UNIVERSITY OF CRAIOVA
FACULTY OF SOCIAL SCIENCES
POLITICAL SCIENCES SPECIALIZATION &
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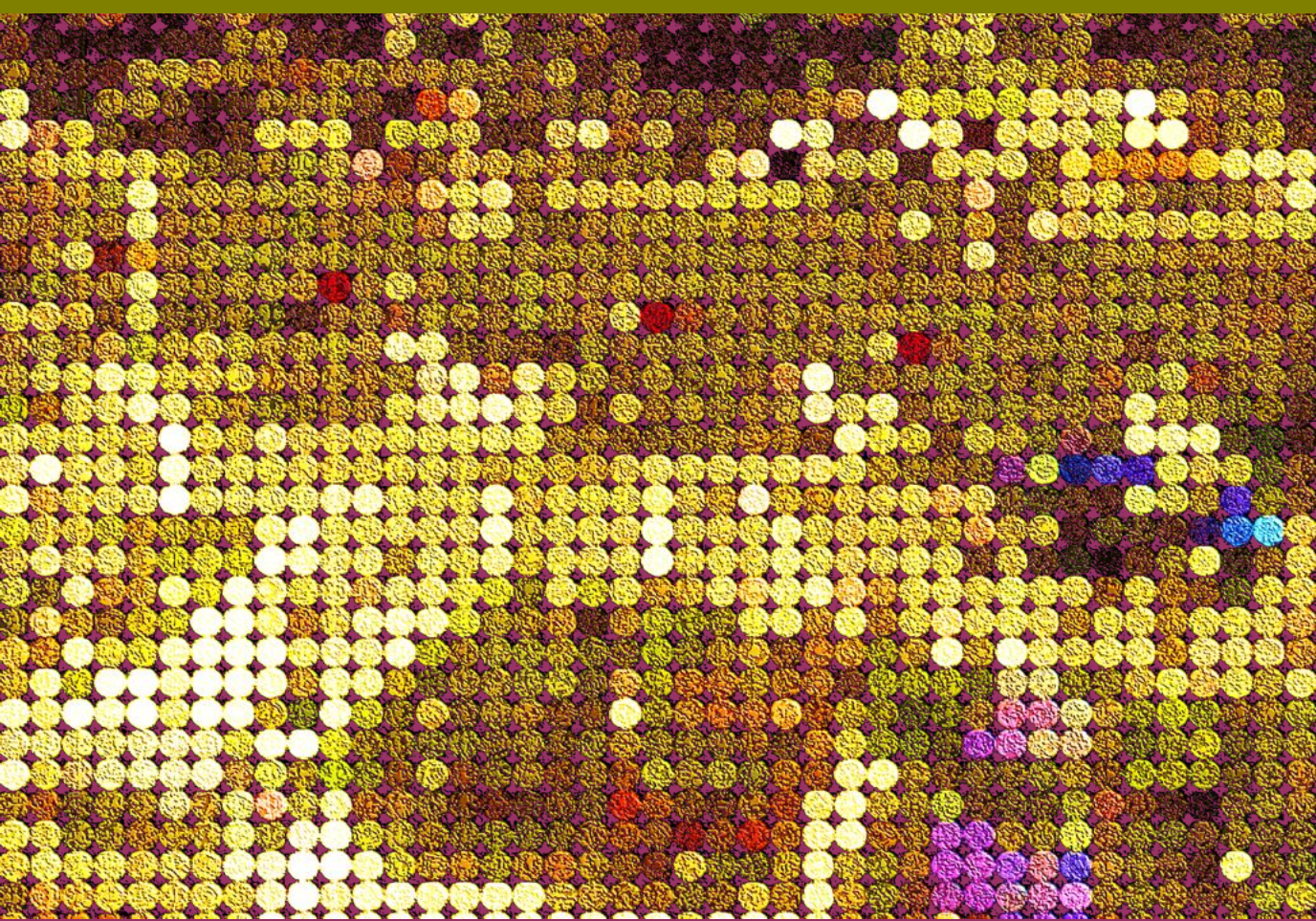
# REVISTA DE ŞTIINȚE POLITICE.
# REVUE DES SCIENCES POLITIQUES

NO. 53 • 2017



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# Revista de Ştiinţe Politice.

# Revue des Sciences Politiques

**No. 53 • 2017**

Editura Universitaria Craiova

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# CONTENTS

## Revista de Ştiinţe Politice. Revue des Sciences Politiques

## RSP • No. 53 • 2017

## Rights and Liberties Consignments in Post-Communist Europe betwixt Law and Politics Endeavours

RSP • No. 53 • 2017: 9-11

# EDITORS' NOTE

## Rights and Liberties Consignments in Post-Communist Europe betwixt Law and Politics Endeavours

### Note of the Editors of the *Revista de Ştiinţe Politice. Revue des Sciences Politiques*

**Anca Parmena Olimid**[*]**,**
**Cătălina Maria Georgescu**[**]**,**
**Cosmin Lucian Gherghe**[***]

Reviewing the recent specialized literature on the *inputs* and *outputs* of the post-communist political system and Eastern policy facets serves as major outlook to integrating the divergent and convergent debates on the East and West challenges.

For the last fifty-two issues, *Revista de Ştiinţe Politice. Revue des Sciences Politiques* (**RSP**) added in the field of the political sciences and related areas a brand-new attitude by head-setting the Eastern transition and integration into the European Union dynamics into a new stage of the scientific objectivity.

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## EDITORS' NOTE

The first issue publishing in 2017 (**RSP**, issue 53/ 2017) is entitled "Rights and Liberties Consignments in Post-Communist Europe betwixt Law and Politics Endeavours" landscapes and triggers new academic key concepts aimed at enabling the institutional dialogue between Law and Politics and carrying forward the thematic of the issues previously published in 2016:

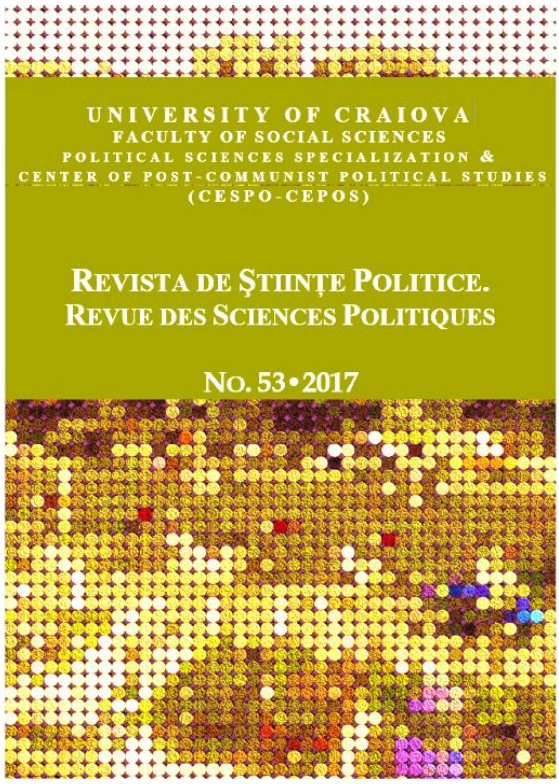
(1). **RSP**, issue 49/ 2016 (April 2016) bridging the relationship between state-citizen-administration;

(2). **RSP**, issue 50/ 2016 (June 2016) linking security-identity-education;

(3). **RSP**, issue 51/ 2016 (September 2016) connecting politics-culture-leading styles;

(4). **RSP**, issue 52/ 2016 (December 2016) snapshotting integration and institutional building.

This issue galvanizes as frame of reference the debate on the Rights and Liberties *re*-discovered, *re*-gained and *re*-activated after the fall of the communist regime in Central and Eastern Europe.




**RSP** ● Issue 53/ 2017 (April 2017)

This debate contributes to foster and to share a mutual understanding and a basic correspondence between the legal status and the political institutional establishment.

As the research interests and reviewing exigences of the journal editorial management have evolved, the editorial ongoing cross-sectorial aims provide fresh panoramas for the future scientific explorations.

This issue features top-quality legal studies covering various judicial literatures and emboding new theoretical lens of the research focused on the judicial reform priorities, the limits of the national regulations in the post-communist period, the social impact of the new legislation, a basic-to-composite legal practice, the democratic establishment after 1989, the human rights protection, the rules and procedures of codification, institutional conflicts and rule-making process, implementation and evolution of the national and European jurisprudence, the restrictions of powers and competencies and the foreign viewpoints on the legal theory, practice and terminology. **RSP**, issue 53/ 2017 advances the scientific research in the field of political sciences "negotiating" and "mediating" various views, attitudes and perceptions of the

comparable legal extends integrating the legal analysis in a well-ordered guidance of the post-communist leadership. **RSP,** issue 53/ 2017 (April 2017) appoints the new international indexing and abstracting of the journal (detailed within the context of the page 6) and launching new research lens for the forthcoming issues to be published this year: RSP issue 54/2017 (June 2017), **RSP** issue 55/2017 (September 2017) and **RSP** issue 56 (December 2017).

RSP Editorial Board is grateful to the authors of this inaugural issue of 2017 for their integrative and consolidated scientific efforts aimed at conducting and extending the research in the field of the political sciences and related disciplines to new edges.

