.2013.

[14] Decision no. 9J/2012, the Department for judges – disciplinary matter, http://www.csm1909.ro/csm/linkuri/15_10_2012__52151_ro.PDF accessed on 16.02.2013.

amendments, in our opinion it has been created the legal frame for the violation of the constitutional principles that aim the independence of law and the separation of powers.

Furthermore, the widening of the disciplinary offenses area, by the presenting of the selected cases, has revealed some abnormalities of the Romanian judiciary concerning not only the actual activity of a magistrate but, in our opinion, related with the system. Thus, unless we note a real reform of the judiciary, we cannot have fewer cases of disciplinary liability of the magistrates.

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THE RIGHT TO A DEFENCE IN THE CRIMINAL PROCEDURE OF THE YOUNG SPANISH DEMOCRACY

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Abstract

Although the designated topic for discussion is the technical right to a defence in Spain, I consider it opportune to give a brief overview of the current criminal procedural situation in my country. Spain is a young democracy of only 35 years in which sovereignty was returned to the people with the 1978 constitution, the moment that marked the beginning of a period during which we have enjoyed the full range of freedoms.

Keywords: *right to a defence, criminal procedural law, constitutional rights*.

I. Spain, a constitutional monarchy

Allow me first to explain by way of introduction why it is that Spain is a democracy, not just on paper but also in reality. Spain has ratified all internationally approved legislation with respect to human rights, both at European and international and supranational levels. These international treaties are in full vigour and can be placed on the second rung of the hierarchical ladder, between the Constitution and the organic and ordinary laws. Article 10, section 2, of the Spanish Constitution clearly states that laws must be interpreted according to the principles of basic rights and freedoms recognised therein, in line with the Universal Bill of Human Rights and the international treaties and agreements ratified by Spain dealing with the same matters.

This means that, as these laws are in effect in Spain, any suspect, whatever the crime involved may be or his nationality, can appeal to these laws and the rights contained therein in their defence, and the authorities are obliged to respect and enforce these. The same is true of witnesses and insurance surveyors, as well as the victims of crime in such cases, as happens in Spain, where they are both the accusing party and the civil party in criminal procedure. And this is exactly what happens on a daily basis due to the cosmopolitan nature of my country (according to official statistics for 2011, there is a population of some 47 million Spanish residents and almost 57 million tourists visit annually, mainly from Germany, the UK, Italy, France and the US, with almost 6 million legal foreign immigrants registered, mainly from Latin America, Northern and Central Africa and Eastern Europe. The largest colony is made up of Rumanians with more than 9 hundred thousand people.

In order to understand the movement of criminal and criminal procedural legislative reform in Spain it helps to refer to the aforementioned democratic transformation. Following this, most major reforms of this nature since 1978 have essentially consisted of strengthening the range of guarantees for the defendant and adapting our criminal procedure to suit the postulates of accusatory criminal procedure, especially in the instruction stage. But these changes were not sufficient. A Law for Criminal Procedure was needed. *La Ley de Enjuiciamento Criminal* (henceforth to be abbreviated to LECRIM), was totally new and replaced the relic from 1882, a descendant of the Napoleonic *Coded'instruction criminelle* from 1808, and therefore describes a mixed accusatory system (or what the Germans call revised criminal procedure) and is worthy of the 1995 Criminal Code. The government plans to present the corresponding bill during the current term of office (2011-2015). One specific problem will be how to regulate the criminal

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procedural fight against terrorism within what remains an overall model of accusatory criminal proceedings - this will not be at all easy, as will be seen in the forthcoming pages.

Criminal procedural reforms since the reinstatement of democracy in Spain, the most important anyway, have affected not only the summary stage of Spanish criminal procedure, but also the regular process and the right to a defence, the area we are primarily concerned with here. Many of these reforms have not been brought about by procedural laws in the strict sense of the words, but rather through, for example, major reforms in the Criminal code. I will offer a fairly full list as some knowledge of the major reforms helps better understand our particular situation and allows for comparison at this time of such significant legislative reform in Rumania:

1) Legislation:

A. Changes which affect ordinary and special processes

a) Jurisdictional conflicts: The Organic Law (henceforth abbreviated to OL) 2/1987, from 18th May, annulled articles 48 to 50 of the LECRIM pending new legislation on the matter.

b) The creation in Spain of a National High Court. Almost two years prior to the Constitution a trial court was created specifically with the purpose of trying certain especially serious crimes such as terrorism, the National High Court (henceforth abbreviated to NHC). Its existence is sanctioned under articles 62 onwards in the Courts Act (henceforth abbreviated to CA).

c) Changes in jurisdictional authorities for the criminal courts. These were introduced following the LO 4/1988, from 25th May, relating to reform of the LECRIM, with the LO 7/1988, from 28th December, relating to criminal trial courts which modified various precepts from the LOPJ and the LECRIM, and with the Law 36/1998, from 10th November, which modified article 14, sections 1 and 3, of the LECRIM. A law from 2009 gave certain certain functional judicial authority to the court clerks.

d) New legislation was introduced to combat gender violence. The Law 27/2003, from 31st July, brought in the restraining order for cases of domestic violence, but it was the LO 1/2004 Full Protection against Gender Violence, from 28th December, which dealt in more detail with the civil and criminal regulation in cases of gender violence involving a man, either the husband or the sentimental partner, and a woman even when they do not cohabit. New criminal offences were introduced and other existing ones were modified. The great novelty was the creation of a new jurisdictional organ with specific responsibilities, the Trial Court for Violence against Women.

e) The demand for criminal accountability for corporations (Corporate Criminal Liability) in a criminal trial: The regulation of criminal accountability for corporations came into being for the first time in Spain through a 2010 law reforming the Criminal Code, which overlooked the need to provide trial entities to make these hearings possible. These provisions were introduced later in Law 37/2011, concerning *Medidas de Agilización Procesal* (Measures to Speed Procedure), from 10th October, and had a profound impact on the fight against terrorism as the front companies used by armed organisations, especially for financing their activities, could now also be brought to trial meaning that, either by collective or individual criminal trial, the results have been much better and more satisfactory for society.

f) New speedy criminal trials, hugely important as they are sufficient for less serious crimes and misdemeanours, which are the most numerous, were introduced, one through the LO 7/1988, from 28th December, and the other through Law 10/1992, from 30th April. These were subsequently reformed by the LO 2/1998, from 15th June, which meant modifications being made to the Criminal Code and the LECRIM, and again by the LO7/2002, from 5th July, meaning partial reform to the LECRIM amongst other laws.

g) Misdemeanor trials. Law 10/1992, from 30th April, made significant changes to this ordinary process, one of those originally considered in the LECRIM.

h) Cassation review. In order to balance the situation concerning grounds for appeal in civil and criminal trials, Law 9/1985, from 27th March, and Law 21/1988, from 19th July, were passed. These have reformed the grounds for denial of the appeal. Law 21/1988, from 19th July, reformed articles 855, 876, 882 bis, 884, 885, 893 bis, a), and 898 of LECRIM.

i) Retrial. Law 10/1992, from 30th April, reformed criminal review to make it suit the new demands imposed by the Spanish Constitutional Court (henceforth abbreviated to the CC).

j) Criminal procedure for speedy trials for certain crimes. Law 38/2002, from 24th October, created, along with other reforms, a new criminal procedure, the procedure for speedy and immediate trials in certain crimes and misdemeanours.

k) Safeguarding the basic rights recognised by the Constitution. Originally covered in the criminal domain in articles 1 to 5 of Law 62/1978, from 26th December, these governed the legal protection of basic human rights, but were annulled by Law 38/2002, from 24th October, meaning that there is now no specific legislation covering this area.

l) Victim protection. The LO 14/1999, from 9th June, modified the 1995 CC and the LECRIM concerning victim protection in cases of (domestic) abuse.

m) Terrorism. Given the importance of this issue, please refer to section IV of this text where it is dealt with separately.

n) Suppression of punishments. Law 6/1984, from 31st March, suppressed article 995 of the LECRIM which dealt with interdict penalty.

o) Increased penal fines, through the LO 8/1983, from 25th June, which reformed article 14 of the LECRIM, and through Law 10/1992, from 30th April, which reformed articles 175-5º, 420. 684 y 716 LECRIM.

p) New legislation on mediation. Mediation, a way resolving a conflict through negotiation so that both parties reach an agreement by accepting the proposal made by a neutral mediator who is authorised to draw up the agreement and to ensure that the conditions of the agreement are met, has finally been regulated in Spain under Law 5/2012, from 6th July, for mediation in civil and trade cases. Although this law does not include mediation in the criminal field for adults (though it is recognised for juveniles), future reform of the Criminal Code, being drawn up currently, could change some things (Bill for Criminal Code Reform, 2012), and so be binding on certain criminal procedural dispositions.

B. Changes affecting the pre-trial stage

Ordinary criminal procedure for serious criminal offences in Spain, the other procedure originally covered by the 1882 LECRIM, is divided legally into two separate phases. It is in the first of these two stages, that of criminal investigation, known as teh summary phase, where the most significant changes have been introduced since the Spanish Constitution was agreed in 1978.

a) The public nature of the pre-trial stage: The right to a public procedure, guaranteed in articles 24.2, 120.1 and 120.3 of the Constitution, is expressed under Law 53/1978, from 4th December, passed just a few days before the Constitution, but without a doubt grounded in that finished text.

b) Reform in the obligation to report a crime in international cases of drugs trafficking has come about through the LO 8/1992, from 23rd December, which added article 263 bis LECRIM.

c) New legislation on criminal "instruments and effects"(weapons, drugs etc. seized by the police) was brought in with Law 4/1984, from 9th March, which amended article 338 of the LECRIM.

d) Modifications were made to witness evidence legislation: OL 12/1991, from 10th July, which reformed articles 411, 412, 413, 414, 415, 70 and 703 of the LECRIM.

e**)** Changes were made to search and seizure legislation under Law 10/1992, from 30th April, a rewriting of article 569 of the LECRIM.

f) Reforms relating to illegal arrest came about with a reworking of article 17.4 of the Spanish Constitution, when OL 6/1984, from 24th May, set out in Spain the institution of "Habeas Corpus".

g) Reform over temporary custody pending trial. The right to personal liberty guaranteed under article 17.1 of the Spanish Constitution was further developed to ordinary level where criminal procedure is concerned, because, among other reasons, the Spanish Constitution itself had demanded regulation over the maximum duration of preventive imprisonment on more than one occasion, presumably due to the complexity of the issue. Thus, prior to current drafting of articles 503, 504 and 529 of the LECRIM, amongst others, found in OL 13/2003, from 24th October, which reformed the LECRIM guidelines on preventive prison, Law 16/1980, from 22nd April, OL 7/1983, from 23rd April, and OL 10/1984, from 26th December, were passed.

h) Investigating drug trafficking and other types of organised crime. OL 8/1992, from 23rd December, which modified the Criminal Code and the LECRIM in matters relating to drugs trafficking, needs mentioning. Law 21/1994, from 6th July, which brought changes to article 338 of the LECRIM pertinent to the destruction of confiscated drugs, and OL 5/1999, from 13th January, which modified the LECRIM on improving investigative action in cases of the illegal drugs trade and other illicit crimes, which acknowledged a new type of proactive investigation technique, that of the infiltrator policeman, so creating the figure of undercover agents in Spanish Law (article 282 bis LECRIM).

i) Collecting DNA evidence in criminal procedure is covered by articles 326 and 363 of the LECRIM, subsequently reformed by OL 15/2003, from 25th November.

2) Principles

The general principles which govern criminal procedure are those of the Democracy, adapted to suit this topic. Thus, when classified systematically and with normative reference to the Spanish Constitution, I have to say that our underlying laws have upheld the following principles:

1) Concerning the organisation and working of the criminal courts (Jurisdiction): a)The principle of unity (art. 117.5 of the Spanish Constitution), b) the principle of jurisdictional exclusivity (art. 117. 3 of the Spanish Constitution), c) the principle of judicial independence (art. 117.1 of the Spanish Constitution), d) the principle of the legal Judge (art. 24.2 of the Spanish Constitution) and e) the Jury (art. 125) reinstated in 1995.

2) Concerning the right of public access to the criminal courts. a) the right to uninhibited access to the courts of law (art. 24.1 of the Spanish Constitution, for those without financial means, art. 119 of the Spanish Constitution) and b) the prohibition of undue procedural delays (art. 24.2).

3) Finally, the principles relating to processes and procedures are Equality; contradiction or the right to be heard; the principle of observing due process guarantees (art. 24.2), which means as well as the constitutionalization in our country of the principle of due process of law, the maxim that can cover any constitutional omissions where other equally important procedural principles are concerned. The principle of presumed innocence is also upheld by article 24.2 of the Spanish Constitution, which is primarily of a criminal content - the oral presentation of proceedings, the public nature of proceedings, and the principle of prohibition of double punishment, amongst others.

3) The Defendant´s rights

It is important to highlight that the accusatory principle is not explicitly covered by the Spanish Constitution but the Constitutional Court has often repeated that it is present in and

influences the constitutional legislation that governs our criminal procedure, making up part of the right to proceedings with all the guarantees of article 24.2 of the Spanish Constitution.

All of these principles are regulated by the Spanish Constitution and developed under the LECRIM. We will see as we continue which of them affect the defendant from differing perspectives.

In this respect and above all, the legal statute for the defendant, with the following characteristics, must be highlighted:

a) The defendant is a party in the process and as such is subject to a series of various procedural rights and obligations, depending on the stage of proceedings.

b) The defendant must appear before the trial court but is not obliged to testify. (art 24.2 SC, art. 520.2, a) and b) the LECRIM). The testimony of the defendant implies a voluntary act and a right but it is not an obligation. This is why any kind of coercion is forbidden (arts. 15 SC, and 387, 389, 393 y 520 the LECRIM). The obligation to appear at trial is sanctionable by arrest (art 487 the LECRIM).

c) The defendant can be used for the performing of certain means of proof, such as with the expert witness or for legal identification. Questioning of the defendant at trial is of the utmost importance both for evidentiary purposes and for him to exercise his right to a defence.

d) Finally, he or she is the holder of assets and rights upon which the enforcement of a judgement may be meted out. It is his freedom and assets which are subjected to cautionary measures to guarantee the possibility of enforcing a future sentence.

4) Spanish Constitutional Court Doctrine

Many aspects of legal reform have been analysed by our highest courts, especially the CC, which have declared as anti constitutional certain laws, such as –

1) S CC 10/2002, from 17th January, which found unconstitutional art 557 of LECRIM, referring to the entering and searching of hotel rooms.

2) S CC 71/1994, from 3rd March, which found unconstitutional art 504 bis LECRIM, dealing with certain prerogatives of the prosecuting attorney when challenging the provisional release of certain criminals of organised crime.

But on other occasions laws which affect issues dealt with in this presentation, already mentioned or referred to shortly, have been analysed and found constitutional. Worth highlighting is the finding by the S CC 48/2003, from 12th March, that the LO 6/2002 concerning Political Parties, from 27th June, which was applied in order to declare illegal the Basque nationalist political group *Herri Batasuna*, was constitutional.

All of the reforms mentioned above have been discussed line by line during their passage through parliament, as is fitting under our political legislation, and have also been at the centre of in-depth analysis by legal experts in journals, congresses and work shops.

Furthermore, it cannot be said that there is emergency doctrine, at least of a general nature, in this area of legislation, although it is true that the 1988 reforms, which came after a very difficult period in our history following Colonel Tejero´s attempted military coup on 23rd February 1981 and the series of fatal terrorist attacks towards the end of the decade, make some legal commentators form the opinion that indeed there is. This is because in reality certain basic rights of the defendant have been limited. That we have not been flooded with this type of legislation after the multiple terrorist attack in Madrid on 11th March 2004 which killed 191 people, is an unmistakeable indicator of the political – legislative desire to proceed with caution in the face of such provocation.

II. The almost total recognition of the right to a defence

Spain has opted for almost total recognition of the right to a defence, that is a defence prepared either by a lawyer of the defendant´s own choosing or a court-appointed lawyer in the case of less affluent individuals. This right has been recognised constitutionally in several precepts (arts. 17.3, 24.1, 24.2 y 119 of the Spanish Constitution). This is true primarily because the defendant has the right to counsel from the very moment of arrest (arts. 17.3 y 24.2 CE, y arts. 118, 520 y 767 LECRIM).

Several legal changes have been made to the right to counsel. Of particular note is Law 53/1978, from 4th December which meant changes to arts 520 and 522 of the LECRIM, and the LO 14/1983, from 12th December, which affected arts 520 and 527 of the LECRIM. This final article, hugely important in the fight against terrorism (see *infra*), was declared to be within the Constitution by our Constitutional Court (S 196/1987, from 11th December).

1) Appointment

The first important thing to consider is the question of when appointment of a defence attorney becomes procedurally compulsory. Spanish Law is a little unclear with respect to this, making an erroneous distinction between various systems depending on which is the relevant specific criminal procedure.

1. Compulsory appointment: the defendant must appoint a defence attorney (the lawyer who will defend him/her) and a legal representative, if he does not already have them (art. 545 CA) as soon as he is notified of the court summons, in regular procedures for serious crimes, once the hearing for the characterization of the defence is under way (art. 384, II and 652, II LECRIM). In summary procedures, the appointment must be made as soon as legal advice is required; in other words, the moment of arrest or the first formal accusation of a crime, and whatever else for the hearing (arts. 767 LECRIM). In speedy trials for certain crimes (art. 796.1-2nd LECRIM). If no defence attorney is named, a legal aid lawyer will be appointed by the court (art. 545, CA and art 118 III and IV, 520.2, c) 'in fine'. 552, II, and 767 LECRIM), because the authorities are bound to safeguard the defence and legal assistance for anyone who cannot afford a lawyer (art. 545 CA, referring to arts. 14, 17, 24 and 119 SC, and arts. 118 and ss, and concurrent LECRIM)

The Spanish Legal Aid Justice System does not make use of a public defenders' office as in the Anglo-saxon or Latin American systems, but rather decisions concerning the legal representation of indigent or poor defendants are made by the bar association in conjunction with public administration which reaches a decision concerning the defendant's financial status. However, in practice, any defendant who claims to have insufficient funds when arrested, will receive legal aid, and so will not have to pay a defence attorney.

2. Voluntary appointment: according to art 545.1 CA, parties, and therefore the defendant, can freely appoint the attorney of their choice as long as he or she has the qualifications required by the law, and there is no legal barrier to him or her acting in the defendant's defence (v. art. 527, a) LECRIM, declared as constitutional by the S CC 196/1987, from 11th December)

According to the new wording of art 520.2, c) LECRIM, every detainee or inmate has 'the right to name a lawyer and to request his presence at any police or legal statement proceedings or identity parades he or she is subject to...'. It is not thereforepurely decorative.

Art. 118 LECRIM refers to legal situations at arrest or prison, whilst art. 520 LECRIM is related to police activity prior to the procedure. In this way, as the constitutional right to legal defence is the same, both possibilities are taken into account in order to fully guarantee the appointment. But this should not lead to any misunderstanding; the basic right to a legal defence is the same and it is applied throughout the entirety of criminal procedure. It must be the same defence lawyer from start (the arrest) to finish (sentencing) as is the case in speedy criminal trials

(see arts. 767 and 796. 1-2nd LECRIM). Furthermore, art. 118 LECRIM is applicable even when there is no arrest, nor prison, since there are times when a citizen is informed of a case against him/her, but no arrest is made.

2) Legal System

Concerning the legal system for legal representation, the following general points are worthy of mention:

a) Once the defendant has been informed of his/her right to name a defence attorney (art. 520.2, c) LECRIM), and this lawyer is present, he/she can request that the defendant be informed of his/her rights (art. 520.6, a) LECRIM); that the contents of the record of questioning, or any events that took place during questioning, be extended or modified (art. 520.6, b) LECRIM); and finally, that he be granted a private audience with the defendant subsequent to the end of questioning or any other legal proceeding (art. 520.6, c) LECRIM), although in speedy trials he/she can meet with the defendant before hand as well (art. 775, II LECRIM).

b) Any legal aid lawyer asked to act on behalf of the defendant is bound to respond to the Bar Association's summons within eight hours (art. 520.4, I LECRIM, even though the police questioning can take place if he/she does not appear within this time), and will be held responsible if he/she fails to (art. 520.4, II LECRIM).

c) The right to legal representation can be renounced, but only in cases of traffic offences, including driving under the influence (art. 520.5 LECRIM).

d) If the procedural situation requires solitary confinement (which is usually the case in arrests of suspected terrorists, rebels or major criminals, see gr, drug smugglers, arts. 407, 408, 509, 510 and 520 bis 2 LECRIM), the defendant does not have the right to choose his/her own defence attorney, but rather one will be assigned to him/her; he/she can not contact relatives; nor does he/she have the right to a private audience after the procedure in question (art. 527 LECRIM).

The law grants limited capacity for the defendant to name a lawyer in certain cases: 1) In summary trials (art. 967 LECRIM); 2) Proposal of a motion to challenge whilst in solitary confinement (art. 58 LECRIM); 3) To request the reinstatement of the writ to elevate the arrest to confinement (art. 501 LECRIM); 4) To propose procedures in his favour when entering a plea during the pre-trial stage (art. 396, I LECRIM); and 5) the right to 'the final word', the most genuine demonstration of the right to the defend oneself, at the end of the celebration of the trial (art. 739 LECRIM).

3) Other contents

The defendant is also granted other rights during this first stage of Spanish criminal procedure, such as: the right to have mitigating circumstances recorded and to be informed of his/her rights (arts. 17.3 SC, 2 and 767 LECRIM); the right to be informed of summary proceedings, as long as the these have not formally been declared secret/confidential (art. 302 LECRIM); the right to "habeas corpus" (arts. 17.4 SC, 286 LECRIM, and OL 6/1984, from 24th May, which governs this right); the right to be issued with a formal indictment summons, in other words, the order to stand trial if relevant (art. 384, I LECRIM); the right to make an initial statement before the judge regarding the facts of the case, within 24 hours of arrest, if he/she has been charged (art. 386 LECRIM); the right not to make a general statement or be made to incriminate oneself and the right to declare oneself not guilty, that is to say, the right to remain silent (art 17.3 and 24.2 SC); the right not to be compelled to tell the truth (art. 387 LECRIM); the right not to be led by suggestive questioning (art. 389, II LECRIM); the right to an interpreter (arts. 398, 440, 441, 520.2, e) and 762-8ª LECRIM); the right not to be the subject of torture, coaction or threats in order to make a statement (art. 15 SC and arts. 389, III; 391, III and 394 LECRIM, and 1984 New York Convention); the right to be presumed

innocent (art. 24.2 SC); the right to challenge expert witnesses (art. 469 LECRIM); the right to be heard when accused of a criminal offence (arts. 24 SC and 486 LECRIM); the right to a proper arrest according to all the formal legal requirements (arts. 17.1 SC and 489 LECRIM); the right to be sent to have the arrest increased to prison or to be released within 72 hours (arts. 17.2 SC, 497 and 499, I LECRIM); the right that the committal be confirmed or annulled within 72 hours of imprisonment if relevant (art. 516 LECRIM); the right to immediate release once innocence has been established (art. 528, II LECRIM); the right for his/her home not to be searched unless the law stipulates otherwise (arts. 18.2 SC, and 545 LECRIM, and art. 21 LSC); the right to be informed concerning the preliminary findings (art. 623 LECRIM), etc.

4) Constitutional rights on the presumption of innocence and protection against self-incrimination

The presumption of innocence, as well as the right of the suspect, detainee or defendant, to remain silent, and the protection against self-incrimination or pleading guilty, are basic rights for the detainee or defendant in criminal Spanish procedure, and as such, are constitutional rights as stated in Art. 24 of the SC. They form an integral part of the right to a defence in that they protect the individual against the State, but the individual's legal treatment is independent of this.

A. The presumption of innocence is not really a presumption at all, but rather an evidentiary rule which is given this high status due to the way in which it affects the legal trial system one would expect in a democracy. It plays a less important part in criminal procedure, as an accusatory system tends to consider the defendant as innocent unless certain suspicions or well grounded evidence indicates the contrary. This is why the defendant enjoys the basic right to demonstrate his/her innocence from the very moment of arrest (art. 24.2 SC), but does not have to do so in order to be acquitted. Where the presumption of innocence is paramount is at the moment of handing down the sentence. Spanish constitutional jurisprudence has seen how, on many occasions, the presumption of innocence has required the acquittal of the defendant.

1) If no evidence has been produced during the trial;

2) If evidence has been provided but this is not substantial, in other words, the prosecution has not produced incriminating evidence; and

3) If there is substantial evidence but this is not considered to be sufficient to overrule the presumption of innocence, for instance, if it is no more than a piece of circumstantial evidence.

In conjunction with another evidentiary rule, the maxim that *in dubio pro reo*, not expressly recognised by law but recognised by legal doctrine, which refers to substantial evidence with uncertain conclusions concerning either criminal activity, or the defendant's participation in said activity, it can be concluded that the presumption of innocence plays a very important part in Spanish legal practice.

B. The rights to remain silent and the protection against self-incrimination, are manifestations of the right to counsel within an adversarial, although mixed, system as is still the case in Spain. The importance of its constitutional recognition in Spain, can be seen in the way it affects the most delicate moment for the defendant; his/her sworn statement to the police. Art. 520 LECRIM further develops these safeguards.

Its practical efficacy lies in, on the one hand, the fact that the law enforcement agencies cannot force the answers during questioning, although they can continue to enquire if the defendant refuses to answer a question. Furthermore, if this right is not respected, the whole statement will be declared invalid, which could mean acquittal of the defendant due to lack of evidence once the answers obtained in this fashion have been excluded as evidence.

Since the solemn declaration of the Spanish Constitutional Court in its decision 99/1985 from 30th September, that being Spanish or foreign in Spain makes absolutely no difference in

procedural questions, since the relevant rights correspond equally to Spanish and foreign individuals. This also applies to those basic individual rights as a person, not as a citizen, in other words, those rights which are necessary to guarantee human dignity which, according to art. 10.1 of our constitution, make up one of the foundations of Spanish political order. One of these basic rights guarantees that all people will receive effective protection from the Judges and Courts (art. 24.1 CE).

Of course, it is certainly not the case that there are two types of criminal rights, one for friends and one for enemies, nor is anyone considered less than a person under the Spanish body of laws. What is more, Spain is probably the country where the clearest and most explicit rejection of the German criminal procedural law professor Günther Jakobs' theories on the existence of a *Feindstrafrecht*.

5) Withdrawal of constitutional guarantees

The SC allows the withdrawal of certain human rights in situations which are extremely threatening to Spanish democracy. Therefore, Spain is among the countries which best distinguishes between revocable and non-revocable human rights in extreme political situations. This is done via two different possibilities:

A. In accordance with art. 55.1, the following listed rights can be temporarily withdrawn (revoked) when a state of exception or grave threat to public order has been declared.

a) Procedural rights whilst in police custody (the legality of the arrest, maximum duration, information, defence attorney and habeas corpus) recognised in art. 17 of the SC (although the right to be informed of the arrest and legal assistance can only be withdrawn in the case of grave threat to public order, art. 55.1 *in fine* SC);

b) The right to inviolability of the domicile, art. 18.2 SC;

c) The right to privacy in postal, telegraphic and telephonic communications, art. 18.3 SC; and,

d) Other non-procedural rights covered in arts. 19 (freedom of movement and residence), 20.1, a) and d) (freedom of information and the Press), 20.5 (seizure of publications), 21 (assembly and demonstration), 28.2 (strike), 37.2 (collective disputes) SC.

The states of exception and of grave threat to public order are governed by art. 116.2 and 3 of the SC and in the OL 4/1981, from 1st June, covering states of alert, exception and grave threat to public order. These states are declared by the Government, following authorisation from the Spanish Congress. The corresponding rule must establish how far-reaching and long-lasting the limitations on these rights are.

Fortunately, we have never had the opportunity to test the efficiency of these rules in the defence of democracy.

B. Procedural rights during police custody (the legality of the arrest, maximum duration, information, defence attorney and habeas corpus) recognised in art. 17 of the SC (although the right to be informed of the arrest and legal assistance can only be withdrawn in the case of grave threat to public order, art. 55.1 *in fine* SC); rights to inviolability of the domicile, art. 18.2 SC, and the right to privacy in postal, telegraphic and telephonic communications, art. 18.3 SC, can be withdrawn for certain individuals when the activity of armed groups or terrorist organizations is under investigation (art. 55.2, I SC).