Wishing you all the best,

***RSP Editors***

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RSP • No. 53 • 2017: 12-23

ORIGINAL PAPER

# From *The People's Choice* to the Social Media Voting Platforms. The 2014 Romanian Presidential Elections and the Sociological Construction of Voting Decisions

**Mihaela IVĂNESCU***

**Abstract**
In several studies from the 1940s and 1950s, Paul Lazarsfeld, Bernard Berelson and William McPhee developed one of the most famous and provocative models of the electoral behavior – the Columbia model. Their empirical researches, that were conducted on two different communities, in two different electoral moments, led to similar conclusions, according to which the social context (the group of affiliation) exercises the main influence in the process of forming voters' political options. This paper aims to discuss the theories advanced by the Columbia model, by linking them to the development of the communication technologies in the last few years (especially those regarding the social media). Consequently, the purpose of this paper is to use some of the conclusions advanced by Lazarsfeld and his collaborators based on their theories in order to prove that, even after half a century (period during which the way of making and understanding politics has substantially evolved), the Columbia model remains relevant and is able, in many cases, to overcome many of the limitations of the economical and psychological explanatory models of voting behavior. In order to better articulate our research inquiry, the paper will present a case study – the Romanian presidential elections from 2014. The theoretical framework of the Columbia school will help in showcasing how the rising influence of social media played an extremely important role in forming voting options, while leaving in the background not only the rational approaches, but also the political affiliation. However, in the case of the Romanian presidential elections, the social media effect of unifying political ideas and options did not lead to an increase in the voter turnout in the first round of the elections, whereas the rise of the turnout in the second round could be explained by considering multiple other factors, leading us to the conclusion that although the influence of these new communication channels became extremely visible during major electoral moments, its influence on the political participation was generally modest.
**Keywords:** *Columbia studies, voting behavior, sociological model, Romania, elections, social media, voter turnout*

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## Introduction. The Columbia explanatory model of voting behavior

The Columbia model took its name from a group of researchers at Columbia University, under the supervision of Paul F. Lazarsfeld, who used the polling technique for the first time during the study of voting behavior. The conclusions of the team of researchers presenting the results of the panel studies performed in two local communities, Erie County, Ohio and Elmira, New York, during the 1940 and 1948 presidential elections were published in two pioneering books in this field, *The People's Choice* (Lazarsfeld, Berelson and Gaudet, 1944) and *Voting* (Lazarsfeld, Berelson and McPhee, 1954).

Initially, Lazarsfeld intended to analyze the impact of the media and messages delivered through media on voters' choice. However, considering that the necessary funds for developing such a project exceeded his available budget, he later adjusted his research and, using the panel technique, he submitted monthly questionnaires to a group of 600 people in Erie County, Ohio, for six months before the 1940 American presidential elections, in order to analyze their impact on the voters. Specifically, his purpose was to discover "*the way* and *the reason* the citizens decided to vote in a certain way" (Lazarsfeld, Berelson and Gaudet, 2004: 37), to study "*the evolution* of the votes, and not their distribution" (Lazarsfeld, Berelson and Gaudet, 2004: 39), therefore to analyze the process determining political opinions and not just their description.

Analyzing the questionnaires pointed out the fact that the voting intention is generally stable, both in time for the same individual, as well as between generations. Thus, 77% of the panel members declared that they would vote for the candidate of the same party in favor of whom they had voted at the previous elections and for whom their parents and grandparents had voted (Lazarsfeld, Berelson and Gaudet, 2004: 25). Also, more than 90% of the subjects declared that they had taken their decision to vote for one or the other candidate long before the electoral campaigns began. Moreover, the various personality features used as variables for measuring the respondents' deep motivations did not have the expected outcome during the analysis. These matters determined Lazarsfeld and his team to take into account other variables too, not just the ones related to the individual's personality, relevant in the process of explaining the voting decision. Therefore, the external influences were emphasized, and *the affiliation to a certain group* was identified as the element influencing both the voting intention, as well as its stability in time (Lazarsfeld, Berelson and Gaudet, 2004: 25).

According to Lazarsfeld and his collaborators, those social groups thought to decisively influence the voting option (the political parties, the pressure groups – especially the unions, or the media) are often in the background, while primary groups such as family, friends, co-workers or religious communities can be even more influential. Thus, these groups are frequently used to strengthen a certain political opinion or a belief about one candidate or political party, unlike the media, for example, which, most of the times maintain or even accentuate some political differences. The group influence on the individual's political opinions is not an indirect impact, given that they build and materialize these opinions exactly by means of the contact with the other group members; therefore, the information-selecting mechanisms, and not just political opinions, become similar within the same group. A very important aspect should not be left out: information is never identical for each group member, considering that each individual is a member of several groups at the same time, and the actions of selecting the information and shaping political opinions are achieved according to each group's characteristics.

Therefore, Lazarsfeld explains the changes in an individual's voting intentions in terms of the pressure he experiences as a simultaneous member of several groups (social, ethnic, religious, occupational, etc.) (Lazarsfeld, Berelson and Gaudet, 2004: 26). In this respect, he provides the example of a high-class Catholic individual determined to vote in a certain way by his religious beliefs and to go for the opposite choice by his social status. Under such circumstances, that particular individual would have to decide which of the two group affiliations is more important for the voting decision. This situation clearly emphasizes the prospect of him changing his political opinions during different moments in time, according to the perceived importance of a certain group during a certain moment in time.

Another new aspect brought forth by the team under Lazarsfeld's coordination referred to the role of *opinion leaders* in the process of viewpoint formation within a certain group (Lazarsfeld, Berelson and Gaudet, 2004: 27-28). They are the ones extracting information from mass media and subsequently delivering it to the other group members, filtered through their own values and principles, applying an overwhelming influence over the process of shaping their political opinions. Therefore, Lazarsfeld's conclusion is that the individual's political preferences depend almost entirely on his social status; in his view, "a person's political thoughts are similar to his social condition; social characteristics determine political preferences" (Lazarsfeld, Berelson and Gaudet, 2004: 65).

The study developed eight years later by the team under Lazarsfeld's coordination in Elmira, New York, included a panel of 1000 de subjects who were submitted 4 questionnaires. During this research, Lazarsfeld paid more attention to local organizations of political parties and other political organizations, as well as to the respondents' positions and perceptions on political issues, leaving in the background the elements related to the electoral campaign that did not stand as an essential factor for the voting decision, as noticed in the previous situation. The analyzed data in this new study confirmed the conclusions drawn in the previous research: the social environment influences the individual's voting decision, but Lazarsfeld now offers a few additions to his previous theory, especially by introducing two new concepts, i.e. *the group identification* and *the group perceptions*. Max Visser defined *the group identifications* as "emotional connections joining individuals to certain groups that are not necessarily part of their close social environment and that may have a stronger impact on their vote than the direct group influence" (Visser, 1998: 26). *The group perceptions* refer to "the respondents' perception on voting tendencies within certain ethnic, social and economic or religious groups" (Visser, 1998: 26). Therefore, the closer an individual feels to the group, the more he perceives himself as having identical voting intentions as that particular group or, in an opposite situation, when hostile towards a certain religious or ethnic group, the individual would perceive himself as closer to the party opposing that particular group. Actually, also during his previous research, one of his conclusions stated that during electoral campaigns "social groups instill the political ideology accepted by the group into their members [...] [and that the individuals – A/N] vote not only *with* their social group, but *for* it too" (Lazarsfeld, Berelson and Gaudet, 2004: 196-197).

The main new element provided by the second research developed by Lazarsfeld is that, unlike the previous situation, the individual is no longer perceived as having no contribution in the process of creating his political preferences, but as an active agent. In other words, he no longer appears as complying with the social environment and his decisions as a direct and unmediated result of the group, but the idea of a mutual influence

is brought forth, where the individual and the social environment represent a "system of mutual influence" (Visser, 1998: 26). The main purpose of this paper is to analyze, using the Columbia model framework, the Romanian presidential elections from 2014, in order to show that, even if the group affiliation (seen mainly through social media interactions) played an important role in forming voting options, this effect of unifying political ideas did not necessarily lead to the increase of the voter turnout.

**Elections and social media. The Romanian case**

In recent years, the advent of social media has created new opportunities for political expression in the public sphere. Two areas of civic engagement where social media appear increasingly to play a bigger and bigger role are protests and elections. So far, the intersection between the new technologies and social media is thought to possess "the capacity to strengthen civic society and consolidate democracy around the world" (Diaz Romero, 2014: 30). In the case of Romania, we have also witnessed a rise in the use of social media especially where political mobilization was concerned both in terms of protests (2015, 2017) as well as during elections and electoral campaigns with a focus – for now at least – on presidential elections. In this paper, we are interested in addressing whether the rising influence of social media played a role in forming voting preferences or if on the contrary, the tendency of social media towards the consolidation of particular political ideas and options did not translate into an increase in the number of voters.

Until the 2014 presidential election we cannot talk about a coherent online grassroots movement coalesced around a political figure though politicians like Traian Băsescu had made earlier inroads in terms of online presence. In 2014, both the current president Klaus Iohannis, candidate of the Liberal National Party (PNL) and the independent candidate Monica Macovei benefited from online support, in particular on social platforms like Facebook – which registered at the time of the election around 7.5 million Romanian users (Covaci, 2015: 85). Previously, as Camelia Cmeciu remarks, former president Traian Băsescu had been "the first Romania candidate to exploit the internet as a political communication tool during the 2004 presidential elections" (Cmeciu, 2016: 233).

There have been several studies which found social media to have played an essential role especially in the second tour of the presidential election, most notable of which has been an IRES study (Romania Institute for Evaluation and Strategies) regarding the voters' preferences. This post-electoral analysis identifies the phenomenon of media convergence as a decisive characteristic of the second tour, arguing that the convergence between Facebook, TV, and mobile communication formed a network that led to a high degree of electoral mobilization. Citing Chesney's book on *Corporate Media and the Threat to Democracy* (1997), the authors define "media convergence" as a phenomenon where various media amplify one another, where television can become a sounding board for Facebook and vice versa (IRES, November 2014). The authors attribute the electoral turnover from the second tour of the presidential election to a combination of factors revolving around a negative campaign against the liberal candidate run by his opponent and more importantly, around the poorly organized electoral proceedings on the part of the Socialist Party (PSD) – especially where the voting conditions for the Romanian diaspora were concerned.

In terms of voter turnout for presidential elections and its variations between the first and the second round, the Romanian post-communist democratic history can be divided into two periods. In the first period between 1992-2004, during each election

(1992, 1996, 2000 and 2004) the voter turnout decreased during the second round by an approximate average of 3 percentage points (the lowest drop recorded during the 2000 elections) (Romanian Permanent Electoral Authority). The second period between 2009 and 2014 included a reversed tendency, where the voters rallied more during the second round (Romanian Permanent Electoral Authority). With respect to this aspect, Ovidiu Gherasim-Proca even states that hyper-mobilization is a "trade mark of the 2014 presidential elections" (Gherasim-Proca, 2016: 120), considering that the voter turnout grew by 10.93% during the second round as compared to the first round (Romanian Permanent Electoral Authority).

A short review of the last two presidential campaigns reveals a consistent pattern in terms of the electoral behavior of the Romanians in the context of presidential elections with high degrees of correlation between the second tour of the election and the decisive role of the diaspora in determining the outcome of presidential elections. In other words, the electoral behavior over the course of three presidential elections cycles has tended to follow a particular pattern: the centre-left wing party has tended to be the main favorite in the first tour of the presidential election (coming in first in two out of three cases) while the centre-right votes have been split among different candidates. Meanwhile, in the second tour, the former tends to maintain its vote share from the first round while other parts of the electorate including the diaspora vote preponderantly for the centre-right wing candidate perceived to have the highest odds of winning.

Consequently, in the first tour, the center-left wing candidate Victor Ponta obtained 40.44% of the votes while Klaus Iohannis scored 30.37% of the voting share, followed by former liberal prime-minister Călin Popescu Tăriceanu with 5.36% of the votes, Elena Udrea (president of the Popular Movement Party) with 5.20% of the votes and Monica Macovei with 4.44% of votes (Romanian Central Electoral Bureau, 2014a). Meanwhile in the second tour, Klaus Iohannis obtained 54.5% of the votes while Victor Ponta registered 45.49% of the votes (Romanian Central Electoral Bureau, 2014b). By comparison, in 2004, the candidate of the Socialist Party, Adrian Năstase obtained 40.97% of the votes in the first tour and 48.77% in the second tour, while his competitor Traian Băsescu, from the Democrat Liberal Party (PDL) scored 33.92% of the votes in the first tour and 51.23% in the second tour (Romanian Central Electoral Bureau, 2004). A similar situation was repetead in the second tour of the 2009 presidential election where the incumbent president Traian Băsescu won 50.34% of the votes and his opponent, socialist Mircea Geonă registered 49.66% of the votes. Moreover, as mentioned earlier, the votes of the Romanian diaspora proved decisive both in 2009 and in 2014: in 2009, 78% of the Romanian voters living abroad voted for Traian Băsescu while in 2014, 86.9% voted for Klaus Iohannis.

All things considered, analyzing the role of social media in shaping electoral behavior can help us better understand how segments of the electorate formulate their voting choices especially where younger demographics are concerned. In her analysis on the impact of electoral debates in the 2014 presidential election, Camelia Beciu observes that in terms of the new media, studies have focused on the influence of social media – regarded as hybrid communication environment – on the public. The "viewertariat", for example, represents a phenomenon that takes place in real time and presupposes the live participation of citizens on social media platforms like Facebook and Twitter, commenting and reacting to the presidential debates (Beciu, 2015: 260). By facilitating this behavior, the new media and the traditional media enable new practices associated with hybrid political communication. These are tied to the larger issue concerning the role of the

Internet on the political participation of the citizens and range from actions like raising attention to various political topics to shaping different forms of civic engagement and political participation (Beciu, 2015: 260). How do these aspects translate into practice? Andreea Iancu and Cornelia Stan hypothesize that when online interaction is high the individuals are more predisposed to develop a commitment towards political participation through online channels of communication. Moreover, the authors also posit that the more the electoral campaign is present in the online sphere, the more important the social media apparitions of the candidates become in defining a voter's political option (Iancu and Stan, 2010: 19).

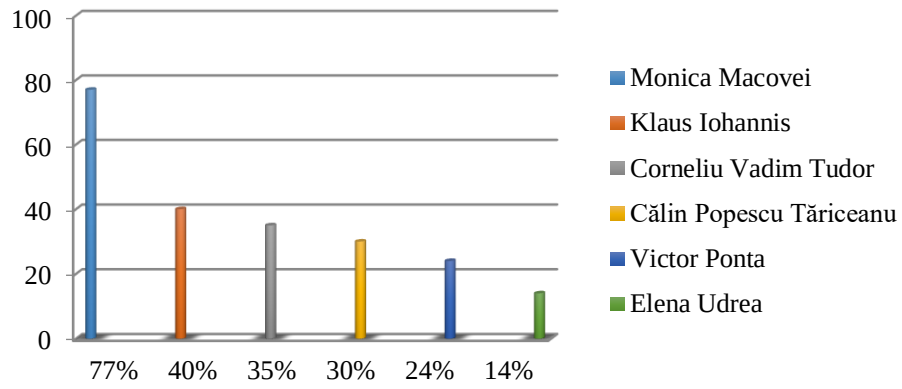
Though it is undeniable that social media provide a platform for information and civic participation, it remains to ascertain to what degree do social media effectively create new voters or persuade voters to change their political options. Otherwise, we would not err too much on the side of caution to posit that social media like Facebook and Twitter create in fact an echo chamber for like-minded people. For example, the IRES survey was conducted on 1271 participants where more than half (54%) declared that they use the Internet as opposed to 46% who stated they don't. Of these 54% Internet users (cca. 686 respondents), 58% (cca. 397 respondents) declared that they have a social media account, as opposed to 42% who don't. In addition 70% (cca. 480 respondents) of those who use the Internet declared that social media and the Internet influenced the electoral turnout. Paradoxically, 87% of this group did not personally engage in transmitting or forwarding electoral messages, nor did they gave a like to the candidates' pages or messages on social media (76%) (IRES, 2014). Social media provides an opportunity for political discussion but it is not the decisive factor in shaping electoral behavior on a scale greater than the users online social network. In the 2014 presidential election while it is undeniable that the candidate Klaus Iohannis had an effective social media presence, "off-line" factors still took precedence. Case in point, according to the IRES survey, 69% of the respondents declared that they had already made up they mind about their choice for the second tour even before the start of the electoral campaign while only 30% had initially been undecided (6% decided during the campaign for the first tour of the election while 24% decided in the period between the two electoral rounds).

As pointed out by Ovidiu Gherasim-Proca, even though the Romanian 2014 presidential elections in Romania could be considered the first elections where the social contribution of the media was essential for shaping the victory of a candidate, a number of other elements – such as the tensions on the political stage or many social and constitutional crises – may represent equally reasonable explanations for the elections result (Gherasim-Proca, 2016: 118). Moreover, the deficiencies in the management of the voting process abroad (especially in the areas with a high number of Romanian citizens, such as Italy, Spain, United Kingdom, France) became a clear shortcoming for Victor Ponta, the PSD [*Social Democratic Party*] candidate. He was the Prime Minister and held as main responsible for the poor election management in the voting stations abroad. The Romanian researcher's pertinent remark is that during the last decade and a half, the Romanian political system was "under the sign of exception" (Gherasim-Proca, 2016: 118) and the 2014 presidential elections fit into that pattern.

According to a survey of Mediafax Research & Monitoring, on 2 November 2014, Victor Ponta had 625,780 Facebook followers, whereas Klaus Iohannis had 404,003, but an important aspect is that Victor Ponta was active for a longer time, while Iohannis had a major increase during the last few weeks before the elections (Mediafax News Agency, October 28, 2014). Therefore, even though in terms of absolute rates Victor

Ponta's messages reached a larger number of followers as compared to the number of Facebook followers, Klaus Iohannis's efficiency was higher, and the most efficient of the main candidates in terms of message delivery was Monica Macovei. Even though she had less than 100,000 Facebook followers, her posts reached an engagement rate of 77%, as pointed out in the figure below.

**Figure 1. The Engagement Rate, week 20-26 October 2014**

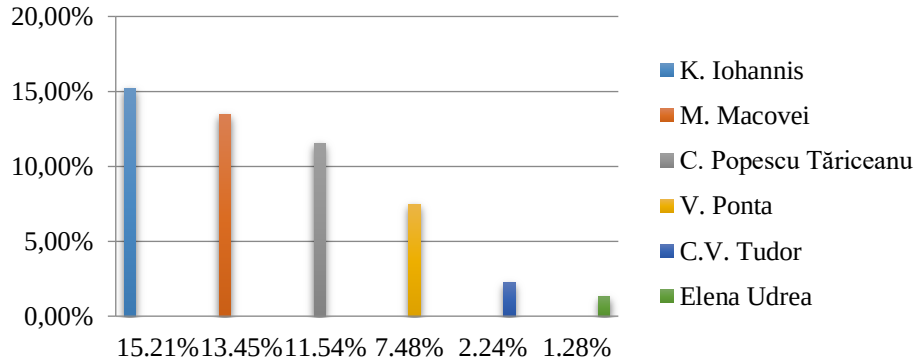



Source: Mediafax News Agency, October 28, 2014

The engagement rate = the rate between the number of unique individuals interacting with the page content (link, comment, share) and the total number of followers.

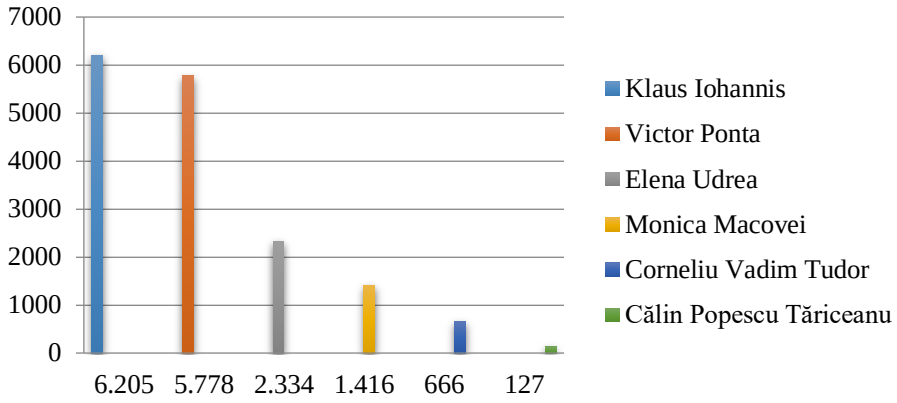
As far as the evolution of follower number is concerned, the week prior to the first round of the presidential elections displayed increases for all the candidates. If we carefully analyze the weekly increase of "likes", it is noticeable that Victor Ponta has a lower growth than Klaus Iohannis, where the latter exceeded his follower number right after the elections.

**Figure 2. Registered growth in the number of fans, 20-26 September vs. 13-19 October 2014**




Source: Mediafax News Agency, October 28, 2014

**Figure 3. Average number of likes per posting, week 20-26 October 2014**




Source: Mediafax News Agency, October 28, 2014

An interesting comparison connects Facebook "efficiency" and the election results, showing that only two of the main candidates, Klaus Iohannis and Călin Popescu-Tăriceanu, reached a higher election rate than the social network rate. As for the other candidates, the election rate was lower that the Facebook rate by approximately 2-3%. Elena Udrea represented a special case (confirming the theory that online mobilization did not necessarily lead to an actual voting mobilization or to a higher voter turnout), who, even with a Facebook rate of over 16%, she got only 5.20% of the votes, therefore a negative gap of more than 10% (Data source: Mediafax News Agency, October 28, 2014).