Since this is a permanent criminal possibility, there is, logically, no time limit on this withdrawal. Statutes can be found in the LECRIM, in which the corresponding limits to these rights, authorised by art. 55.2 of the SC, are expounded.

In this second case, the withdrawal must be governed by organic law – as was originally the case with OL 9/1984, from 26th December, against armed groups and terrorist organisations,

and as a further development of art. 55.2 of the SC, now repealed, and its provisions incorporated into the Criminal Code and the LECRIM through subsequent reforms, meeting the requirement of organic law approval. The key is legal authorisation, but art. 55.2, I of the SC requires parliamentary control of these measures and art. 55.2, II of the SC refers to the CC in the case of unjustified or abusive use of the powers recognised by the legislation and which, in the CC and LECRIM are destined to be used in the legal fight against organised crime and terrorism.

In both cases, those charged with hearing criminal procedure cases are the members of the ordinary judiciary: thus, such cases will never be tried by military courts.

Spanish criminal procedural legislation will under exceptional circumstances allow the investigation stage to be proclaimed secret for a limited period of time, and may forbid the use of documents declared to be secret for reasons of state. Secret legislation cannot be passed under any circumstances nor are there any secret justice officials, with the exception of undercover policemen (see *infra*). Also bear in mind the public nature of court proceedings (art. 120.1 of the SC), and, when these happen, of criminal trials, with very few exceptions (art. 680 of the LECRIM).

6) The public nature and secrecy of proceedings

A. The secrecy of proceedings is governed by art. 301 of the LECRIM, although what is really meant by this precept is that summary investigation proceedings are not open to the public, to third parties.

The ruling of secrecy that concerns us can be found in art. 302, II of the LECRIM. This makes it clear that neither the defendant nor his defence attorney are to be informed of the investigation proceedings being carried out by the public law enforcement agencies (chiefly the police and the prosecutor, but also the investigating judge). The prosecution, although a party in the trial, is not excluded from hearing the information following the secrecy declaration of the investigating judge. This is therefore an exception to the adversarial principle, the unconstitutionality of which has not been admitted.

In practice, the declaration of secrecy in summary proceedings is frequently called into use, especially in the investigation phase of proceedings against members of organised crime, in Spain mainly mafiosos and drug traffickers, and against terrorists.

B. With respect to reserved or secret documents, with the exception of diplomats, who are protected under international law, and those papers that are protected by Spanish legislation for different reasons, such as those of the defence attorney (arts. 25 and 32 of the General Regulations for the Spanish Bar from 2001), those of notaries and property registrars (art. 578 of the LECRIM), the basic regulation can be found in the Spanish Law of Civil Procedure from 2000, which in art. 332.2 forbids the procedural use of any documents that have been deemed secret or reserved, governed by the Official Secrets Act 9/1968, from 5th April, subsequently modified by Law 48/1978, from 7th October.

III. The absence of prisoners of conscience

In my country, citizens therefore enjoy total political and civil freedom. Thus, there are no prisoners of conscience, nor can there be, since every individual has the right to express his or her views through pacific methods, the only limitations being that other citizens' rights must be respected and no-one may incite or support violent or subversive activities against the democracy. This is a right guaranteed not only to Spanish nationals but also to the significant number of foreign residents in the country.

This statement of fact requires some qualification, however, for in Spain, since before the beginning of the democracy, that is to say since the 1960s, there has been a serious problem with

terrorism, still not definitively resolved. This terrorist threat is mainly comprised of the organisation ETA, although in our more recent history other groups have been active (we remember the terrorist attack in Madrid on the 11th of March, 1994, which caused 191 deaths, work of an Islamic terrorist group).The criminal organisation, ETA, has, for decades now, used violence with the aim of gaining independence for the Basque country, "El Pais Vasco", an area of exceptional beauty in the North of Spain which shares a partial border with France. To hide the problem would not be good for democracy, nor would it be wise to allow this terrorist group to express their unfounded criticisms of the State of Spain throughout the world without issuing a categorical condemnation. Towards the end of this presentation I will say a few words on the new situation that has arisen since the armed group´s cease fire one year ago.

The reason for which there are no prisoners of conscience in Spain is neither political, nor sociological, nor is it cultural; it is quite simply legal. Not a single individual in Spain can be detained or imprisoned due to their ethnic origin, their gender, the colour of their skin, the language they speak, their social status, their financial situation or their sexual orientation. Neither can anyone be imprisoned for expressing their ideas.

The Constitution, by consecrating in the letter of the law and through practising the principle of equality in reality, forbids, on the one hand, any type of discrimination and as such, will not permit imprisonment for any of these reasons. Furthermore, by establishing freedom of ideology and thought, the constitution also safeguards against any administrative or criminal prosecution for the ideas that one may hold. Also, the fact that freedom of information and freedom of the press, almost absolute where I am from, are basic and fundamental rights means that journalists cannot be detained and tried for providing information on issues that may not be popular with the government or which pursue an ideological path different from that of the political party in power.

Anyone who uses violence to achieve certain ends, mainly political in nature, is outside the law if they commit a violent act classified as a crime under existing legislation, and also on occasions if they are seen to advocate the use of violence or offer ideological support of the perpetrators.

It is precisely the violent nature of these acts in a democracy that means that those responsible cannot be considered political prisoners, although no doubt members of the terrorist organisation argue to the contrary through their shameful legal lying. Spanish governments since the earliest days of the democracy are right when they say that in Spain there are no political prisoners. These people are simply criminals upon whom the full weight of the Criminal Code must be brought to bear in a fair trial as guaranteed by the Constitution. They do not even constitute a threat to the democracy, since it is now so robust, and they will never achieve what they set out to do; to gain Independence through the use of violence, in the face of total rejection by the Spanish population, including the vast majority of Basque society.

But this does not mean that the State should not deal seriously with this problem and defend itself against terrorist attacks, which have been especially worrying, as you will know, in Spain in recent years. I will now go on to consider this question from a procedural perspective, with reference to legislation from my specialist area of knowledge.

IV. Democracy's fight against those who threaten it; the legal problem of terrorism and the right to a defence

Before I continue – and now that we have seen that there are no political prisoners in Spain, nor can there be, and that the only possible problem in this respect would be that of terrorism, a problem to which I have alluded several times already in this text, since in the eyes of the perpetrators there are political issues at stake – it is worth highlighting that the State's reaction in

its fight against this threat to date has not been to pass new anti-terrorist legislation. This shows how the Spanish authorities consider terrorists simply as criminals, albeit guilty of serious crimes, but when all is said and done, nothing more than criminals. That is why, and here I must insist, there are no special or emergency criminal laws against them, nor is there a special criminal procedure for their trial. The rules governing this area from a substantive perspective are to be found in the Criminal Code, and those describing procedure in the Criminal Procedure Act. There is, therefore, no special criminal procedure specific to instances of terrorism; the same Criminal Code and the same Criminal Procedural Code are applied to terrorists as to all citizens. One last point: under no circumstances are military tribunals employed instead of the ordinary trial courts.

There was, however, special legislation in the past, most notably during Franco's dictatorship and in the early days of the democracy. But the scourge of terrorism has forced constant reform both in terms of substantive and procedural law, in an attempt to provide the most efficient legal response to the inadmissible challenge that such terrorist groups represent, especially within the framework of a democracy.

The first anti-terrorist law was passed in Spain in 1968, during the times of the Franco dictatorship, although there were some precedents. This made terrorist and "militia/bandit" activity fall under the jurisdiction of the military courts. Franco´s final anti terrorist law, in August of 1975, three months before he died, made certain terrorist activities punishable by the death penalty, and others were to be given very heavy sentences, but they were no longer to be tried by the military courts. Some were tried by the now sadly famous, or infamous, *Tribunal de Orden Publico*. One of the first laws passed under the Monarchy, in February of 1976, nullified the most significant legislation from the times of Franco in this area, and under the leadership of President Suarez almost all trials for suspected cases of terrorist activity were moved under the authority of the ordinary jurisdiction in January 1977. Important new legislation in this area was passed in 1978, 1979, 1980, 1981, 1984 and 1988, the worst years of escalating terrorist activity in the newly born democracy, and again in 1995, 1998, 2000, 2002, 2003 and 2005, for different reasons but now in a slightly less tense atmosphere.

The fight against terrorism in times of the democracy deserves closer attention. In accordance with art. 55.2 of the SC, antiterrorist legislation, if it needs to be passed, must regulate any judicial intervention in the phases of investigation and taking of precautionary measures which interferes with the defendant's or accused's rights; it must consider the cases in which and indeed the way in which it is used, and its application must be controlled by parliament, and if the conditions are met, the following rights can be limited or withheld – arts. 17.2 (length of arrest), 18.2 (inviolability of the domicile) and 18.3 (privacy of communications) of the SC, for certain individuals under suspicion of belonging to armed groups or terrorist organisations. It is worth noting that these basic rights can only be limited or withheld to the defendant. In accordance with this, the following legislation has been passed

1) Two very significant anti-terrorist laws, the Organic Laws 3/ and 4/1998, from 25th May, which have meant the formal repeal of anti-terrorism legislation, as I have already mentioned, but not in terms of meaning or effect. These are the result of the S CC 199/1987, from 16th December, which held that legislation partially unconstitutional. The opinion of both Spanish criminal and criminal procedural law scholars has been of the opinion, and not without reason, that this legislation exceeded itself with respect to the agreed content of art. 55.2 of the SC, thus making it an authentic piece of exceptional or emergency legislation.

2) Though not directly envisaged as part of the fight against terrorism, whilst still applicable to certain areas of the legal struggle against this pernicious phenomenon, as well as in drugs trafficking cases, OL 1/1992, from 21st February, on the Protection of Citizen Security, needs to be mentioned. This is an administrative law.

3) The laws passed in order to prevent and block the funding of terrorist organisations (OL 4/2003, from 21st May, and Law 12/2003, from 21st May), should also be alluded to. These were in line with international trends on the matter.

4) The CC of 1995 also contains procedurally important provisions in the fight against terror, even leaving aside the legislation referring to crimes of terrorism (arts. 571 to 580), especially the provisions concerning "those who have repented", that is to say those members of groups dedicated to organised crime who turn state´s witness and in turn receive substantial and procedural benefits, as long as they meet the strict legal requirements (arts. 90.1, 376 and 579 of the CC, to which art. 72 of the OL 1/1979, from 26th September, on the General Penitentiary should be added if we bear in mind the major reform of 2003). This sensitive topic is nothing new in our Law, but it has, over the past few years, gained greater legal and jurisprudential development, although it is yet to be accepted by legal scholars as it is not proving effective in practice.

5) The International agreements in the fight against terror, ratified by Spain, should also be mentioned (Strasbourg in 1977, New York in 1999, Prüm in 2005 and New York in 2005).

I should mention, incidentally, that legal scholars are of the opinion that the procedural criminal law struggle against organised crime, and more particularly against terrorism, affects the principle of procedural equality (art. 14 of the SC), also known as the principle of equality of weapons. This is due to the important role played by the police and the prosecution office in these procedures, as well as the restrictions on the right to a defence and the possibility of being kept in solitary confinementwhich give the government the upper hand in the fight against this type of crime, which affects the due process clause, one of the demands of which is this state of equality.

It is also worth highlighting that there are hundreds of sentences handed down by the CC in appeals brought by people convicted of terrorism, some of themin favour of the appellant, but I will not look at them in detail here as they deal with specific basic rights of the condemned, which the plaintiff argued at appeal had been violated.

Such legal reform has not only come about in the field of terrorism, but also in certain areas of organised crime; which is why the legal texts now talk of "armed groups", "terrorist individuals" and "rebels", to which "gangsters", "drug smugglers", "child pornography rings", "slave" and "women traders" should be added.

But there are legislative specialities which allow for a different treatment and certain procedural variations to the trial of a common or garden criminal. Examples where terrorist defendants are concerned would include a centralised jurisdiction, an increased period of custody, custody or imprisonment in solitary confinement, certain leeway concerning human rights during the criminal investigation, a specific police task force, alimited right to counsel, certain rules concerning witnesses, a restriction on inadmissible evidence, rulings with specific sentences, and specific rules concerning the execution of the sentence. Some of these I shall explain shortly.

The special treatment in these cases shows how democracy is taking a tough line in the fight against organised crime, especially against terrorists, by limiting certain constitutional guarantees and giving a freer rein to the law enforcement and criminal investigation agencies, especially the police. Research shows that Spanish society in general, as desiring of security as it is fed up of terrorism, always understanding of the victims of terrorist attacks, usually accepts these stronger stances towards terrorism and applauds any reform that strengthens the arm of the State in the fight against these criminals.

Outside the strict framework of Criminal Law and Criminal Procedural Law, important measures have also been taken in the fight against organised crime in general, and terrorism in particular. I would draw your attention to the inclusion of international rules, especially from the European Union, in the Spanish legal system, and national laws aimed at detecting and putting an

end to the financing of these groups. Internal legislation has also meant that certain political parties which do not respect the rules of a democracy can be declared illegal.

Such practices also aid the intended strengthening of the democracy since many of the sentences handed down by our highest courts (the Constitutional Court and the Supreme Court) over the past two decades endorse a less rights based approach, especially where the police are concerned, even pushing the limits towards the violation of such basic and hallowed rights as the presumption of innocence and the right to a fair trial. The restrictive evolution where inadmissible evidence is concerned in the latest Spanish jurisprudence undoubtedly shows this to be the case.

One specific problem is that of the victims. The State has established public funds, to be financed by State budgets, for the repair in so far as any is possible to the harm and damage done.

The state's right to defend itself against anyone who threatens to rock its solid democratic pillars currently resides in making certain legal modifications to decisive aspects of criminal procedure. The aim is to make it impossible for terrorists to make use of cracks and weaknesses in the system and so escape judicial action. I would like to draw particular attention to the following five aspects:

*1) Jurisdictional authority of the courts***:** The jurisdictional authority for the trial and handing down a sentence in criminal cases involving organised crime, especially those accused of terrorist activities, is centralised in one jurisdictional body, called the National Court ("Audiencia Nacional", in Spanish) based in Madrid but with territorial jurisdiction throughout the whole nation. Created in 1977, this is an ordinary trial court / court of first instance. Cassation in these cases is heard by the Supreme Court.