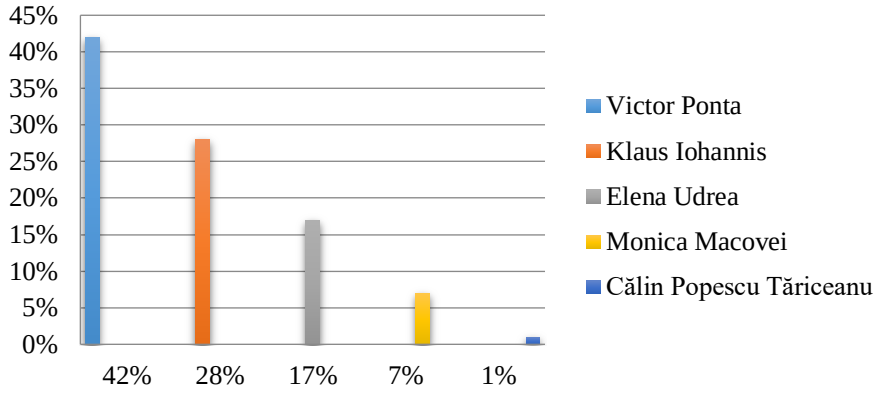
Some analysts and political advisors consider that one of the weak points of the Romanian politicians in the process of advertising on social media networks is the lack of constant posts (Roșu, 2015). During electoral campaigns, Facebook users are actually bombarded with messages and articles, while the rest of the time few politicians maintain communication to a satisfactory level. The candidates with less supporters or with a lower notoriety failed to efficiently use this communication channel, in the sense that they should have started sooner their informing campaign on Facebook. Without it, they had even more to lose as opposed to certain "already famous" characters on the political stage with a notoriety that brought them a higher number of followers in a shorter period of time and thus, a faster and more efficient distribution of their electoral messages.

**Conclusions**

Despite all the debates related to the major role of social media in voter turnout and creation of political options, the Romanian 2014 presidential elections proved that no matter how aggressive and well-built, an online electoral campaign cannot replace the traditional campaign. The best relevant example is Monica Macovei who, with an electoral campaign developed almost exclusively online and with an engagement rate higher than any of her counter-candidates (as shown above), collected only 4.44% of the votes. Consequently, Klaus Iohannis's success – him being a candidate who resembles in some respects Monica Macovei's candidate profile – is not the exclusive outcome of a Facebook mobilization, but, as mentioned above, other factors had a significant contribution to his victory. Two of them seem to have an essential importance. First, in the electoral campaign developed in Romania, the party system of PNL [*National Liberal Party*] played a major

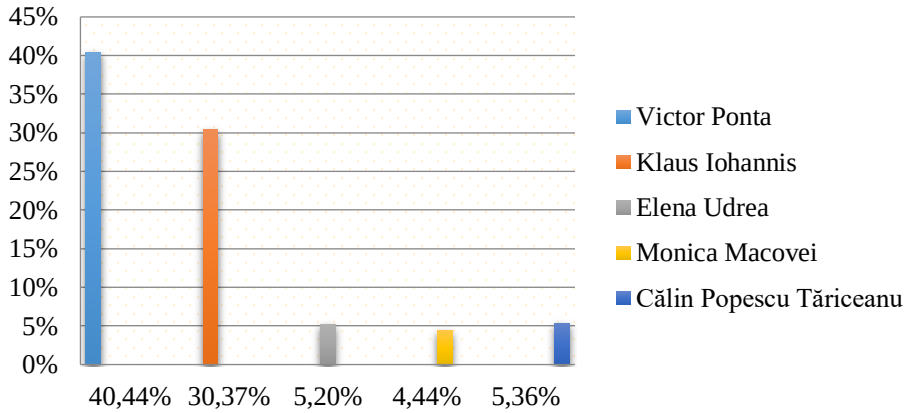
role, counteracting the fact that before the elections Iohannis was a quasi-unknown politician on a national level. This is exactly one of the elements missing from Monica Macovei who, as an independent candidate, was unable to mobilize a larger number of potential voters, considering that in Romania party identification represents a determining factor of voting options, irrespective of the election type or the voting type.

**Figure 4(a). Facebook performance vs. votes (Facebook data)**




Source: Mediafax News Agency, October 28, 2014

**Figure 4(b). Facebook performance vs. votes (voting data)**




Source: Romanian Permanent Electoral Authority, 2014

Secondly, the failed management of elections in the voting stations abroad generated, especially during the second round, an unprecedented mobilization of the Romanian abroad, who voted at an overwhelming rate in favor of the right-wing candidate. Consequently, the online campaign did not necessarily lead to the voter turnout during the analyzed presidential elections.

Thomas J. Johnson and David D. Perlmutter argue that in the emerging medium of digital democracy, candidates are no longer in control over how their messages are shaped and transmitted: "an [i]ndividual can create their own blog to tout their views on the campaign or post those same messages on discussion boards, social media sites or Twitter", leading the authors to conclude that "[t]he traditional campaign, with its centralized power and planning, although not dead, now coexists – sometimes uneasily – with an unstructured digital democracy" (Johnson and Perlmutter, 2011: 2).

Sharon Meraz notes that "social media environments that depend on friendships and social information filtering to determine popularity" exacerbate the echo chamber effect and can even have a paradoxical effect in terms of the contemporaneous exploits of digital democracy due to the "negative informational cascades, which result when groups remain insulated and homogenous in both perspective and composition" (Meraz, 2009: 125). In addition, as Mihai Covaci observes, in spite of the successes registered via social media, online mobilization tends to be rather short termed: "electronic solidarity happens fast, but it does not have long terms effects on the political sphere. Emotional surges are quickly lost if not properly channeled and articulated in an institutional framework while participants quickly forget the engagements assumed during these periods" (Covaci, 2015: 90). In other words, instead of fostering the development of community that is actively engaged in the political process, for the time being, social media act like a transmission relay between the public and the electorate only during particular periods characterized by intense polarization over the course of the democratic cycle.

It is obvious that this online mobilization is more successful in Romania during the last few years when important issues for the civil society are at stake, and the protests of February 2017 against controversial decisions of the newly-invested government after the elections of December 2016 stand as the best relevant example. Nevertheless, when talking about elections, as important as they are for delivering electoral messages of candidates and parties, the social media networks leave the determining role related to shaping the voting options and the actual turnout either to party identification, or to sociological factors, making Lazarsfeld's famous explanatory theory more and more useful for understanding the subtle mechanisms of forming and expressing the electoral options.

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# State interference in the right to free speech. A legal perspective related to the ECHR jurisprudence

**Maria-Nicoleta Morar***

**Abstract**

The purpose of this paper is to show that in many cases, the State abusively restricts individuals' freedom of expression, amid confusion between exercising their right to free expression and the issue of value judgments. The State sanction applied to individuals for exercising their right to free speech is not always aimed at a legitimate purpose (the protection of rights and freedom of others) and conviction does not correspond to a pressing social need, as it should happen. ECHR jurisprudence reveals that a State interference in the right to free speech is not necessary in a democratic society more so when there is no proportionality between the sanction of state or conviction and the aim sought by the Authority. The way a person exercises his right to say what he thinks, makes it almost impossible to separate a value judgment of its abusive exercise of freedom of expression to it. In such a context, it remains to be seen whether the value judgment is an exception to the limits of free speech or if freedom of expression is the sum of value judgments.

**Keywords:** *State, free speech, legal, ECHR, jurisprudence*

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**Introduction**

Suppose that freedom of expression must be exercised without limits and that this right is granted to any individual. In exercising this fundamental right it is impossible to ignore the consequences which may be expected on another individual or private communities and even on a nation. Of course, the right to free speech takes a liberal and democratic form in the legal regulations of international, European and national states, legislative texts even leaving the impression that by exercising this right, individuals can materialize another right, the right to liberty of conscience. If the exercise of a fundamental right through another fundamental law, represents a normal legal situation, it is necessary to analyze to what extent the restriction of rights reflects on the other right. In this case, when there is an interference of the state in the right to free speech, the question is whether, indirectly, the interference did not affect the right to liberty of conscience.

In many cases the state may abusively restrict individuals' freedom of expression, amid confusion between exercising their right to free expression and the issue of value. Therefore, analyzing case law of European Court of Human Rights, it can be seen that in many situations, state interference in freedom of expression is not necessary in a democratic society and it does not correspond to a pressing social need, which is why it creates a disproportion between state sanction and the legitimate aim pursued by state when it comes to convict individuals who exercise this fundamental right.

**State interference in freedom to free speech relative to the condition of "necessity in a democratic society"**

In the main, although freedom of expression should not assume the public authorities, the right to free speech is not absolute, for exercising this right by an individual may be restricted in the name of "values" that the state deems necessary and assigns them a democratic society where prevails a type of social order. Beyond the myriad reasons invoked by a State or another to justify the interference in freedom of free speech, interesting is the way in which the States relate to the exercise of this right by individuals. Not the individual prevails, not the limit exeding of this right, but the quality of the individual which, according to the State, exercises his right in an abusive manner. Not the way a statement was made is important in restricting the right to free speech, but the type of allegation, the circumstances in which this claim was submitted, the social impact that it could have, and of course, professional or social status of the transmitter of the information, for all thesse elements are essential in establishing that *""pressing social need"~* that supposedly the State would take into account when resorting to the interference with freedom of expression.

An example of this is *the cause Perna v. Italy* (European Court of Human Rights, judgement by the July, 25, 2001), Giancarlo Perna notified the European Court of Human Rights, claiming that his freedom of expression provided in the Convention was violated. He is convicted of defamation because, as a journalist, he published in 1993 in the newspaper "Il Giornalle" an article about the Judge G. Caselli, entitled ” Caselli, white tuft of justice”, with the subtitle ”School priests, communist militancy as a friend Violante”, *the* magistrate being presented as a follower of the Communist Party ideology, standing out in the article in which G. Caselli made a *""vow of obedience"* to this party. In the same article, the magistrate was accused of trying to gain control of the Prosecutor in several cities in Italy, It was used an informant to invict the former Italian Prime Minister Giulio Andreotti.

By judgment of 2001, the Judges of the Court held that the complainant's allegations regarding the political militancy of Caselli are simple values of judgments, it did not require any sanction for his critics, stressing that journalistic freedom covers a certain degree of exaggeration. As a result, according to the ECHR, the conviction of Perna, to pay material and moral damages by the national courts of Italy was not necessary, being violated Article 10 of the European Convention. (European Convention of Human Right, 2015 :" Article 10 – Freedom of expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary").