The Spanish Jury Court, reinstated in Spain, as I have said, in 1995, has the authority to try a limited group of crimes via special criminal procedure, but none of these crimes would come under the category of organised crime, although perhaps a murder committed by a drug trafficker or sympathiser of a terrorist organisation could be heard in the Jury Court, as has already happened in Spain in the latter case (The sentence of the Spanish Supreme Court, abbreviated henceforth to SC, number 364/1998, from 11th March, RA 2355, in the *Mikel Otegi Case*).

*2) Custody***:** Maximum time in custody (for questioning), normally a period of three days, is extended to five days if the detainee is suspected of having taken part in organised crime or some terrorist activity.

*3) Solitary Confinement***:** In the case of organised crime, the law allows for the solitary confinement of the detainee or provisional inmate; this means he or she is denied any contact with the outside world for a limited period of time, with access to his defence lawyer only, and even this is subject to the following proviso.

4) The right to a defence: The accused has the right to defence by counsel from the moment of arrest and throughout every step of the legal process, right up to its conclusion. But if the procedural situation is one of solitary confinement (usually the case where suspected terrorists are concerned, as I have just mentioned) the accused does not have the right to retained counsel but must rather be assigned a court-appointed lawyer, with whom the arrestee can only speak upon conclusion of police questioning. These provisions, which have precedents in both German and Italian law, have been severely criticised in Spanish legal doctrine because they restrict the individual´s right to counsel in ways not expressly prescribed in the constitution.

5) Completion of the sentence: The rules governing execution of the sentence have been interpreted in such a way that convicted terrorists leave prison later as their legally accrued prison benefits are minimised. Furthermore, the convict must first meet the requirements of civil responsibility and they must be judged to stand a good chance of social reinsertion. Under some circumstances, however, for humanitarian reasons the inmate might be granted time under house arrest, for example, if death is imminent.

I should remind you that the Constitution allows for certain human rights to be overruled in situations judged to be of extreme danger to the democracy. Spain therefore finds itself among those countries which distinguish at the highest level between non-revocable human rights and those that can be withdrawn in politically extreme situations. This is achieved by establishing two distinct possibilities: temporarily suspending certain rights for all citizens when a state of siege is declared or there is a grave threat to public order. Or, specific rights can be revoked for certain people when an investigation is underway for suspected terrorist activities. Fortunately, neither one of these two possibilities has been called for since the reinstatement of the democracy, not even in critical situations such as the attempted coup d'etat of the 23rd of February, 1981, or the spate of fatal terrorist attacks towards the end of the 1980s, or even after the aforementioned Madrid bombings of March, 2004.

This Spanish model is by no means unique in the world. Any state that suffers serious internal threats or conflict, including Azerbaijan if this is indeed the case, is entitled to take measures and impose certain restrictions upon criminal procedure involving those who threaten to break the peaceful existence or endanger the lives of the nation's citizens.

IV. Conclusions

To bring this paper to an end, I will say that the terrible scourge of terrorism that has afflicted Spain since the 1960s, mainly, though not solely, due to the activities of the terrorist organisation ETA, as there are unfortunately other terrorist groups operating among us, has driven constant legislative reform. This reform has been of both a substantive and procedural nature and the aim has been to heighten the effective legal response to this unacceptable challenge presented by these diverse groups, especially within the confines of the democracy. Since the 11th September 2001, there has been an increase in legislative reform in order to bring an end to these criminal groups.

As we have seen, legislative reform has not come about only with a view to terrorism, but also to certain sectors of organised crime. The major crimes that form part of organised criminal activity, and terrorism in particular, are in Spain subject to the exclusive authority of ordinary criminal jurisdiction and there is therefore no administrative (sanctioning) or military procedure under which responsibility can be sought for these acts.

As a consequence, the reforms which have come about have not established a special alternative procedural route other than that provided by the ordinary penal system since the precepts that govern this area from a substantive point of view are now collected in the Criminal Code, and those that regulate the procedural aspect are to be found in the Law of Criminal Procedure (La Ley de Enjuiciamento Criminal).

It can therefore be said that there is no special criminal procedure for cases of terrorism. There are, however, legislative specialities which make it possible for certain procedural institutions affected by the new legislation to be treated separately and grouped together, and these have certain special characteristics when compared to the trial of a "normal" delinquent: centralised jurisdiction, a longer time limit on custody, solitary confinement during custody or the prison term, investigation of the crime and basic human rights, a specific police task force, limited right to a defence, special rules for witnesses, a limiting of the fruit of the poisonous tree doctrine, specific sentencing of prison terms.

These specialized treatments in specific cases mean that we can conclude that Democracy and the Government of Laws has strengthened its stance in the fight against organised crime, especially against terrorists, limiting certain constitutional safeguards and by providing law enforcement investigators and the prosecution, especially the police, with better means. It has been seen that Spanish society in general, so concerned about security and disgusted by terrorism,

always empathetic towards the victims, usually receives these stronger stances with open arms and applaud reform when it gives more power to the Government in its struggle against these delinquents.

Outside the framework of what is strictly Criminal Law and Criminal Procedural Law, significant measures have also been adopted in the fight against organised crime, and especially against terrorism. I would draw particular attention to the way Spain has embraced the inclusion of international rules, especially from the European Union, in the Spanish legal system, and national laws aimed at detecting and putting an end to the financing of these groups, and internal legislation which makes it possible for political parties which do not respect the rules of a democracy to be declared illegal.

Practical applications have also helped with this intended strengthening of the state of democracy, since many sentences handed down by our highest courts (the Constitutional Court and the Supreme Court) over the past two decades have supported a methodology, especially by the Police, not entirely in line with safeguarding principles, even bordering on violation of such basic human rights as the presumption of innocence and the right to a fair trial (with all the safeguards this entails). The restrictive evolution concerning inadmissible evidence from recent Spanish jurisprudence shows this without doubt.

It seems that the armed activity of the main Spanish terrorist Group, ETA, has come to an end, once and for all, following their declaration on the 20th October 2011. There are well-grounded political reasons for such optimism that the cease in activity is permanent, and this will, little by little, change the legislative framework we now have in Spain to something closer to "normality". But as many other terrorist organisations are still at large, especially internationally, such as the Islamic groups which have hit my country so hard, most famously on March 11th, 2004, Spain will, in my opinion, continue with the same trend as in other countries threatened first hand by terrorism; that is a trend of severity and intolerance during a not-insignificant period of time. Anti-terrorist legislation will be kept in place and safeguards will be restricted especially where Police activity is concerned and efficiency can be heightened, the only limit being that nothing must clash directly with the literal overriding tenor of the Constitution itself. As a consequence, the evolution of the practical reality of these safeguards and guarantees in Spain, which entered a grey area some time ago, is in danger of continuing to do so, that is if the situation doesn´t get even darker for quite a long period of time.

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CONSIDERATIONS ON THE CONCEPT OF PERSONALIZING THE PENALTIES

Ion RISTEA[*]

Abstract

The adaptation of the constraint related to the committed offence is a mandatory request of equity, of principles deeply rooted in the individuals' conscience namely that no sanction must overcome the gravity of the committed offence (suim cuique tribuiere – giving to each person what he deserves), principle that, in the concept of the Roman lawyers, was part of the fundamental principles of law (jus praecepta), along with other two principles: honestere vivere (having a honest life) and alterum non laedere (not harming another human being).

Keywords: *offence, criminal liability, penalty, adaptation, individual reeducation.*

Introduction

Art. 1 of the Criminal Code which has as "*nomen juris*" the purpose of the criminal law states that "the criminal law protects, against all offences, Romania, the sovereignty, independence, unity and indivisibility of the state, the human rights and freedoms, property, and the entire state of law". This disposal represents the basic norm of the ensemble of regulations of the Criminal Code, "it contains a fundamental orientation in order to serve to the understanding, explanation and appliance of all the other norms provided by the Code".

But, social protection, as a fundament of the criminal law and penalty, has not the meaning given by the doctrine or by the positivist school, which, by its illustrious members, Cesare Lombroso, Enrico Ferri and Rafaelle Garofalo, sustained among others, the principle of the offender's liability on the base of the social protection; nor the meaning given by the doctrine of "the new social protection", which, by its representatives, Adolphe Pins and Filippo Gramatica, claimed to avoid, if possible, the deprivation of liberty and re-socialization of the offenders with the appropriate treatment measures.

The modern criminal law's theorists have unanimously established that the fundamental institutions of the criminal law are offence, criminal liability and penalty, because around these three notions revolve all the legal criminal provisions, creating the pillars of the law system[1].

Content of the paper

Offence has been defined as being "any action incriminated by law and sanctioned by penalty"[2] or "action or inaction, which is considered a fault, and the legislator punished it by the

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[1] Vintilă Dongoroz et al., *Explicaţii teoretice ale codului penal român, partea generală*, 1st Volume, Romanian Academy Publishing house, Bucharest, 1969, pag. 99; Costică Bulai, *Manual de drept penal. Partea generală*, All Educational Publishing house S.A. Bucharest, 1997, p 150.

[2] Vintilă Dongoroz – *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000, p 159.

criminal law"[3] or "material act stated and punished by law which can be imputed to its author"[4]. Reducing this legal category to its most simple and schematic form, Professor George Antoniu defined offence as being "a clash of wills, that of the offender and that of the legislator; as well as the result of this clash, the defeat (violation) of the legislator's will"[5].

Traditionally, the Occidental criminal codes do not state regarding the offence, justifying this omission by arguing that the elaboration of this notion does not belong to the law maker, but only to the science of the criminal law. Thus, considering the special importance of this institution, the Romanian criminal code in 1968 stated in its Art 17 the essential features if the offence: social danger, guilt and its statement in the criminal code. From these essential features it results the idea that the offence is a complex, material, human, social, moral, political and legal phenomena.

But of these three key features, there is now a tendency to remove the social danger from the definition of offence. The idea is very bold and it can be argued by various controversies concerning the definition of this reality that constitutes a substantial aspect of the offence and therefore the difficulty to introduce such a factor in characterizing the concept of offence. Moreover, the legislator takes care to criminalize only those conducts that affect or threaten the social values protected and as a consequence, it is argued that social danger is not required in the definition of the offence.

Criminal liability, as a form of the legal liability, has been defined as the criminal legal relationship of constraint between the state and the offender, on the other side, a comprehensive relation whose content is given by law as representative of society to hold responsible the offender and the obligation of the offender to be liable for his offence and to subject to the applied sanction[6].

The criminal liability is the judicial consequence of committing an offence, namely the immediate reaction of society against the offender.

Hence, the perpetration is the very cause of criminal liability and the resort to criminal law's penalties is the consequence of criminal liability[7].

The current criminal doctrine allegedly argued that criminal liability is only the logical consequence (not natural) of infringing the precept; criminal liability is not the product of the criminal offense in the meaning of a reality separated in time and space from the penalty, but a trial, a rational conclusion that the wrongdoer must suffer the consequences of his deed, to answer for it[8].

In the actual Criminal Code, the criminal liability concept is found in Art 17 Para 2, which states that "the offence is the only base of criminal liability".

Regulations regarding the criminal liability are found also in Title II, Chapter V, regarding the causes that removes the criminal character of the offence (Art 44-51) where the object of the regulation is the very existence of criminal liability, indissoluble related to the issue of criminal liability's existence.

Also, we find stipulations regarding criminal liability in Title VII regarding the causes that remove the criminal liability (Art 19, 121-124, 131-132), whose object are the situations in which an offence has been committed and therefore, exists criminal liability, but, subsequently, for certain considerations, is has been removed and the offender no longer bears the legal consequences.

[3] Ion Tanoviceanu, Vintilă Dongoroz, *Tratat de drept şi procedură penală*, 2nd Edition, Bucharest, p 151.
[4] Robert Vouin et Jacques Leante, *Droit penal et criminologie*, Paris P.U.F., 1956, p 147.
[5] George Antoniu, *Vinovăţia penală*, Romanian Academy Publishing house, Bucharest 1995, p 53.
[6] Costică Bulai, *Drept penal. Partea generală*, p 311.
[7] Vintilă Dongoroz et al., *quoted works*, 1st volume, p 19.
[8] George Antoniu, *Criminal Law Review*, No. 1/2004, p 30.

Penalty, the third criminal law fundamental institution, is the legal sanction specific to criminal law, representing the consequence of non-complying with the criminal norms; in terms of the real content, penalty is harm, a sufferance to which the offender will be subjected to if he disobeys the criminal laws[9].

By its provision in the criminal norms, the penalty acts as a threat over the members of the collectivity for them to comply to the criminal law, thus as a mean of general prevention; by its effective appliance, the penalty acts a mean of the legal constraint; by its implementation, the penalty has a therapeutic character and function, of a severe, but necessary mean of redress[10].

The social, political and legal justification, namely the base of penalty, is confounded with the base of the criminal law, namely the protection of society against offences.

Social protection is a protection against offences, as socially dangerous acts, potentially repeatable and only against the offenders[11].

Art 52 of the actual Criminal Code states that penalty is a mean of constraint and reeducation of the convicted and has as purpose the prevention of committing new crimes.

From the analysis of this definition it results the features of penalty: penalty is a mean of constraint; penalty is a mean of reeducation; penalty is stated by the law; penalty is applicable only by the courts; penalty is personal and individual; penalty is applicable with the meaning of preventing new offences to be committed[12].

Regarding this last feature of penalty, we sustain that the prevention or forestall of new offences to be committed is made both as a special prevention (from the side of the penalty's subject), as well as a general prevention (from the side of other persons who have the intention of committing criminal acts).

Professor Vintila Dongoroz believes that the penalty exercises its general prevention action towards the persons who have a latent criminality, towards the victim and towards the entire collectivity[13].

It should be noted that penalty carries out the preventive purpose, the *antidelictum*. Before the crime to be committed, it is forestalled the committing of criminal acts by providing the penalty in the criminal law, warning over the consequences of breaking the law.

After the committing of the offence (*postdelictum*), the penalty exercises its preventive purpose on the one hand in the moment of its implementation by the court, and on the other hand, on the entire subsequent time of execution. In both cases, the penalty influences not just the behavior of the offenders, but also the behavior of those who, from the offender's sufferance, learn the necessary to their own behavior.

The penalty applied, directly, has the purpose of avoiding the relapse, and indirectly, by resonance and exemplarity can contribute to the correction of certain persons' behavior.

But regardless of the extent in which the appliance of penalty would increase the intimidation force of the penalty's threat over the public, the concrete punishment is meant, preponderant, to influence the offender and to modify his behavior[14].

To achieve its purpose, the penalty must perform the following functions:

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[9] Vintilă Dongoroz, *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000, p 465.

[10] Vintilă Dongoroz et al., *quoted work*, 1st Volume, p 22.

[11] Ştefan Daneş, Vasile Papadopol, Individualizarea judiciară a pedepselor, 2nd Edition, Judicial Publishing house, Bucharest, p 55.

[12] Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 2nd Edition, Universul Juridic Publishing house, Bucharest, 2003, p 186-187.

[13] Ion Tanoviceanu, *Tratat de drept şi procedură penală*, 3rd Volume, Bucharest, 1926, p 203.

[14] George Antoniu, *Sancţiunea penală,Concept şi orientări*, in the Romanian Law Review, nr.10/1981, p 7.

- The constraint function, results from the nature of the penalty as a mean of constraint;
- The function of reeducation, consists of the influence over the offender's mentality and skills;
- The exemplarity function has an adjoining feature and consists of the influence which the penalty applied to an offender has over other persons;
- The elimination function, which assumes, is achieving its purpose, the temporary or definitive elimination of the convicted one from society[15].

Art 53 of the Criminal Code, with its subsequent modifications and completions, establishes the frame of the actual penalties, referring to the main, complementary and accessory penalties.

Noteworthy is the fact that by Law no. 278/2006 inserted in the Criminal Code a new chapter regarding the penalties applicable to the juridical person, containing rules regarding the fine (as main penalty), and rules regarding complementary penalties applicable to the juridical person.

One of the fundamental principles of the criminal law that is placed at the base of criminal sanctions is their adaptability[16].

The principle contains the rule that the criminal law sanction must have the quality of being individualized, namely to be able to be proportioned qualitative and quantitative in relation to the nature and gravity of the act and according to the concrete circumstances of the cause.

A penalty is adaptable when it can be graded quantitative, namely divisible.

Also, a penalty is adaptable when it can be shaped qualitative, namely elastic.

Usually, are adaptable long-times penalties (imprisonment) and the amount ones (fine)[17].

The penalty is susceptible of a higher dosage, the more it will be proper to answer to a just repercussion[18].

From here results the idea that the adaptable punishment leads to the accomplishment of the penalty's purpose, desiderate which can only be achieved by the complete and efficient realization of the functions of the penalty and listed above.

But the main functions of penalty, i.e. the constraint and the reeducation functions lead to the accomplishment of its purpose only if are considered some basic elements of the offence.

The offences have a different degree of social danger and the offenders are by their nature, morally and physically very different. The psycho-physical capacity, age, occupation, cultural level, behavior are features that individualizes each offender. A penalty which would not have in count these realities would not be able to exercise an efficiently preventive influence – educative and would represent more a revenge of society against criminal offenders.

The ability to be or not be punished, the higher or lower degree of guilt and the nature more or less dangerous of the offender depends on his status.

Raymond Saleills argued that the penalty must be adaptable to the nature of the person is addressed to. If the guilty one does not have a completely perverted base, the penalty itself must not contribute to its perversion; it must help him to rise. If the offender is irrecoverable, the penalty will be against him in the status of society and will represent a radical measure of defense and prevention[19].

The committed criminal act is an important element in establishing and measuring the penalty for several grounds: it indicates to which extent has the legal order been violated and to

[15] Costică Bulai, *quoted work*, p 286-288.
[16] Costică Bulai, *quoted work*, p 282.
[17] Vintilă Dongoroz, *quoted work*, p 468.
[18] Ion Tanoviceanu, *quoted work*, 3rd volume, p 110.
[19] Raymond Saleills, *L'individualisation de la peine*, Paris, Felix Alcon Publishing house, 1909, p 10-11.

which extent must be acted (legal value); it indicates the intensity of the dissatisfaction created in the collectivity and thus the extent to which the social group waits for a satisfaction (social value); it indicates the presence of a person more or less dangerous (symptomatic value)[20].

Another argument regarding the necessity of individualizing the penalty is the fact that the social values susceptible of being harmed by antisocial facts do not have an equal value. One cannot state that the protection of the state is equal with the protection of the patrimony assets or with the protection of life and body integrity.

The objective existence of such differences between the social values protected by the criminal law colors differently also the abstract general danger of the social manifestations against these values, fact reflected in the way of punishing these facts.

Also, the actions and inactions that harm the same social values do not have the same gravity. Some are simple, some are more direct, some are insidious, more complex; some assume more conditions of achievement, some fewer conditions, some have a larger echo in the public opinion, some a limited one etc. These aspects too justify a certain difference in sanctioning each offence[21].

These aspects were taken into account when it was settled in the Criminal Code a more shaped system of measures that can be taken against offenders by the different degrees of social danger presented by their actions and their person. This system of measures contains: penalties, safety measures, educative measures.

Also in the purpose of the different implementation of penalty, the criminal code provided for a minimal and a maximal duration of the penalties susceptible of being applied, adopting the system of the relatively determined sanctions, which allows for a better individualization related to the concrete circumstances of each cause.

Hence, for every guilty person, the penalty must be adapted to its purpose, thus it will give the maximum possible output. The penalty must not be fixed before, rigidly, nor regulated by the law, so that it will be invariable, since its purpose is individual and must be achieved by using a special strategy adapted to each case[22].

In the legal literature, the individualization of penalty was defined as being the operation of adapting the penalty and its execution to the individual case and the offender, so as to ensure the functional ability and the achievement of its purpose[23].

The definition emphasizes the fact that the individualization of penalty is, firstly, a mean by which the penalty is concrete determined.

Secondly, the definitions points out the fact that the individualization of penalty is a mean of adapting its nature and its quantum or duration to the individual case, to the committed offence and especially to the offender's person, to his danger and his aptitudes to correct himself under the influence of the penalty.

In the criminal doctrine there are opinions regarding the necessity of reconsidering the principle of individualizing the penalty, sustaining the necessity of replacing this concept with the one of personalizing the penalties.

The most important argument refers to the fact that the sanction should materialize around the accused, the equivalent of a man deprived of his freedom, not his dignity[24].

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[20] Vintilă Dongoroz, *quoted work*, p 233.

[21] George Antoniu, *Cu privire la reglementarea cauzelor de agravare şi atenuare a pedepselor,* Romanian Law Review, no. 4/1970, p 47.

[22] Raymond Saleills, *quoted work*, p 11.

[23] Vintilă Dongoroz et al., 2nd volume, p 119.

[24] Theodore Papatheadoru, *De l´individualisation, des peines et la personalisation des sanctions*, Revue internationale de criminologie ed de police technique, No 1/1993, p 109.

In other words, the respect of the human dignity becomes one of the key factors of the criminal intervention, giving the possibility for some alternative solutions in the implementation of the criminal policy. To the same effect, Raymond Saleilles argued that the penalty, to achieve its purpose, must not lead to the loss of honor, but, on the contrary, must help to its regain, thus the dignity can retake its place inside the conscience[25].

Moreover, the respect for human dignity is mentioned also in the Universal Declaration of Human Rights and subsequently recognized by numerous international documents; is has an absolute feature, promoting the idea of the necessity to protect against treatments that will harm his health, body integrity and dignity of the persons detained.

The protection of the human dignity which involves the personalization of penalties is an imperative that aims the ensemble of the criminal and execution process, but does not mean that from respect to human dignity, the offenders must not be punished. On the contrary, undertakes us to elaborate norms and structures to recognize and ensure this major goal, with the prospect that the human dignity gains a decisive place inside person's own conscience[26].

Another important argument lies in the changing of the regulatory framework. Law No. 278/2006 inserted in the Criminal Code regulations relating to penalties for the legal person. In this situation, no longer about an individual as such, the penalty applying to natural and legal persons, taking into count its specific features, it is natural that this concept be called or possibly even replaced with the personalizing the penalties.

Thus, French criminal law prefers the term of personalizing the penalty instead of individualizing it, on the ground that the latter term, valid for individuals, is no longer adequate for moral persons who, in the vision of the French criminal law, can also be criminally punished[27].

Conclusions

Any transformation of the principle of individualization of penalty into the principle of personalizing the penalty assumes a new way of approaching institutionally or doctrinaire the adaptation of penalty.

We believe that, though there are reasons to replace the expression of individualizing the penalty with another one able to accurately express the idea of adequacy of penalty in relation to all criteria used for this purpose, and compared both with the individual and the legal persons with the legal person, *the term of individualization should not be abandoned*, because on the one hand, the individualization is achieved not only in terms of the offender's persons, but also by his deed, and on the other hand, has a long tradition and entered into the criminal legal terminology.

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[25] Raymond Salleilles, *quoted work*, p 243-245.

[26] Ortansa Brezeanu, *De la individualizarea la personalizarea sancţiunilor*, Romanian Criminal Law Review, no.1/2000, p 47-50.

[27] Philippe Salvage, *Droit penal general*, Grenoble, 1994.

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FULL EFFECTIVNESS OF EUROPEAN UNION'S POLICIES

Lamya-Diana AL-KAWADRI[*]

Abstract

One of the conditions for the adoption of legal instruments in the field of criminal law is to ensure the effectiveness of their indispensability Union policies. European Court of Justice has tried to ensure the full effectiveness of criminal law by proposing the adoption of some criminal tools. The study aims to observe some criteria to determine the full effectiveness, where it exisst and to present some defendpolicies by which the Member-States should be guided.

Keywords: *EU policies, principle of effectiveness, lack, fight against criminality at all levels inside each member-state.*

Introduction

According to Article 83 of TFEU, *The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. EN C 83/80 Official Journal of the European Union 30.3.2010.*

Same article establishes the areas of crime where minimum rules regarding a definition is needed: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Furthermore, same article says that *if the approximation of criminal laws and regulations of the Member States proves essential to ensure the **effective implementation** of a Union policy in an **area** which has been **subject to harmonisation measures**, **directives may establish minimum rules** with regard to the **definition of criminal offencesand sanctions** in the area concerned.*

Regarding these provisions that TFEU underlines, the Commission has made some proposals for a Council Framework Decision in some criminal areas.

Because any legislative proposal from the Commission to the Council and European Parliament is accompanied by an impact study, we will try to highlight how these proposals for a framework decision/directive would reflect the necessity of adopting the legislative act.

European Commission defines impact assessment as a *set of logical steps which helps the Commission to do this. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impact.*

The Commission also mentions that the *most effective way of improving the quality of new policy proposals is by making those people who are responsible for policy development also responsible for assessing the impact of what they propose.*

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It is said that impact assessment also *helps to explain why an action is necessary at the EU level and why the proposed response is an appropriate choice. It may of course also demonstrate why no action at the EU level should be taken.*

Main content

First of all in this study we will focus on how European Commission motivates the need of definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. We will focus on the impact assessments of some directive proposals that regard crimes on trafficking in human beings, protection of the environment, financial interests of the European Union, insider dealing and market manipulation, attacks against information systems, illegally staying third-country nationals.

In the second part of the study we will analyze the principle of effectiveness from the point of view of a part of some European Court of Justice case-law decisons, and last but not least we will conclude on how is mentioned and explained the principle of effectiveness in the impact assessments of the directive proposals chosen in the first part of the study.

A. The need of a definition of criminal offences and sanctions, part of effectiveness of EU policies

I. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims[1].

Being a problem that concerns not only the third countries from where it is considered that rises, but also all the Member States, it is necessary to assure a common policy *aimed at preventing and prosecuting this kind of crimes,* but more important providing protection for its victims.

The explanatory memorandum of this proposal first lists the existing provisions in this area, and then makes a summary of views and how they have been taken into account regarding trafficking in human beings. As it results from it, the European Commission's Group of Experts on Trafficking in Human Beings, in its written opinion, underlined as guiding principles:

- the need for an adequate legal framework in each country,
- the need to make human rights a paramount issue,
- to take a holistic,coordinated and integrated approach to link government policies on trafficking in humanbeings to migration policies,
- to respect children's rights,
- to promote research about trafficking in human beings,
- to monitor the impact of anti-trafficking policies.

Also, it is shown that **many stakeholders agreed on the need for specific provisions aimed at strengthening investigation and prosecution**. The crucial role of assistance measures was generally emphasised. The issue of introducing a specific obligation to criminalise clients who knowingly use sexual services from a trafficked person was controversial among stakeholders. Several MS pointed out that in any case such a provision should not be binding.

On the impact assessment problem, the proposal underlines that **v**arious policy options have been examined as a means to achieve the objectives of preventing and combating trafficking in human beings more effectively, and better protecting victims.

More, the proposal summarizes some policy options as there are shown below:

[1] Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, *OJ L 101, 15.04.2011, p. 1-11.*

1. No new EU action refers to that fact that the EU would take no action to combat trafficking in human beings, while Member States may continue the process of signature and ratification of the Council of Europe Conventionon Action against Trafficking in Human Beings. So, in this case, the most important role is the one of the MS that, not in these terms exactly, has the obligation to sign and ratificate the EU's legislative act that fights against trafficking in human beings.

2. Second of all, non legislative measures are imposed. So, first, FD 2004/629/JHA would not be amended. Non-legislative measures could be put in place in the areas of victim support schemes, monitoring, prevention measures in countries of destination, prevention measures in countries of origin, training, and law enforcement cooperation. This policy takes into consideration the victim support and should be taken measures to assure a protection based on MS's cooperation.

3. Third of all, new legislation on prosecution, victim support, prevention and monitoring is needed. So, the new FD will contain along with existing provisions new ones in the areas of substantive criminal law, jurisdiction and prosecution, victims' rights in criminal proceedings, victim assistance, special protective measures for children, prevention, and monitoring.

4. As policy 2 and 3 shows, New legislation and non legislative measures should be taken into account. So, a new FD would be adopted, incorporating the existing FD and including new provisions. The new FD would be supplemented by non-legislative measures, and in particular those identified in policy option 2.

II. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law[2]

As the explanatory memorandum first states, *in order to guarantee a high level of protection of the environment, an objective recognized by the EC Treaty (Article 174 §2 EC), the increasing problem of environmental crime must be tackled.*

It is necessary to take measures in order to assure a fully effective protection of the environment. Many acts of legislative are already adopted in this sense, but, as it is shown in various studies the sanctions currently in place in the Member States are not always sufficient to effectively implement the Community's policy on environmental protection.

After all the arguments that a framework decision, and an improved legislation has to be implemented in each MS, it is presented the general context of all the acts that had been taken to try to assure such a protection.