Regarding the speculative assertions of the journalist about the Caselli magistrate's alleged strategy to control activities in the Prosecutors', The Court found that it did not contain an ambiguous expression, being injured the magistrate's reputation by the content published. As a result, by reporting that the journalist did not seek to prove abuse of authority of Caselli, claming only that in the content are expressed critical judgments, the judges decided that *State interference in freedom of expression is necessary in a democratic society when it aims to protect the reputation of others*. As a result, because the journalist's speculative assertions were serious allegations that could not be proved by him and exceeded the limits of acceptable criticism, it was found that the penalty imposed on it was justified, in this case is no infringement of the right to free speech.

**The discrepancy between the "pressing social need" and state interference in the freedom of expression of the individual**

Returning to the idea that in the case of the state interference in free speech, it matters more how the state relates to circumstances in which this fundamental right is exercised, and the quality of the person who exercises it, we could deduce that the state rather seeks the individual not to breach the limits of freedom of expression, only positive obligation of a public authority to protect this right. Let's take as an example the cause Fuentes Bobo v. Spain (European Court of Human Rights -Fourth Section- judgement by the February, 29, 2000). The applicant requested the Court to rule on the infringement by the Spanish government to free speech, showing in his application to the Court that as the Spanish television TVE employee, published critical acclaim concerning mismanagement of trust, which is why, after being moved to another workstation, it was sanctioned with suspension of the employment contract and salary rights for a period of several weeks. As a result of the sanctions that have been applied, Fuentes Bobo discussed at several radio stations measures that have been applied, action which resulted in his dismissal.

Spanish national courts, although noted that F. Bobo value judgments issued during the broadcast of programs on radio that he was invited, have held that his right to free speech, guaranteed by the fundamental law of Spain, do not cover the right to insult or slander, and as such, the sanction was required to be applied.

ECHR judges stressed, however, that the applicant was imposed on the most serious sanction prescribed in the Statute of Workers, ie termination of employment without payment of any allowances, saying that his journalist could be applied other lighter disciplinary sanctions. As such, taking into account the facts set forth in the application, The Court found a violation of Article 10 of the European Convention on Human Rights, considering that the interference did not correspond to a *"pressing social need" and that ""there is no proportionality between the sanction imposed on the applicant and the legitimate aim pursued".*

This case is just one example of how the state tries to justify the interference in the right to free speech, by putting the sign of equality between value of judgment and insult, not reporting to the circumstances in which an individual makes critical statements on another individual, group of individuals or a given situation. In this case, the journalist Fuentes Bobo criticized many people from Spanish television executives, but, as it is clear from the complaint filed by the Court, statements were made in some of the direct emission of radio stations, in a spontaneous exchange of words between him and journalists. The circumstances in which they were expressed, the values of judgments are very important in determining restrict the right to free speech, It is necessary to take into account whether or not the individual can correct or even withdraw those stated.

This constitutes a notable example of how a state may mistakenly interpret and apply the restriction of free speech having been reported to the quality of the individual exercising his right. From the judgment of the ECHR it appears that national courts considered that the Spanish state interference in the applicant's freedom of expression is necessary in a democratic society and that the solution would have been totally different if it had a journalist on that date.

So, not the information content matter, nor that the value of judgment it was labeled as insult, but as that "insult" came from a person who was not at that time employed and not exercise the profession of journalism. So, what is the essence of value judgment? It is democratic and it is for the competence of the rule of law to apply differentiated protection of free speech admitting that a statement can be considered value of judgment only in case of an employment relationship and only if it comes from a person who has a certain quality?! ECHR jurisprudence shows that issue of value judgments whose authenticity cannot be proven, such as expressing ideas about a person's character, It should not be followed by a penalty, for this would be a violation of free speech, aspect emphasized in the case Grinberg v. Russia (European Court of Human Rights, judgement by July, 21, 2005). Isaak Grinberg Pavlovitch asked the Court to rule on violation, by the Russian Federation, of Article 10 of the Convention, him showing in complaint that following publication of an article in the newspaper in which it characterized the General Chamanov as having *""no shame, no scruples",* he was sentenced to pay damages of 2,500 rubles (about 100 euros), and the foundation to edit newspaper it was forced by court order, to pay the sum of 5,000 rubles in damages and to publish the judgment.

ECHR judges found that the decision by Grinberg was sentenced it represents an interference of the state in the freedom of expression of there, arguing that, the veracity of information regarding the characterization of General Chamanov cannot be calculated and that national courts have imposed such evidence is proof that the authorities did distinguish between value judgments and statements of fact: "The Court considers that the statement is a perfect example of value judgment. The applicant was held responsible for the alleged damage caused to the reputation of Mr. Chamanov, simply because it failed to prove that was not actually prove that «no shame, no scruples», which it was impossible

to prove" (ECHR, 2005).

In continuation, The Court emphasized that the article has had minimal impact on the general's career, enrolling within a reasonable criticism, which is why the measure taken by the authorities it was not necessary in a democratic society, the Article regarding freedom of expression was violated.

**The necessity of state interference in the freedom to free speech relative to the origin of acceptable criticism**

Although, at least in principle, freedom of expression is guaranteed for every individual, without privileges and discrimination, from the European Court of Human Rights appears that the protection of exercising the right to free speech, by issuing critics, it is applied differently in relation to the quality of the person making the allegations. For example, the Court held that limits of acceptable criticism in people who have a political career are broader than of ordinary people, as it originates from the case *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft v. Austria. (*European Court of Human Rights, judgement by November, 14, 2002). In the application to the Court, the applicant, company responsible for publishing a monthly magazine, he showed that he was convicted for publishing an article in the contents of which had criticized the expression *"punitive camp"*, used by the politician Jörg Heider, criticizing it that by using that term it distorts the significance of the Nazi extermination camps which would constitute a crime. As a result, by court order, the defendant was ordered to pay damages, disposing the confiscation of the magazine number in which the article was published and publication of the judgment. Austrian Court emphasized in the sentence that restricting this right was necessary, arguing that the terms used by Haider were taken out of context to give the impression that it intentionally would minimize the atrocities committed in the extermination camps, which contravenes to the law.

Analyzing the exposed request, ECHR judges concluded that the article published by the applicant is, essentially, a value judgment, is not justified State interference in the freedom of expression. More than that, The Court emphasized that they were notoriously Nazism ambiguous statements concerning the politician, not denied by anyone that it consistently uses the phrase "punitive camp". In continuation, they said that for politicians the limits of acceptable criticism have a different dimension to other people.

Finally, the judges of the Court found that Article 10 of the Convention was violated, Austrian courts did not expose relevant and sufficient reasons to justify the interference with the right to free speech of the applicant's. Regarding the limits of acceptable criticism, not infrequently the Court relates to the quality of person and type of allegation, not taking into account the impact that could have the assertion that, any circumstances in which a person has used expressions that could harm the interests of another person or a particular group. An example of this is the judgment of the ECHR in the *Cause Jerusalem v. Austria* (European Court of Human Rights, the Third Section, judgement by February, 21, 2001) in which it was found the violation of Article 10 of the Convention.

In his complaint to the Court, the applicant Susanne Jerusalem, showed that, as member of the municipal council of Vienna she attended the council debates, giving a speech about granting subsidies to the associates to help parents whose children joined the sect. In her speech, she made several assertions to sects which she called "psycho-sect" (ECHR, 2001: " *Like everyone, I know that today a sect no longer a small group that dissociates from a recognized church (...),but a psycho-sect".* ) and characterized it as

having in common a "totalitarian character" and "fascist tendencies" adding that the involvement of a person in a sect results in loss of identity. Further, commenting on the work of an association, IPM, which the applicant considers sect, she emphasized that it would have an influence on the Austrian People's Party regarding the drugs ( ECHR, 2001: "... The sect IPM [the Institut zur Förderung der psychologischen Menschenkenntnis – The Institute of a better understanding of human psychology], recently established in Austria, but already has several years of activity in Switzerland, where called VPM [Verein zur *Förderung der psychologischen Menschenkenntnis* – The Association for a better understanding of human psychology], exerts an influence on the Austrian People's Party policy on drugs."). Consequently, IPM has filed a civil action against Jerusalem, the latter being forced by Court not to make statements regarding the totalitarian character of the association. Considering that in this way was violated her right to free speech, the applicant requested the European Court of Human Rights to find a violation of Article 10 of the Convention.

Analyzing the reasons in fact and in law put forward by the applicant, ECHR judges ruled that there was an interference in the right to free speech, whereas, in their view, activity of the association IPM target a general interest and it ought to have a greater degree of tolerance for criticism made against her. (ECHR, 2001: "In the present case, the Court finds that the IPM and VPM are associations active in a field that interests the public, namely policy in relation to drugs. They took part in public debates on this issue and, as the Government recognizes, cooperated with a political party. Because they were active in the public domain, they should demonstrate a greater degree of tolerance for the criticisms of opponents regarding their goals and means used in the debate.")

Moreover, the Court opines in a hallucinant manner the fact that although the applicant's allegations are not covered by immunity, they were not formulated in a parliamentary session, they were submitted at the meeting of a forum that can be compared to a legislative forum due to the structure and activity. As a result, there would have been important considerations to justify state interference in freedom of expression, The Court held that the applicant's claims are value of judgments which in reality were contradicted by the bylaws.

It can be considered that the Court's reasoning is unfair whereas the judges fail to take into account the protection of the interests of association, mentioning in the judgment that she targeted a general interest.

Further, the Court's argument becomes confusing, whereas although she stressed that complainant's allegations are value judgments, she qualified terms used by it (*"fascist tendencies"* and *"totalitarian character*" ) *statements of fact* requiring the burden of proof.

The Court had to consider that the applicant's speech was meant to highlight the need to provide subsidized associations fighting against sects, not to award a special character or a name to sects, giving as an example a certain association and criticizing its links to a particular political party.

ECHR judges did not take into account the negative social impact that Jerusalem's speech had over the association's members and supporters, nor that the debate was one of general interest, neither protected the interests of the association which pursued a general interest, nor the circumstances in which the statements were made, she be content to appreciate the fact that the association should have a greater degree of tolerance.