Regarding the impact assessment, we mention from the proposal that various options were considered in the impact assessment: For example:

- the possibility of no action on EU level,
- the possibility to improve cooperation between the Member States through voluntary initiatives,
- the possibility of full harmonization of environmental criminal law,
- a limited approximation of the national legislation on environmental crime in the Member States.

On the lack of action or non-binding action by the Community legislator the proposal says that would not tackle the existing difficulties in addressing environmental crime, difficulties which are rooted to a significant extent in the differences between the laws of the Member States.

[2] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328, 6.12.2008, p. 28–37*.

Furthermore, the necessity of a full harmonization of environmental criminal law would go beyond and would ignore the fact that national criminal law is still strongly influenced by the respective cultural values of each Member State so that a certain flexibility in the implementation is required.

The notion of a limited approximation is mentioned in this proposal and it takes into consideration three different possible measures:

- harmonization of a list of serious offences,
- harmonization of the scope of liability of legal persons,
- approximation of the sanction levels for offences committed under aggravating circumstances.

Finally, it is said that in all three cases, **the possible impact on the level of protection of the environment as well as police and judicial cooperation have been assessed very positively**, whereas the costs for business and the burden on public authorities would not be significant.

III. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation[3]

Regarding the economic crisis prevention and support for economic activity, the European Commission has assessed the application of the national rules implementing the MAD and has identified a number of problemswhich have negative impacts in terms of market integrity and investor protection.

In our opinion, this proposal is the most complete in determing the impact assessment of it, describing in a large way all the instruments that should assure effectiveness of such a framework decision.

The impact assessment identifies that the sanctions currently in place to fight market abuse offences are lacking impact and are insufficiently dissuasive, which results in ineffective enforcement of the Directive.

More, along the Member States criminal offences on this matter are very different defined. So, the proposal give for example that *five Member States do not provide for criminal sanctions for disclosure of inside information by primary insiders and eight Member States do not do so for secondary insiders. One Member State does not currently impose criminal sanctions for insider dealing by a primary insider and four do not do so for market manipulation.* All these undermine the internal market and leave a certain scope for perpetrators of market abuse to carry such abuse in jurisdictions which do not provide for criminal sanctions for a particular offence.

Like other legislative proposals, this one also shows that in ensuring effectiveness of this Union policy minimum rules on criminal offences and on criminal sanctions for market abuse would be transposed into national criminal law and applied by the criminal justice systems of the Member States.

Also, an issue is the definition of criminal offences, and the proposal states that*common minimum rules for the most serious market abuse offences facilitate the cooperation of law enforcement authorities in the Union, especially considering that the offences are in many cases committed across borders.*

Furthermore, *the definition of the most serious market abuse offences and on minimum levels of criminal sanctions attached to them.*

[3] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation,COM (2011) 0654 final.

Asresults of consultations with the interested parties and impact assessments thepolicy options related to criminal sanctions were considered as part of this preparatory work.

The conclusion of the impact assessment required for Member States **to introduce criminal sanctions for the most serious market abuse offences being essential to ensure the effective implementation of the Union policy on market abuse.**

IV. Directive 2013/40/EU of the European Parliament and of the Council on attacks against information systems and replacingCouncil Framework Decision 2005/222/JHA[4]

As we seen in all the legislative proposals, the explanatory memorandum states the main objective in adopting a framework decision. In the area of attacks against information systems the objective is to improve cooperation between judicial and other competent authorities, including the police and other specialised law enforcement services of the Member States, by approximating the rules of the criminal law in the Member States in relation to attacks against information systems.

The proposal also underlines that *the main cause of this phenomenon is vulnerability resulting from a variety of factors. Insufficient response by law enforcement mechanisms contributes to the prevalence of these phenomena, and exacerbates the difficulties, as certain types of offences go beyond national borders. Reporting of this type of crime is often inadequate, partly because some crimes go unnoticed, and partly because the victims (economic operators and companies) do not report crimes for fear of getting a bad reputation and of their future business prospects being affected by public exposure of their vulnerabilities.* Different definitions and different procedural maners and *may give rise to differences in investigation and prosecution, leading to differences in how these crimes are dealt with.*

The conclusions of the consultation of interested parties in this area where sattled down in a few important points:

- the need for the EU to act in this field;
- the need to criminalise forms of offences not included in the current Framework Decision, in particular new forms of cyber attacks (botnets);
- the need to eliminate obstacles to investigation and prosecution in cross-border cases.

Also, some policy have been summarized as follwos:

1. Status Quo / No new EU action. EU will not take any further action to combat this particular type of cybercrime, i.e. attacks against information systems. Ongoing actions are due to be continued, in particular the programmes to strengthen critical information infrastructure protection and improve public-private cooperation against cybercrime.

2. Development of a programme to strengthen the efforts to counter attacks against information systems by means of non-legislative measures. This policy point brings into atetntion the cross-border law enforcement and public-private cooperation, named as a soft-law instruments that will aim to promote further coordinated action at EU level, including:

- strengthening of the existing 24/7 network of contact points for law enforcement agencies,
- establishment of an EU network of public-private contact points involving cybercrime experts and law enforcement agencies;
- elaboration of a standard EU service level agreement for law enforcement cooperation with private sector operators;

[4] Directive 2013/40/EU of the European Parliament and of the Council on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *OJ L 218, 14.08.2013, p. 8-14.*

- support for the organisation of training programmes for law enforcement agencies on the investigation of cybercrime.

3. Third policy option settles a *targeted update of the rules of the Framework Decision (new Directive replacing the current Framework Decision) to address the threat from large-scale attacks against information systems (botnets) and, when committed by concealing the real identity of the perpetrator and causing prejudice to the rightful identity owner, the efficiency of Member States' law enforcement contact points, and the lack of statistical data on cyber attacks.*

In this policy option, strenghtened legislation must be adopted along with non-legislative measures in cooperation against cross border criminality in area of information attacks.

4. Fourth policy option regards introduction of comprehensive EU legislation against cybercrime.

New comprehensive EU legislation is the main idea of this policy option, along with different kinds of information system crimes, also financial cybercrime, illegal Internet content, the collection/storage/transfer of electronic evidence need more detailed jurisdiction rules.

This option underlines that the legislation would operate in parallel with the Council of Europe Convention on Cybercrime, and would include the accompanying, non-legislative measures mentioned at the policy options described above.

5. This fifth policy option reffers to an update of the Council of Europe Convention on Cybercrime.

The proposal makes clear that is needed a*substantial renegotiation of the current Convention, which is a lengthy process and is at odds with the time frame for action that is proposed in the Impact Assessment.*

A problem is that it is identified a sort of no international willingness to renegotiate the Convention, and an updated Convention it is considered a not feasible option.

This Proposal highlights furthermore a referred policy option which is made of a combination of non-legislative measures (option 2) with a targeted update of the Framework Decision (option 3).

V. Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals[5]

The proposal underlines the scope of the problem as *tackling illegal immigration - one part of the EU's effort to develop a comprehensive migration policy.* As a general problem, the illegal immigration needs to be reduced, especially regarding the employment of third-country nationals who have no or limited rights to work, and the limited rights are being exceeded.

The large number of illegaly staying nationals made necessary that some objectives to be taken into consideration. The proposal takes into two categories of objectives, general and specific, as follows:

General objectives:

- to contribute to reducing illegal immigration.
- specific objectives:
- to reduce employment of illegally staying third-country nationals
- to create a level playing field for EU employers.
- to contribute to reduced exploitation of illegally staying third-country nationals.

As regards the policy options for this proposal, six important options were mentioned.

[5] Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 0249 final.

1. The first policy option for this directive - Status quo – proposes to maintain the existing legislative acts in this area. More, this policy option mentions that national measures also had been taken, preventive measures and penal sanctions are increasing. Also, they mention *measures placing the responsibility on the employer to declare new employees and verify their status, measures encouraging employment of documented workers, and, partnership agreements for cooperation and initiatives to prevent illegal work (between (1) Member States, and, (2) Ministries and Social Partners)* that had been imposed.

2. Second policy option - Harmonised sanctions for employers of illegally staying third-country nationals across the EU, with an enforcement obligation on Member States. Here, the main issue is to harmonise sanctions for employers of illegally staying third-country nationals, to put in place new penalties and criminal sanctions. For example, they propose *a 'menu' of penalties would be put in place, including, for example, temporary ineligibility for public contracts and subsidies, temporary suspension of activity, temporary withdrawal of trading licence and/or confiscation of equipment.* The proposal also establishes some criteria to be taken into consideration when choosing a penalty:

- intention / knowledgeable act: whether the employer deliberately and knowingly hired (an) illegally staying third country national(s);
- repeat offence;
- other circumstances (e.g. economic situation).

In serious cases employers could also be subject to criminal sanctions, based on the following alternative criteria:

- repeat offence (e.g. second or third time / within a certain time period);
- employment of a significant number of third-country nationals; and/or
- particularly exploitive working conditions.

3. Policy option 3 refers at - harmonised preventive measures: common requirements across the EU for employers to copy the relevant documentation (residence permit) and to notify the competent national bodies.

For this policy option it is needed to **involve actions by the employer and competent national authorities.**

4. For the policy option 4 - harmonised employer sanctions and preventive measures – is a combination between policy option 2 and 3, as the proposal itself states.

5. EU awareness raising campaign on consequences of hiring an illegally staying third-country national – is the fifth policy option.

It is a *non-regulatory* option seek to make employers aware of their legal obligations and negative consequences of hiring illegally staying third-country nationals.

6. The last policy option - identification and exchange between Member States of good practices on the implementation of employer sanctions – involves the **cooperation between Member States in implementing a common system** in managing the situation of illegally staying third-country nationals.

B. ECJ case-law and the principle of effectiveness

Analyzing 175 ECJ decisions, we have selected a number of 19 such decisions where we can find the principle of effectiveness mentioned. From this 19 selected decisions we can see that only in a few of them the effectiveness is defined from a criminal point of view. In many of them the effectiveness is only determined in relation with civil law issues. For example, the most common situation where effectiveness is involved is the one based on the amount of damage which could be recovered by an individual who has suffered an infringement of his rights.

Regarding relevant decisions where the principle of effectiveness is mentioned, we can find a very important one that states: It is settled case-law that, in the absence of EU rules in the matter, it is for the internal legal order of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding in full rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that ***they do not render virtually impossible or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness)***[6]. So, the effectiveness is in relation with the rule that if they are needed to be laid down common EU rules, these one can not be less favourable.

Similar[7], the Court stated that it is for the domestic legal system of each Member State to lay down such a procedural rule, provided, first, that the rule is not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that it does not render in practice impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness).

Furthermore, regarding the application of the principle of effectiveness, the Court has held in another decision that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure[8].

The ECJ case-law highlights the **effectiveness in relation with an obligation of injured parties to have recourse systematically to all the legal remedies available to them** even if that would give rise to excessive difficulties or could not reasonably be required of them, obligation considered to be contrary to this principle[9].

From the ECJ case-law we can observe that firstly this principle is interpreted along with the principle of equivalence.

Then the basic condition that must be met to be considered as respected this principle is that there are provisions to protect the rights of individuals nationwide, provisions that can not be less favorable and not impose difficult procedures than those conferred by EU law.

Finally we can note that this principle is discussed especially in those cases which concern an injury repair.

[6] See Case C-452/09, *ToninaEnzaIaia, Andrea Moggio, UgoVassalle*, [2011] ECR I-4042, paragraph 16; Joined Cases C‑114/95 and C‑115/95, *Texaco and OlieselskabetDanmark*, [1997] ECR I‑4263, paragraph 41; Case C‑62/00,*Marks & Spencer*, [2002] ECR I‑6325, paragraph 34; and Case C‑445/06,*DanskeSlagterier*, [2009] ECR I‑2119, paragraph 31.

[7] Case C-542/08, *Friedrich G. Barth*, [2010] ECR I-3189, paragraph 17; Case C-228/96, *Aprile*, [1998] ECR I-7141, paragraph 18.

[8] Case C-246/09, *Susanne Bulicke*, [2010] ECR I-7003, paragraph 35; Case C-312/93,*Peterbroeck*, [1995] ECR I-4599, paragraph 14; Case C-432/05, *Unibet*, [2007] ECR I-2271, paragraph 54; Case C‑40/08 *Asturcom Telecomunicaciones* [2009] ECR I‑9579, paragraph 39; and Case C-63/08, *Pontin*, [2009] ECR I-10467, paragraph 47.

[9] Case C-445/06, *Danske Slagterier* [2009] ECR I-2119, paragraph 62.

C. Impact assessment and the principle of effectiveness. Conclusions

It is stated in one impact assessment that compared with the civil and administrative tools in implementing common procedures to reduce criminality in each Member State, the means of criminal investigation and prosecution are more *powerful*.

Furthermore, the effectiveness of Union policy, in our opinion, of any Union policy proposed, can be assured by transposing into national criminal law minimum rules on criminal offences and criminal sanctions (*for market abuse* in the issue analyzed in the proposed directive) that should be applied in each and every Member State.

It is also mentioned that the effectiveness of measures are highly dependent on efforts and resources put in place for enforcement.

Conclusion 1

We can develop the idea and say that the effectiveness of such measures depend especially on how each Member State can implement a common category of procedures taking into account its situation and its level of judiciary development. It is not a solution to create measures or to impose procedures that are impossible to apply in one Member State.

Of course, we also agree that shared definitions make it possible to exchange information and collect and compare relevant data in specific areas of criminality as we have already analyzed above and, again the effectiveness of prevention measures across the EU and international cooperation will be also enhanced.

As we said above and as even the Commission underlines, the effectiveness of measures currently in place seems to be highly dependent on efforts and resources put in place for enforcement.

Again, effectiveness still depends significantly on enforcement, so how can each Member State can apply each proposed policy option without affecting its main system of such measures and procedures.

So, effectiveness still depends on the Member States capacity to enforce the common regulations. Of course, the objectives that are highlighted as we have seen in the proposals analyzed are important to establish, but maybe it is needed to create a common pattern for all criminal offences through EU policies, so that the criminality to be reduced. But we think that creating such a pattern is yet early as Member State still have own policies applied above EU ones.

A very important idea is the one that provides a very important criterion regarding improved effectiveness and efficiency of enforcement bodies that could positively influence the number of offences uncovered.

Conclusion 2

We agree that effectiveness depends on the power of the legislation envisaged to be transposed and enforced in practice. The enforcement is the the responsibility of each Member States. Even with the enforcement obligation and the the sharing of good practices, the effectiveness of inspections would still be dependent on the Member States.

The effectiveness of penalties and sanctions are important considerations in the context of legal persons and crimes affecting the EU's interests, but they are not the only considerations. The criminalisation of conduct undertaken by legal persons also allows for enforcement agencies to use (more intrusive detection) criminal procedure methods (e.g. surveillance, telephone tapping, searches, seizure of computer hardware etc.) which can change perceptions of the likelihood of

being detected[10]. But even if these instruments can be used, we think that EU can not impose them as general instruments and because of them all policies to become effective.

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[10] Dubin, J.A., Criminal Investigation Enforcement Activities and Taxpayer Noncompliance, Public Finance Review, July 2007, vol. 35 no. 4, p.500-529.

SOME APPROACHES ON THE OFFENSE OF MURDER OR INJURY OF THE NEWBORN COMMITTED BY THE MOTHER, PROVIDED IN ARTICLE 200 OF THE NEW CRIMINAL CODE

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Abstract

In addition to the innovations included in the new Criminal Code, the legislator of this legal act makes a number of amendments to the existing institutions and offenses in the criminal law. Such a situation is encountered for the offense of murder or injury of the newborn committed by the mother provided in Art. 200 N.C.C., offense that partly corresponds to the offense of infanticide described in Art. 177 of the Criminal Code in force. The legislator considered it necessary to also criminalize in the new Criminal Code the act of injury of the newborn committed by the mother, along with the action of killing, a situation that rightly caused the change of the marginal name of the offense. Moreover, another interesting aspect that also constitutes the focus of our approach is represented by the two phrases which are different from those in the legal text in force, i.e. "immediately after birth but not later than 24 hours" and "state of mental disorder", which are designed to equalize the views expressed in the criminal literature regarding the analyzed crime and the practice in the field.

Keywords: *killing, injury, newborn, mother, disorder.*

Introduction

The objective of this study is to analyze two very important, even essential issues in order to characterize the offense of murder or injury of the newborn committed by the mother, referred to in Art. 200 of the new Criminal Code[1]. The first aspect is related to the choice of the legislator to limit the situation of being newborn for the passive subject of the crime to the first 24 hours after his birth. The second aspect relevant in supporting our approach is related to the active subject this time, represented by the mother of the newborn child, which should be in "state of mental disorder" in order to apply to her an attenuated punitive treatment, according to the legal provisions of the Art. 200 N.C.C., if she kills or hurts her newborn child.

The starting point in this study is represented by the provisions of the new Criminal Code and the issues raised in the Explanatory Memorandum[2] to the new Criminal Code which determined the form in which the text of the offense was written in the new Criminal Code, on the one hand, and the provisions of the Criminal Code in force and the jurisprudence and doctrine, on the other hand.

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[1] Represented by Law no. 286/2009, published in „The Official Gazette of Romania" no. 510 of July 24, 2009 and most recently amended by Law no. 187/2012, published in „The Official Gazette of Romania" no. 757 of November 12, 2012. Further N.C.C.

[2] "Explanatory Memorandum to the new Criminal Code", accessed: August 4, 2009, http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf.

1. Approaches Regarding the Content of Art. 200 N.C.C.

The offense of murder or injury of the newborn committed by the mother is provided in Art. 200 N.C.C., of the Chapter III, called "Crimes Committed against a Family Member", of the title I of the special part of the new Criminal Code, entitled "Crimes against the Person".

We will not continue the existing discussion[3] in the doctrine whether it is appropriate or not to create this third chapter dedicated to the description of the offenses committed against a family member, which contains only two crimes, and which is not found in the Criminal Code in force, as it is not the object of this study.

Article 200 N.C.C. reads: "(1) killing the newborn immediately after birth, but no later than 24 hours, committed by the mother in a state of mental disorder shall be punished with imprisonment of one to five years. (2) If the facts set out in Art. 193-195 are committed to the newborn immediately after birth, but no later than 24 hours, by the mother being in a state of mental disorder, the special limits of the penalty shall be of one month and three years respectively".

For a better understanding of the option of the legislator of the new Criminal Code to draft in this way the legal text we believe that it is important to know the provisions set out in the Criminal Code in force related to the topic taken under consideration.

Thus, we can say that the variant described in para. (1) of Art. 200 N.C.C. corresponds to Art. 177 Criminal Code in force, where the crime of infanticide is described as "killing the newborn immediately after his birth by the mother which is in a state of disorder caused by the birth is punished with imprisonment from 2 to 7 years".

It is true that the variant described in para. (2) of Art. 200 N.C.C. has no counterpart in the Criminal Code in force. We consider appropriate to create this legal text because if the legislator chose to apply a lower sentence for the mother who, in a state of disorder caused by birth, kills her newborn baby, she is also entitled to a reduced penalty if, in the same conditions relative to her mental health, the mother causes harm to her newborn immediately after birth.

We agree with what it was stated in the Explanatory Memorandum to the new Criminal Code on this issue, that the desire was to "eliminate the gaps and the inconsistencies caused by the successive amendments of the criminal code in force".

Moreover, we believe the legislator made an inspired option to change the marginal name of the offense from "infanticide", as described in Art. 177 Criminal Code in force, to "murder or injury of the newborn committed by the mother" because the marginal name has to be consistent with the legal text in question.

Relative to the provisions of Art. 200 N.C.C. we believe that the legislator opted for the inclusion in the same article of the Criminal Code of two distinct offenses, namely: the offense of killing the newborn committed by the mother in para. (1) of Art. 200 and the offense of injury of the newborn committed by the mother in para. (2) of Art. 200.

An argument in issuing this hypothesis is the existing legal text of Art. 266 Criminal Code in force, which is called "Illegal Arrest and Abusive Investigation" and that, in fact, comprises two distinct offenses individually described in paragraphs (1) and (2) of the article in question.

Another argument in supporting the thesis is the very presence of the conjunction "or" in the marginal name of Art. 200 N.C.C. If the legislator used in the existing Criminal Code the conjunction "and" in stating the marginal name of Art. 266 Criminal Code in force, thus showing

[3] Petre Dungan, Tiberiu Medeanu & Viorel Pasca, *Handbook of Criminal Law. The Special Part. The Offenses against the Person. Crimes against Property*, (Bucharest: Legal Universe Publishing House, 2010), 103-105. The authors believe that „the intention of the legislator to build a section with only two offenses is not very inspired" because „the concern of the legislator to create a separate legal framework will not lead to reducing domestic violence and especially to eradicate it".

that in practice there may be a situation in which the offense of illegal arrest, contained in para. (1) of Art. 266, and the offense of abusive investigation, referred to in para. (2) of Art. 266, may be withheld in contest, the usage of the conjunction "or" in the marginal name of Art. 200 N.C.C. was required for reasons of logical order. Thus, in practice there cannot be a situation in which the provisions of para. (1) and those of para. (2) of Art. 200 to be withheld in contest as the legal classification of the offense is based on the immediate consequence of the action or inaction which is the material element of the offense, taken also into consideration the other requirements imposed by law. In that case the immediate consequence of the offense of killing the newborn committed by the mother, referred to in Art. 200 para. (1) N.C.C. is the death of the baby who was born alive, and the immediate consequence of the offense of injury of the newborn committed by the mother, referred to in Art. 200 para. (2) N.C.C., is the harm of the newborn. We can never withheld in contest the two offenses if we have the same passive subject, although it is true that killing a person inevitably involves producing injury and suffering to the passive subject in question, but they are inherent in the action of killing, which immediate results in the death of the passive subject.

2. Approaches regarding the phrase "immediately after birth but not later than 24 hours"

Another aspect that we intend to analyze is relative to the legislator's option to fix two extremely precise time limits in characterizing the quality of newborn of the passive subject, namely the period between the end of the birth, because it is stated that the offense must be committed "immediately after birth", and the end of the first 24 hours following that moment.

Although medical opinions[4] about the condition of the newborn are not unitary, in the criminal literature[5] it is said that this state lasts a relatively short period, id est from the moment of the completion of birth by cutting the umbilical cord to 10-14 days, while the child's body still preserves the signs of birth[6].

In another opinion[7] it is stated that legally speaking "immediately after birth" has the meaning of the period in which the recent signs of the birth still remain on the baby's body and it can last up to three days after birth, although medically speaking the state of newborn is kept in the first 28 days of extra-uterine life of the child.

However, under the new Criminal Code, the literature[8] stated that the condition of the newborn remains only in the first 24 hours following birth. This time interval is in fact a condition to characterize the offense.

[4] „Newborn" is the name for the baby from birth until the age of 28 days; accessed: December 23, 2012, http://www.romedic.ro/nou-nascutul-prima-luna-de-viata-0C429. In another opinion it is stated that „the newborn is the name given to the baby born alive in the first 30 days of life"; Dungan, Medeanu & Pasca, *Handbook of Criminal Law*, 110.

[5] Ioana Vasiu, *Criminal Law. Special Part*, volume I, (Cluj-Napoca: Blue Publishing House, 1997), 122, cited by Ilie Pascu & Mirela Gorunescu, *Criminal Law. The Special Part, 2nd* edition, (Bucharest: Hamangiu Publishing House, 2009), 115.

[6] In medical science it is stated that "the skin of the newborn may present edema which may resolve spontaneously within the first week with kidney involvement, (...) staining pink skin gradually becomes yellowish, physiological jaundice starting in the third day and gradually disappearing in 10 - 14 days, (...) umbilical stump to mummify and detach within 2 weeks (...) on the forehead, shoulders and back we can see very fine hair that falls in about 2 weeks (...)". "Signs of birth", accessed: February 10, 2013, http://www.nou-nascuti.ro/neonatologie/nou-nascutul-normal.html.

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[8] Vasile Dobrinoiu & Norel Neagu, *Criminal Law. Special Part. Theory and Legal Practice under the New Criminal Code*, (Bucharest: Legal Universe Publishing House, 2011), 73.

It is true that the expression "immediately after birth" of Art. 177 Criminal Code in force is ambiguous and has over time generated non-unitary solutions in the judicial practice, but we consider that the time condition required to be fulfilled in order to be in the presence of the offenses described in art. 200 N.C.C. is extremely limited, respecting of course the other requirements imposed by the legal text. Therefore we propose replacing for the future regulation the term "immediately after birth but not later than 24 hours" with the phrase "immediately after birth, but not later than 14 days", taking also into account the existence of a state of mental disorder for the mother.

However, the essence of the offense of killing or injury of the newborn is represented by the quality of newborn for the passive subject and by the condition of mental disorder of the active subject. However, as described in Art. 200 N.C.C., given the maximum time limit of 24 hours after birth, if the mother being in a state of mental disorder kills her newborn baby within 30 hours after birth, the act would comply with the provisions of Art. 199 N.C.C., relative to the description of the offense of domestic violence, and the punishment would be more severe than that provided in Art. 200 N.C.C. In the judicial practice[9], it has been established that there was not committed the offense of infanticide, according to Art. 177 Penal Code in force, but the offense of murder under the Art. 174 and Art. 175 letters a), c), d) and i) Penal Code in force, in the case of a newborn killed 4 days after his birth by his mother, and this situation was not due to the lack of quality of the passive subject, but to not complying with the condition of the state of mental disorder of the active subject.

The existence of the state of mental disorder of the active subject is established by forensic means in each case held before the Court because it will be appreciated from person to person depending on certain factual data and this state may exceed the 24 hours following the child's birth.

Criminal literature[10] stated that the introduction of this time condition "not later than 24 hours" will lead to "a more precise and uniform judicial practice".

This statement is correct, but at the same time, it seems unacceptable the situation where, the fact of murdering a newborn by his mother being in a state of mental disorder, according to Art. 200 N.C.C., at, say 30 hours after birth, to be assigned to the offense of domestic violence provided in Art. 199 N.C.C., and not to those of Art. 200 N.C.C., and applying a more severe punishment because the condition of time was not respected.

3. Approaches regarding the phrase "state of mental disorder"

Another important aspect that we want to analyze is that relative to the phrase "state of mental disorder", which is prerequisite for the active subject in order to find the hypothesis of the offenses described in Art. 200 N.C.C.

In Art. 177 Criminal Code in force, we find the phrase "state of disorder caused by birth". As shown in the criminal literature[11], this condition, which has to be established in the concrete conditions of each case brought before the Court, excluded the situations in which the state of disorder was pre-existing or has appeared after the birth by reasons such as fear of parental reaction, the public stigma, lack of subsistence, separation of the mother and father of the newborn and so on. For these reasons the legal practice was uneven.

[9] „The Supreme Court of Justice, Criminal Section, Decision no. 4457/2003", available online at: http://legeaz.net/spete-penal-csj-2003/decizia-4457-2003 (accessed: December 29, 2012).

[10] Dungan, Medeanu & Pasca, *Handbook of Criminal Law*, 109.

[11] Dobrinoiu & Neagu, *Criminal Law*, 74-76, Pascu & Gorunescu, *Criminal Law*, 116.

In one case[12] the defendant was charged with the offense of murder referred to in Art. 174 and Art. 175 letters c) (of a close relative) and d) (taking advantage of the helplessness of the victim to defend herself) and not with the crime of infanticide, provided in Art. 177 Criminal Code in force, for the fact of hiding her pregnancy and giving birth alone in her parent's home, unattended by a physician, and killing the baby immediately after birth in order his cry not to be heard by the defendant's parents and hiding the body in a bag held under her pillow for 4 days until she got sick and, presenting herself to the doctor, the offense was discovered. When brought before the court the offense of infanticide could not be retained as the forensic examination established that the defendant did not show postpartum psychiatric disorders, and the offense was committed with discernment. The conflicts prior and with no connection to the birth such as the fear of parental reaction, the public stigma, affecting the psyche of the defendant have the value of motives of the crime and not the meaning of a state of disorder caused by birth.

In another case[13], the defendant was acquitted because the attempted infanticide is not punishable. It was established that, at night, the defendant gave birth to a baby at home, unassisted, and immediately after that she introduced the newborn in a plastic bag and threw him through the garbage collection piping where he was found alive the next morning by the maid, who also alerted the authorities. The conclusions of the forensic report showed that the defendant was at the time of the offense in a state of disorder caused by birth, which affected her judgment. The evidence in the case showed that the defendant had decided to keep the pregnancy despite being in conflict with her concubine and she even was registered in the medical records of a specialist for monitoring her pregnancy and the fact she had not announced the birth was due to the lack of means of communication.