Although sustainable, the Court's assertion that freedom of expression is extremely important for elected people. The Court had to consider the fact that Jerusalem's

speech was not of ambiguous nature, affected not only the interests of the association in question, but also the reputation of the association members, which Jerusalem described as *deprived of identity*.

Given all these considerations, given that the applicant did not seek to demonstrate "fascist tendencies" and "totalitarian character" of the association, exceeding the limits of acceptable criticism, it can be accepted that the interference with freedom of expression was necessary because it was intended not only to protect a general interest targeted by association, but also protect the reputation of its members and supporters.

Doing a brief comparative analysis of the causes Perna v. Italy and Jerusalem v. Austria, it can be inferred that the ECHR applied differently the protection of free speech, in relation to the origin of acceptable criticism. Although the judges of the Court consider that freedom of expression in elected officials is another dimension compared to the ordinary people, it is clear that Perna was not just an individual, he has the quality of a journalist. And yet, in his case, judges of the Court delineated statements of fact from value judgments, admitting that in case of some statements interference in freedom of expression she was justified, necessary in a democratic society outweighs the protection of the rights of others.

**The report of proportionality between state interference in the right to free speech and the legitimate aim pursued**

As evident from the above, State intervention in the individual's freedom of expression must match the condition of necessity in a democratic society and a pressing social need, the state should take into account the origin of acceptable criticism. But for the interference with the right to freedom of expression not to be contrary to the provisions regulated in the European Convention on Human Rights, to conditions listed above are added to a major factor, namely to exist a *proportionality* between the state sanction and the legitimate aim pursued, this proportionality being examined by the potential impact that a person exercising his right to free speech can have.

*Regarding the existence of a proportionality report* between state interference in freedom of expression and the legitimate aim pursued by it, European Court of Human Rights reveals that the solution convicting a person must be proportionate to a legitimate aim envisioned by the authorities, otherwise the interference suffered by that person is not "necessary in a democratic society". An example of disproportionate it is revealed in the *Cause Barb v. Romania* ((European Court of Human Rights, judgement by the February, 21, 2005). The application to the Court, the applicant John Barb, a journalist, shows that he was sentenced to pay a criminal fine for the offense of insult, following the publication of an article which referred to that the German Forum President, P. D., promised employment of approximately 700 people, without a legal basis, even supporting training courses in German through his association, for which he received payment, although it did not have a certificate of teaching this language. In the content of the article, the journalist also said that although P. D. can not be held responsible for organizing courses, he "exploited the credibility of those who wanted to work". (ECHR, 2005). Considering that in the judgment of conviction has been infringed his right to freedom of expression, Barb asked the Court to declare the violation of Article 10 of the Convention.

Noting the reasons stated in the application, judges of the Court found a violation of the article, stating that the action taken by national authorities was disproportionate to the legitimate aim pursued and that they "have not provided relevant and sufficient reasons to justify it" (ECHR, 2005). Consequently, the Court concludes that the interference

suffered by the applicant does not correspond to *the condition of necessity in a democratic society*.

*Regarding the examination of proportionate punishment through the potential impact generated*, ECHR judges have determined that, compared to print, audiovisual environments can produce immediate and strong effects by statements made, enjoying a considerable audience. For example, in *the Case Baadsgaard and Pedersen v. Denmark (*(European Court of Human Rights, judgement by December, 17, 2004) although the applicants requested to note that it was infringed his right to free speech by their conviction by the authorities to pay a criminal fine and damages, for transmitting a television station interview questioning the investigation of a crime, the Court found that the penalty imposed on them was proportionate to the legitimate aim pursued.

As shown in the documents in the case file, the applicants have expressed criticism about the murder investigation of a crime whose author was sentenced in 1982, disseminating within some programs at prime time, a person's interview stating that at the time of the crime he saw the convicted in another place. During the show it was displayed on the screen a photo of a policeman and his name, it was affirmed that in the case which was the subject of discussion samples were removed from the file.

ECHR judges qualified the journalists assessments regarding the investigation and the statements to the police as value judgments, but the accusation of stealing police evidence from the file it is a very serious one, requiring proof of veracity. Given this context, the Court considered, in this case there is no violation of Article 10 of the Convention.

The Court's reasoning reinforces the fact that, the report of proportionality between state interference in freedom of expression and the legitimate aim pursued must be examined in the light of the potential impact.

The issues presented in this article reflect that yet, delineation statements of fact from value judgments is clouded by confusion, the states disregarding , most often, the conditions of admissibility of interference in the right to free speech: the interference "to be necessary in a democratic society", it is conditioned by the existence of a "pressing social need", it should be reported to the origin of admissible criticism, it should be "proportionate to the aim pursued" and this proportionality to be examined by the potential impact.

In light of all these considerations, it can be said that the expression of value judgments and statements made that need to be probed are the essence of freedom of expression. It can be said, in this context, that freedom of expression could be redefined as *"sum of all value judgments and statements of fact susceptible of proof that a person has the right to express them, within their admissibility in a democratic society "*.

This definition is based on the consideration that limiting the freedom of expression should be represented by admissibility in a democratic society of all value judgments and statements of fact susceptible of proof that a person claims and that all he must assume. Reporting to the limit of acceptable criticism in a democratic society is essential, since, in such a society outweighs individual freedom, freedom that can only be restricted to protect the freedom of another.

When there is interference of a state in the fundamental right to free speech, it should be taken into account all the points made in the European Court of Human Rights, described in this article. In contrast, compliance by a state individual's right to free speech should be a mere formality that affects individuals externalization of consciousness, no longer able to exercise conscience rights, this right is materialized by exercising the right

to free speech. This is how the restriction of a right can prevent the exercise of another right, between the two fundamental freedoms in question settling some interdependence. No right to free speech can be exercised without first having a free conscience, nor freedom of conscience can not be manifested in other way than exercising the right of free speech.

**Conclusions**

Freedom of expression is not an absolute right and there's no need to generalize it, for no exercise of this right can be irresponsible and infinite, nor the restriction of this right can be unreasonable or without limits. To justify, however, rightly restricting the right to free speech, a state must provide sufficient arguments to prove the application of such measures in a democratic society, not merely be limited only to the invocation of the term "pressing social need" , which it uses when trying to prove that the interference with freedom of expression of an individual was proportionate to the aim pursued.

In fact, beyond all these issues highlighted which would justify restricting freedom of expression, the question of what point to what point can operate this restriction. If for factual statements likely proof of truth restricting freedom of expression is justified by the evidence itself, aiming to protect the interests of another, when issuing a value judgment, which means the expression of ideas that belong to the perfectionist values of a person, does not justify restricting freedom of expression.

The public authority must take into account that a value judgment is essentially a perfectionist value, and this perfectionist value takes the moral individual and does not require proof of truth, for it is impossible to prove an opinion related to a person's character, for example. For this reason, as author Dan Claudiu Dănișor emphasizes, "the liberal state, the exercise of freedoms and rights cannot be restricted to defend self perfectionist values" (Dănișor, 2014: 14). Restriction of basic freedoms is therefore only required to enable the protection of other fundamental freedoms. In this case, the interference with the right of a state to free expression is justified only when it is designed to protect the dignity, reputation or interests of another person, the State should take into account that the applied sanction is proportionate to the aim pursued. The necessity in a democratic society to restrict freedom of expression could not be justified by a state by ignoring the origin of acceptable criticism and proportionality of restricting this freedom to the legitimate aim pursued. Moreover, a state cannot justify the pertinent report of proportionality between restricting freedom of expression and the legitimate aim pursued if this proportionality is not examined in terms of the potential impact generated from exercising this right.

It is quite obvious that the right to free speech can be exercised without limits, which is why freedom of speech can be summed up in the idea of freedom, understanding by this term that a person would be entitled to do and say everything he/she wants without incurring any consequence. After all, freedom of expression must not allow an individual to harm the interests or reputation of another, even as restricting freedom of expression cannot operate on the basis that a person does not like the criticisms made against them by another person, for a restriction that would be based on such a consideration would be absurd. After all, as George Orwell said, ”If liberty means anything at all it means the right to tell people what they do not want to hear” (Orwell, 1945: 17).

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# Precautionary Principle - too Vague to be a Viable Policy?

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**Abstract**
In every aspect of our lives risks we face are a basic condition of our existence. Along the time, humanity has tried to limit as much as possible any damage done to humans, goods or the environment. There were different approaches and theories, based on multiple factors from legal to economic and political ones. With the development of mankind and the emergence of new social relations, theories of liability based on the facts and risks had to be adjusted. Thus arose various forms of liability based on different foundations. Regardless of social relationships, be they civil or environmental protection relations, constant concern was to find a common basis for determining when the responsibility intervenes. No matter how seductive it may seem the precautionary principle, its application as an absolute principle regarding basis of liability may lead to confusion and problems, turning it into a concept too vague to be useful.

**Keywords:** *environmental principles, precautionary principle, risk management, pre-damage control, post-damage control, liability*

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## Introduction

Human society is developing rapidly, all over the world industrial, technological and economic development has created wealth and opportunity. This technological development is providing important benefits for the environment and health of the population. For example, ”energy supply, water and waste-treatment systems, modern housing, transport, modern food production and distribution systems, immunization, pest control and telecommunication are playing important roles in improving health and the quality of life and also are contributing to increase of life expectancy and protection of the environment”(Martuzzi and Tickner, 2004: 7).

But all this came with a cost as ”technological development has often outpaced scientific knowledge related to the determinants of environment and population health” (Martuzzi and Tickner, 2004: V). The complex organization of society generates multiple ways through which a variety of factors can affect health and the environment. These include: physical risk factors - like radiation, toxic chemical substances and other dangerous materials -, social risk factors – like the refusal or privation of clean natural resources by limiting the access. The resolutions reached in certain domains that seem to have nothing in particular with the environment or with people’s health, can sometimes influence the environment due to the great number of relations and exchanges in modern society. The function of extreme complex systems has to lead to a healthy environment, but these systems can be unintentionally disrupted, causing negative and irreversible repercussions to people’s health. As a cause of the impact generated by the growing population, the intensive agriculture, industrialization, the environment was not able to heal by itself, so we have to help in his restauration.

Because of this measures had to be taken to assure that our newly stated right to a healthy environment is respected (Ilie, 2016: 18). Especially in the 20th and 21th centuries we have generated an ever-expanding diversity of situations, circumstances and agents whose effects are in most cases mainly unexplored or unidentified yet, very challenging to foresee and capable of doing permanent damage to environment’s health. Of course, human life is, has always been, and will always be full of risks and an urge to deal with the risks we face is a basic condition of our everyday existence. For example, workers on a construction site wear protection helmets and equipment not because they expect accidents to happen, but because they know that it would be irrational not to be prepared for the potential dangers that they face on their work site. We base our everyday decisions for avoiding risks and dangers that might occur on common knowledge or on scientific information when it comes to more complex problems. Problems regarding the environment are one of the most important social issues that are based on scientific information. Scientists and politicians all agree upon the significance of science in environmental policy debates – one of the only things they agree upon about the health of the environment.

When or if substantial science is accessible, the environment and the health of population can be preserved through *preventive action*, but we must comprehend that science itself has its limits. The complexity of the modern world and development and progress of science had in most cases unforeseen consequences that we have to prepare for and deal with them. Because of this, it was needed something even versatile and complex than prevention, something with a potential to face all the problems that arise in today’s society. It was essential the reconciliation between the need to innovate and develop with the need to protect human health from environmental risks. So, the idea of a

precautionary principle was born. The precautionary principle encourages policies that protect human health and the environment in the face of uncertain risks (Kriebel, Tickner, Epstein, Lemons, Levins, Loechler, Quinn, Rudel, Schettler, and Stoto, 2001: 872). Actually, in this broad sense it is not even a new concept and maybe some may even object at giving it a new name, because there are a lot of same ideas that go by using different names in other disciplines. For example, public health practitioners use the term *primary prevention* to mean much the same thing. As stated in doctrine, "the physician's obligation to first do no harm is nothing more of a precautionary approach when treating a sick person. Also, the governments of several Scandinavian countries have made regulatory decisions about electromagnetic fields and other hazards using a concept called *prudent avoidance*, which is also similar[1]" (Kriebel, Tickner and al., 2001: 871). In România, courts had stated their judgements when dealing with electromagnetic pollution using this principle. In U.S. although the precautionary principle it's not accepted in its broad sense, it's used instead the idea of *precautionary approach*. The main advantage of the term *precautionary principle* is that it provides an overarching framework that links environmental sciences and public health.

The precautionary principle states that, "in cases of serious or irreversible threats to the health of humans or ecosystems, acknowledged scientific uncertainty should not be used as a reason to postpone preventive measures" (Martuzzi and Tickner, 2004: 7).

There are two widely accepted definitions of this principle. One is stated by in the Rio Declaration from the 1992 United Nations Conference on Environment and Development (Agenda 21). The declaration stated: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation." The second one comes from 1998 Wingspread Statement on the Precautionary Principle[2] and it states: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action. In this context the proponent of an activity, rather than the public, should bear the burden of proof." It's clear that the principle was intended to be used as a response to those cases when science don't have a fully foresight of the consequences of certain actions and to increase political responsibility in order to avoid or, at least, limit damage to the environment and humans.

**History of the precautionary principle**

The evolution of this principle in the last 30 years is meteoric. Appearing in the early 80s, in a relatively short time it managed to have a word to say both in international and in community law and to some extent in national law systems of the developed countries. Its rise began in international law in the field of marine pollution, first time at a conference on the protection of the North Sea against pollution[3], where participating countries have found the need to apply the precautionary principle to prevent discharges of hazardous substances in the North Sea. At the end of the 9th decade, at several international conventions on the protection of the marine environment and waterways[4], (London, Helsinki, Paris), the precautionary principle was stated, without being formulated and defined in a satisfactorily way.

The first time when it was defined as a legal discretional instrument, was at the United Nations Conference on Environment & Development in Rio de Janeiro in the statement of 13 June 1992, where at principle 15, as we stated the before, is declared: " Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". In this way the precautionary principle was given a general size, being applicable to all forms of pollution.

Following this conference, it was taken over in many international documents on environmental protection, some authors considering it already as having a character of custom[5] and others integrating it in the so-called "soft-law" (de Sadeleer, 1999: 139 and next). Despite the innovations and potential application, international jurisprudence has refused to apply the principle. For example, the International Hague Court of Justice, in a dispute between Hungary and Czechoslovakia on the construction of a dam at Gabcikovo on the Danube, motivates that "danger evoked would intervene on a long term and is uncertain [...] No matter how serious [ ...] it cannot be considered certain enough and, as such, imminent"[6]. Also the European Court of Human Rights, in 1997, related to a complaint against Swiss Federal Council regarding the extension of activity of a nuclear plant, believes that "plaintiffs have not established a direct link between the operating conditions of the plant and the right to protection of their physical integrity ... there were no indications of a danger not only serious but also specific and imminent "(de Sadeleer, 1999: 43-45). Not least, the World Trade Organization, through the judiciary committee, said that the European Union cannot use the precautionary principle to justify its refusal to import meat on the pretext that the slaughtered animals were administrated hormones, as the risk to health is not identifiable, although this principle is mentioned in two complementary agreements, the agreement TBT (Technical Barriers to Trade) and SPS agreement (Sanitary and phytosanitary Systems) which stand alongside the Treaty of Marrakesh in 1994 by which the Organization was founded[7].

In European law, the precautionary principle was included in European primary legislation only by the Maastricht Treaty in 1992, by Article 174. 2 (previously 130 R's. 2) which stipulates that "the precautionary and preventive action principle, the principle of rectifying with priority the damage to the environment at source and the polluter pays principle form the basis of Community environmental policy." Although it appears in the Treaty, the references made by the Community's positive law are somewhat limited on human and environmental risk assessment of hazardous substances[8], especially those of biotechnology (use of genetically modified micro-organisms). Given the fact that the German company Bayer bought for 66 billion US$ giant Monsanto[9], which until April 2016 was the world leader in production of genetically modified organisms, it is clear that the impact on the market, through economic and commercial view, will be an unprecedented one, the production (sometimes very vehemently disputed) of Monsanto will become an European production in the near future and possibly without tariff barriers marketed throughout the EU. In 1997, the European Commission's Green Paper on the general principles of EU food law mentions the precautionary principle as a fundamental principle of action in case of scientific uncertainty. Also, it should not be forgotten the resolution on precautionary principle adopted by the European Council of Nice, which recommends Member States to translate it into deeds. The problem with these resolutions, recommendations and communications is that they are not mandatory provisions of law, being part of the so-called "soft law" and in need of practical implementation.

Regarding the jurisprudence of the Court of Justice of the European Union (CJEU) this is in favor of the precautionary principle, which is invoked in several cases. Thus, in a case from 1990, were the plaintiff brought scientific evidence on the innocuousness[10] for health of 5 hormones banned by a Directive of the Commission, the CJEU confirmed directly that Directive: "because a precautionary measure cannot be based only on scientific data"[11]. In the case of the "mad cow" disease (Creutzfeld - Jacob), given that the most likely cause is bovine spongiform encephalopathy, CJEU, invoking and using the precautionary principle, confirms the decision of the Commission prohibiting the export of meat from cows, the demonstration on the decision being founded on art. 174 of the Treaty: "because the policy of health protection based on the precautionary principle is essential"[12]. Also, CJEU condemns Spain in the decision "Marismas de Santona" because it did not ensure the preservation of wetlands important for migratory birds, thus not complying with Directive 79/409 EEC on the protection of migratory birds. The justification was based on the uncertainty induced by the disappearance of a natural habitat, which could cause a decline in the number of birds reported to invoke the precautionary principle, the CJEU thus rejecting the arguments of Spain which claimed that there was not any noticeable decrease in their number.

The precautionary principle is reflected in the national laws of European countries, its impact being different, however. Its basics were laid in German law in the early 70s from the German principle of *Vorsorge*, or *foresight*. The basic idea of this principle was that society has to find a way to mitigate environmental damage by thoroughly planning for the future in order to hinder any activity that can prove harmful. ”The Vorsorgeprinzip developed into a fundamental principle of German environmental law (balanced by principles of economic viability) and since has been invoked to justify the implementation of strong policies to combat pollution as acid rain, global warming, and North Sea pollution” (as we mentioned before) (Tickner, Raffensperger and Myers, 2003: 2). Also it has led to the development of a strong environmental industry in that country and a careful planning of activities with environmental impact. As examples, the German Constitutional Court ruled that the indeterminate notion of precaution and the stage of development of science and technology in order to apply the principle, must be evalued by the executive and not the judiciary. Operating Permits may be granted only after science demonstrates that it is practically impossible to produce any damage. They should be refused when there are doubts that "necessary caution cannot be limited to what is feasible from a technical standpoint" (de Sadeleer, 1999: 154). Furthermore, the practice of courts in nuclear energy field was based on the idea that "because science is not omniscient, the precautionary principle should apply to possible damage that are not yet a danger, but for the principle to not be invoked, the danger and risk must be virtually excluded " (de Sadeleer 1999, 156).

In France, the 1995 Barnier law[13] stipulates that "The absence of certainty in the light of current scientific and technical knowledge should not delay the adoption of effective and proportionate measures to prevent the risk of serious and irreversible damage to the environment at an economically acceptable cost". The Environment Chart of 2004, which is a part of the French Constitution, amended this contain again, giving it a significantly different meaning: public authorities are the only ones able to apply the precautionary principle which has become a principle of action and not inaction: in the face of uncertainty, research programs must be developed to remove doubt. Science therefore remains a response and cannot be hindered in the name of the status quo.

English law which is based on case law and judicial precedent is reluctant to legal principles and teleological interpretations. Thus, British courts have rejected the precautionary principle, relied on by the applicants on the basis of a decision of the ECJ interpreting in a manner sui generis, in the spirit of common law, challenging the decision of the Court of Justice and the applicability of art. 174. 2 TEU[14].

Likewise, American law and American authorities constantly declare themselves against the inclusion of the precautionary principle in international conventions and promote instead a so-called *precautionary approach*. However, at national level, US federal jurisdictions gave favorable decision to the US Agency for Environmental Protection Agency (EPA), on the grounds that the law and common sense (concept interpreted in the spirit of Common Law) "requires regulation to prevent the risk even when the author of the norm does not have the certitude that the risk is inevitable - because waiting for certainty would lead to the adoption of curative regulations , not preventive ones"(Teleagă, 2004: 37; de Sadeleer 1999: 165). As example, for species threatened with extinction, there is a special legislation under which the precautionary principle, without being named, is used skillfully (Endangered Species Act). Moreover, the principle is applied in terms of air pollution (Clean Air Act). The attitude of US authorities who have defended major commercial interests in different fields (like that of GMO) must be nevertheless understood.