Bound to the state of disorder caused by birth to the mother the phrase "puerperal fever" is used, and it represents all the "mental disorders during pregnancy, childbirth and lactation"[14].

In an opinion[15] the psychiatric disorders caused by birth, may be in the form of "confusional states, anxiety, delirium" leading to denial of motherhood and the commission of the crime, and this states characterize the post-partum period lasting up to 42 days.

All these aspects found in the legal practice caused the legislator to choose for the new Criminal Code the phrase "state of mental disorder".

We believe that the scope of this concept is too broad because one can say that every mental disorder of the mother, even of pathological nature, which only diminishes her judgment, may be considered as part of the concept introduced by the legislator in the new Criminal Code. Assuming that at the time of the offense, the person could not realize the meaning of her actions or inactions or could not control them either because of mental illness or for other reasons, then the irresponsibility operates according to art. 28 N.C.C., which is a question of non-imputation.

[12] S.C.J., Criminal Section, Decision no. 4956 of October 9, 2004, cited by Lia Savonea & Daniel Grădinaru in *Crimes against Life, Bodily Integrity and Health. Jurisprudence*, (Bucharest: Hamangiu Publishing House, 2011), 51-56. The court noted that „the state of disorder caused by birth" within the meaning of Art. 177 Criminal Code „is due to labor, to the physical act of birth, and not to a general concern, due to educational deficiencies, the circumstances accompanying physiological process of birth, which leads naturally to the idea of concealing an act considered as illegal".

[13] S.C.J., Criminal Section, Decision no. 1948 of March 22, 2007, not published, cited by Savonea & Grădinaru, *Crimes against Life*, 131-133.

[14] "Puerperal fever", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.

[15] "Mental disorder caused by birth", accessed: February 10, 2013, http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala.

We agree with the view expressed in the criminal literature[16] that the concept in question is "closely related to the pregnancy and the birth process and the implications they have on the pregnant woman psychologically and socially".

Criminal law is strictly interpreted and applied and in order to eliminate ambiguity of expression and support doctrinal explanations about the meaning of the term in question, we propose for the future legislation the addition of the phrase as follows "state of mental disorder generated by the pregnancy as a whole".

4. Approaches on the Comparative Law

4.1. Costa Rica

In the Second Book, "About Crimes", title I, "Crimes against Life", section I, "Homicide", of the Costa Rican Criminal Code we find Art. 113 para. (3), which reads: "the mother who by reasons of hiding the shame and maintaining her good reputation kills her newborn within maximum 3 days after birth is punished with imprisonment from 1 to 6 years".

As in the Romanian criminal law both the active subject and passive subject are qualified in the person of the mother or the newborn child. Although there is no indication on the mental state of the active subject at the time of the offense, it is interesting to note that the legal text refers to the mobile of the crime, the mother acting "to hide the shame and keep good reputation".

If the Romanian Criminal Code in force provides the temporal condition of the offense "immediately after birth" and the new Criminal Code narrowly defines this condition between the limit „immediately after birth" and the first 24 hours of life of the newborn, the Criminal Code under review provides a distinct temporal condition, id est, "within a maximum of 3 days after birth".

The minimum special limit of the penalty is the same in both criminal laws, namely one year, and only the maximum special limit varies, which is higher in the Costa Rican Criminal Code, namely 6 years, comparative to the Romanian Criminal Code and to 5 years in the new Criminal Code.

Compared with the existing Criminal Code, which provides the penalty of imprisonment from 2 to 7 years, in the new Criminal Code and the Criminal Code of Costa Rica there are lower limits, id est the minimum special limit is of 1 year and the maximum special limit is of five, respectively 6 years.

4.2. Dominican Republic

The Article 300 of the Dominican Criminal Code provides that "the one who kills a newborn baby is guilty of infanticide" and in Art. 302 of the same Criminal Code it is stipulated that "it is punishable by 30 years in prison the one guilty of murder, parricide, infanticide and poisoning".

In the Dominican Criminal Code we find the offense of infanticide and, as can be seen from the legal text, the active subject is not circumstantial, as in the Romanian criminal law, but it can be any person who meets the general conditions of criminal liability.

The passive subject, as in our law, is a newborn baby, but the Dominican legislator provided no time condition relative to the commission of the crime.

The Dominican legislator has a different perspective on this crime from the Romanian legislator, fact proven by the situation that the penalty imposed is 30 years in prison, also

[16] Dobrinoiu & Neagu, *Criminal Law*, 74-75.

applicable for murder or for other crimes against the person. Thus, infanticide is not perceived as an attenuated version of the offense of murder.

4.3. Tunisia

In Article 211 of the Tunisian Criminal Code it is provided that "it is punishable by 10 years in prison the mother for killing her child at birth or soon after".

Unlike the Romanian criminal law existing or future, the Tunisian Criminal Code provides a bigger punishment for the analyzed offense, that of 10 years in prison.

As the Romanian Criminal Code, the active subject and the passive subject are circumstantial, in the person of the mother and the newborn. The Tunisian legislator makes no statement about the condition of the mother at the time of the offense, but he is only interested the act to be committed "at birth or soon after".

4.4. Canada

In Article 233 of the Canadian Criminal Code it is provided that "a woman commits infanticide when by a willful act or omission causes the death of her newborn child, if at the time of the action or inaction she may still feel the effects of child birth or those of early lactation and therefore her judgment is diminished".

In the Canadian Criminal Code we find the offense of infanticide, that can be committed by action as well as by omission, like in the Romanian criminal law, by the mother to her newborn child.

Although there is no time condition provided for the commission of the offense, the Canadian legislator is extremely precise about the causes that are likely to diminish the discernment of the active subject, causes that are related either to the birth process or to the physiological changes in the mother's body onset of lactation.

We believe that Canadian legislator's option to specify the exact causes that may diminish the discernment of the active subject of the analyzed crime is necessary because it leaves no room for ambiguity and it creates no problems in interpreting the legal text and in applying it to the concrete cases that have to be judged.

Conclusions

By criminalizing an act we protect certain specific social relations that emerge and develop on certain social values including the person with her attributes. The legislator considered it appropriate in the new criminal code to criminalize the injury of a newborn along with the infanticide, which is also found in the penal code in force in view of the fact that if the mother receives a low sentence for killing her newborn child, much more she must have the same kind of punishment if she only harms him. The legislator of the new Criminal Code used an already known legal arrangement from the Art. 266 penal code in force, and he included two distinct offenses in the same article, describing in the first paragraph of Art. 200 the offense of killing the newborn committed by the mother, and in the second paragraph, the offense of injury of the newborn committed by the mother.

With regard to the second issue which is the subject of our study, we believe that the legislator provided an excessively limited time condition in characterizing the offenses described in Art. 200 N.C.C., as in the first 24 hours of life of the newborn, and we have proposed for the future legislation that the final limit of this time condition to be represented by the first 14 days of life of the newborn.

Considering that the term "state of mental disorder" that characterize the active subject of the crime is considered a concept with a broader range of coverage, we have proposed to improve

the legislation by completing this formulation as follows "state of mental disorder generated by the pregnancy as a whole".

Since the Law no. 286/2009 for the new criminal code was amended in a single year, 2012, by three acts, although it is not yet in force, we should continue to observe this aspect and also how the regulations of the offenses listed in Art. 200 N.C.C. develop.

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

Nadia CANTEMIR[*]

Abstract

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

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

Introduction

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

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

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

I. The context of the new regulations. Definitions.

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

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

Therefore a legitimate question arises: was the new codification necessary in terms of criminal procedure? A famous professor, member of the drafting of the new criminal procedure code committee answered this question[2], "No, it was not necessary. The abbreviations have though a big flaw, as it can sometimes distort the meaning of what was meant to be expressed. I actually wanted to say that it was not only necessary, but I would say a wider need is required". The new criminal procedure texts are harmonized with Mike Farkas's aphorism, "*the key is the one which creates music",* meaning that the buncombe language of the legislator is reduced, giving priority on the podium to a more accessible speech.

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

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

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

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

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

1. Holder of the plea bargain and its limits.

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

[2] „*Nicolae Volonciu despre noul Cod de procedura penală",* www.juridice.

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

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

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

that the hierarchically superior prosecutor would notify some irregularities. This control also implies the fact that the agreement's limits are set by prior and written approval.

According to paragraph 3 of the same article, the agreement may be initiated by both the defendant and the prosecutor. In theory, one of the negotiated justice's prerequisites, also of "contractual" nature, is equality between the parties. Considering this contractual nature, almost private of the agreement, equality of arms deals with a whole new dimension compared to the traditional procedure, given that the essence of an agreement is not only equality of arms, but also equality between the parties[6].

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

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

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

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

According to paragraph 6 of Article 478 the juvenile defendants cannot conclude plea bargaining agreements. Also in the specialized literature[9] the opinion was stated that this procedure should also be applicable to minors, this procedure being easily done with the consent of the legal representative and in the presence of a probation officer. We appreciate that the legislature felt the need to regulate such a provision taking into account the new changes in the

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

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

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

[9] See, S. Siserman, *Considerații privind acordul de recunoaștere a vinovăției*, www.juridice.ro.

field of juvenile criminal liability regime of the new Penal Code. Thus, the social defense reaction against juvenile delinquency cannot be reasonably and effectively accomplished by the same type of crimes as in the adult crimes. Therefore to the juvenile offenders one should applied a separate system of criminal sanctions, made up mainly of predominantly educational sanctions and only alternatively of repressive sanctions such as penalties. The progress made in both criminology and in other criminal science such as penology have set new guidelines for the criminal sentencing system generally, targeting the diversification of penalties, a strong focus on non-custodial penalties and the diversification of the means of penalties individualization and personalization[10].

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

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

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

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

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

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

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

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

This agreement may be concluded at an early stage of criminal investigations as it is necessary that out of the evidence showing the existence of sufficient data for which the criminal proceedings started regarding the defendant's guilt. The most important aspect to be mentioned is that the when concluding the plea bargaining agreement legal assistance is required. We meet therefore a new situation in which the defendant's legal assistance is mandatory, as provided in Article 90[13]. We ask ourselves how the defendant could agree to this procedure taking into consideration the fact that we are in the midst of criminal prosecution phase, which is governed by the non-publicity principle, in this way not having access to criminal prosecution files. Also the new Code of Criminal Procedure, in Article 94 regulates the file consulting institution. Thus, during prosecution, the prosecutor sets the date and duration of consultation within a reasonable time. We consider that in order to give effective recognition of the institution, the defendant must be allowed to study the case together with a counsel and take a decision afterwards. To proceed in other ways would bring prejudice to Article 6, paragraph 3 of the Convention which stipulates the defendant's right to be informed, in detail, not only with regard to the cause of the accusation, namely the material facts of which he is accused and on which the accusation is founded, but also and with regard to nature of the prosecution, namely the legal classification of the case[14].

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

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

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

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

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

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

not fragments of it, in order for the judge to give efficiency to the truth establishing principle and to take a judgment in relation to judicial truth.

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

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

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

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

- accepts the plea agreement and sentences the defendant to a term of imprisonment or a fine whose limits were reduced with either a third or a quarter if they meet the

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

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

conditions for substantive and formal regulated in Articles 480-482, on all the offenses incriminating the defendant who made subject of the agreement;
- rejects the plea agreement and sends file to the prosecutor for further prosecution, if the conditions for and formal regulated in Articles 480-482.

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

We note that in this case the legal text runs counter with the explanatory memorandum[17] stating that the agreement is subject to review by the court of law regarding to its object and concluding conditions, and where admission sentencing court shall order the defendant to a term not may be greater than that requested by the prosecutor in agreement. It is deficient the regulation regarding the plea agreement and the imposition of a sentence whose limits were reduced, meaning that we do not know whether the court can "validate" understanding, but to act on the penalty proposed by the prosecution and the defense. For example, suppose that the defendant committed the offense of cheating punishable with imprisonment from 6 months to 3 years, according to new Criminal Code. The prosecutor is the one proposing a plea bargain, decides for a penalty of 1 year imprisonment with execution, taking into account that the offense penalty limits are reduced by one third. Afterwards the court of law is seized with this agreement, and the judge, according to regulation, accepts or rejects the agreement. If the court of law considers that the conditions are being fulfilled, but the punishment of 1 year imprisonment is too high and requires a smaller sentence, or chooses as means of implementation the suspension by supervision applies or rejects such penalty? Analyzing the code provisions it should be rejected. In our opinion, such an interpretation would be absurd, and the text should be amended so that the court of law could either fully accept and validate the agreement was concluded, or be partially accepted, being able to modify it only in favor of the defendant, or modify it if the conditions are not being met. We consider that this is a fair solution, because the judge is in top judicial bodies, watches and also contributes to the judicial truth, being the arbiter between the defense and the prosecution, due to its impartiality and its tenure. According to Article 2 Law 304/2004, justice is carried out in the name of law, is unique, impartial and equal for all, being accomplished through the courts of law.

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

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

To proceed against an accepted or rejected judgment of a plea agreement is by means of appeal. Thus, the decision may be appealed within 10 days from the notification. According to Article 407 of the new Code of Criminal Procedure, after delivery, a copy of the minutes of the

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

decision shall be forwarded to the prosecutor, the parties, the injured party, and if the defendant is arrested in the administration of the detention, for exercising the appeal. After drafting the judgment, they shall communicate the decision as a whole.

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

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

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

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

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

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

In Germany, the principle, inquisitorial, which requires the authorities of truth finding, seems at first sight incompatible with the idea of negotiated justice. However, the special procedure of plea agreement recently underwent an upward trend to accelerate procedures. The *informal arrangements, informelle Absprachen,* are established between the accused lawyer, prosecutor and judge, and in exchange for recognition of facts from the defendant, the judge is

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

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

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

obliged to reduce the sentence, exempt from the duty to also establish the offenses based on the evidence and to ascertain the legality and credibility of the evidence means[21].

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

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

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

IV. Conclusion

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

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

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

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

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

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

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

[23] See S.Cazacu, *Acordul de recunoaştere a vinovăţiei, procedură fariseică?,* www. sergiucazacu.com.

[24] „*Nicolae Volonciu despre noul Cod de procedura penală"*, www.juridice.

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