In Romania, the precautionary principle is reflected in the legislation, being expressly stated in G.E.O. no. 195/2005 (as it was adopted and amended later) in Article 3, letter b as "the precautionary principle in decision-making," - the decision-making is only permitted to: environmental protection authorities; central and local government (when operates in connection with environmental protection); by legal and natural persons performing economic and social activities in this area. Also, the principle appears in Government Emergency Ordinance no. 68/2007 on environmental liability with regard to the prevention and remedying of environmental damage, which provides in Art. 10 and 14 that the operator is obliged to take immediate steps, taking into account the precautionary principle in decision making. In practice, we can mention a judicial sentence[15], where in a case concerning electromagnetic pollution with GSM antennas, the court going in the plaintiffs' favor, shows that "as long as it has not been established with any degree of certainty, that the GSM antennas have no harmful effect on life and health of a person that usually lives near these devices, the applicant must benefit of precautionary principle, established by art. 174 of the Treaty on European Community (formerly Article 130R of the Treaty of Maastricht) that would mean that, in the absence of reliable data on long-term consequences of exposure to electromagnetic fields, authorities must protect with priority the individual against potential risks"[16].

**Components of precaution**

”Precautionary Principle” has an important part to play when it’s needed to know what developmental activity is sustainable or not. ”Precautionary principle” is a strong starting point for sustainable development that/which is different from non-controlled development by the fact it’s expected that the developmental processes has to be stopped and blocked if they can generate severe and permanent damage to the ecosystems and human health.

Basically, the Precautionary Principle marks a shift in the international environmental thinking and jurisprudence from *Assimilative capacity principle* to *Precautionary Principle*.

*Assimilative capacity principle* it's the starting point of earlier legal measures to protect the environment and this concept was recognized at the international level even before the Stockholm Conference (1972). The main fundament of this concept is that the natural environment has the capability to absorb the ill-effects of the pollution, but only to a certain limit and beyond this the pollution may cause damage to the environment and so requiring efforts to repair it. Principle 6 of the Stockholm Declaration contains assimilative capacity precept stating that "Pollution must not exceed the environment's capacity to clean itself". This lays the foundation of the idea that science will be able to grant all the crucial information and mechanisms for everyone who's interested to avoid the advance beyond proper, established usual limits upon the capacity of the environment to assimilate effects of the activities. It's also presumed that with proper technical expertise there will be plentiful time for action to limit/avoid the damage if such environmental damage is predicted.

The shift to the approach to environmental protection from assimilative capacity principle to precautionary principle began after 1972. "Precautionary Principle is a principle which ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting it, even if there is no conclusive scientific proof lining that particular substance or activity to the environmental damage." The main idea is that science it's not omniscient and it can't resolve difficult and complex issues over cause and effect every time. So "a decision for further study or not to do anything in the face of uncertainty is a policy decision not a scientific one just as taking preventive action would be (Sahu, 2013: 2)."

As stated in doctrine, "a precautionary approach to environmental and public health decision-making includes these specific components: taking precautionary action before scientific certainty of cause and effect; setting goals; seeking out and evaluating alternatives; shifting burdens of proof; developing democratic and thorough decision-making criteria and methods." (Tickner, Raffensperger and Myers, 2003: 4).

Taking precautionary action before scientific certainty of cause and effect. This should provide an instrument of responsibility for preventing damage to the environment by imposing general duties/obligations to behave in a determined way even there is an absence of explicit laws. The role of this principle is to provide a certain mechanism that should provide accountability. Beyond this, laws should regulate certain actions with potential impact over environment, by imposing certain regulatory acts for those who conducts activities potentially hazardous to environment (Ilie, 2010: 115).

*Setting goals*. Risk assessment is calculated on forthcoming scenarios, but this analyses may be afflicted by errors and preconception. By the contrast, the precautionary principle stimulate anticipative thinking based on precise objectives that had to be achieved.

*Seeking out and evaluating alternatives*. The advantage of precautionary principle over risk assessment is that follows reducing or eliminating the hazard rather than seeking what level of contamination is safe or economically optimal.

*Shifting burdens of proof*. Traditionally, burden of proof is bore by those who seek to demonstrate something. In the legal systems, those who claim that they are affected have to prove this, but with precautionary principle this is shifted and promoters of an activity has to demonstrate that their activity will not cause excessive and inappropriate

damage to population and environment, because in this case it has to be responsible those who have the authority, power and assets and not those who don't have the power or access and resources and are affected by things beyond their control. This responsibility can be split into several components: *Financial responsibility*. Regulations alone are not likely enough to encourage precautionary behavior on the part of governments or those who conduct activities that poses potential threats to natural environment and/or human health. However, assurance bonds for the worst possible consequences of an activity or liability for damages, will encourage companies to think about how to prevent impacts. *The duty to monitor, understand, investigate, inform, and act*. This activities are already part of Romanian legislation in the G.E.O. no. 68/2007 regarding objective liability for environmental damages. Those undertaking potentially harmful activities are required to routinely monitor their impacts, inform the public and authorities when a potential impact is found, and act upon that knowledge. In this way the law has excluded any way of postponing the actions needed to prevent harm.

It's necessary to *develop democratic and thorough decision-making criteria and methods.* When precautionary decisions regarding an activity or project are taken, due to the fact that sensible debates and conclusions regarding causality and effects are, at base, policy decisions, population has to be be a part of the decision process and those can't be just discretionary decisions of an authority. This is also happening in Romanian legislation, where the public participation to decision making it's mandatory for most activities with environmental impact (Ilie, 2016: 20).

*Regulating civil objective liability for not respecting this principle*. Precautionary principle can be applied in two steps. First, together with *prevention principle* as a method of avoiding damages to environment by careful planning and setting goals and, secondly, if a damage has occurred, as a base for liability. The main advantage of this came from the fact that the civil liability will be objective as there's no need to prove the guilt of those culpable of damaging the environment or affecting the health of people.

Each way of protecting the environment is based on one of those procedures: *risk assessment* or *the precautionary principle.* Risk assessment was the first to come, during the 1970s, together with cost-benefit analysis as tools needed to reconciliate uncertain science and the political need for decision-making to limit harm. They were heavily based on the ability of science to model and predict harm in extremely complex ecological and human systems, having as fundament the idea that decisions has to be made on the basis of what can be quantified, ignoring what is unknown or cannot be measured.

As was stated in doctrine (Tickner, Raffensperger and Myers, 2003: 16-18), unfortunately, in most cases, risk assessment is based on assumptions and flaws that limit its ability to deliver a safe and secure solution to potential environmental problems:

*Risk assessment assumes "assimilative capacity",* that humans and the environment can render a certain amount of pollution without significant harm and so it's used to manage and reduce risks, not prevent them, denying even the most basic efforts to institute clean production.

*Risk assessment focuses on quantifying and analyzing problems rather than solving them.* It asks how much pollution is safe or acceptable and how to live with it instead of preventing harmful exposures and to move toward safer and cleaner alternatives.

*Risk assessments are susceptible to model uncertainty and is costly and time-consuming.* Risk assessment is based on interpretation, assumptions and, so because those, no matter what, still have subjective and arbitrary elements the results can be highly

variable. Also a complete and responsible risk assessment can take years to complete and even then has analyzed several problems with solutions only to limit the harm, not to avoid it.

*Risk assessment alone is fundamentally undemocratic*. In the beginning, risk assessment didn't include public opinions, perceptions, priorities or needs. Since then some efforts have been made to involve the public in risk-assessment processes (for example, in Romanian legislation public participation and opinion is mandatory for regulatory acts) (Bischin, 2008: 80-83, Ilie, 2016: 19-21), but this is still wrong because in most cases public is asked how much exposure or harm is acceptable to them, not if they agree and its opposition is usually ignored as unacceptable. The risk-assessment processes and studies are conducted by specialized persons, but the public it's not supported and encouraged to come with their own studies or alternatives and so, in most cases, their opinion it's unscientific and based on assumption so it's dismissed from the start.

*Risk assessment puts responsibility in the wrong place*. Its basic idea that society as a whole must deal with environmental harm in order to develop is also wrong, because it made acceptable and legal the responsibility for harm and those who created it will not suffer any legal consequences.

*Risk assessment poses a false dichotomy between economic development and environmental protection*. Until recent years it seemed that there is no coexistence between economic development and environmental protection and we "have to sacrifice" one for another. Since the principle of sustainable development has taken firm roots, this started to change, linking social and economic policies with environmental ones. The problem is that sustainable development can be an abstract concept sometimes as opposed to scientific research than can support certain actions. What is lost from sight is that in most cases over-regulating can be more costly in the long run, because assimilative capacity actions will have to deal also with subsequent clean-up and health costs.

Beside those criticisms, risk assessment can play a role in implementing the precautionary principle, by changing its role from establishing "safe" levels of exposure and harm to a tool used to better understand the hazards of an activity and to compare options for prevention. It also has to be used in conjunction with democratic decision-making methods, because the basis of policy and decision-making must be precaution and prevention, rather than risk (as is stated in Romanian legislation, for example).

**Conclusions**

Through our analysis we tried to prove that the Precautionary Principle can be a tool for making better health and environmental decisions. It's based on the idea that protective action must be taken before there is a scientific proof of a risk. Lack of full scientific information should not be seen as an excuse to take action, but it should be acted in such way that we must be sure that our impact over environment and human health is minimum. The precautionary principle is not a vague and abstract notion, quite the contrary, it can be used as a mean to mitigate the environmental hazards in the first step and secondly, if a harm is done, to be a justification for every liability that is to be asked. Risk assessment can be used to predict the consequences, but it's costly, time consuming and it can't cover all the variables when complex and new technologies are used. Also, by comparing short-term benefits brought by an aggressive economic and social development, we fail to see the long term consequences of or actions and this can be avoided by setting goals and not accepting that a certain level of pollution is harmless to

the environment. Also, precautionary principle can be used as an effective mean to point responsibility at those who act without it and not to be shared with everyone to a point where none is guilty. Because of its potential impact, the population, as the Romanian legislation states, is to be a part in the process of environmental decisions, but the state should support population in a firmer way by helping them conducting their own studies and accepting their opinions even if they are based on goals not on scientific studies. This is not more idealistic and vague as the concept of sustainable development, where social, economic and environmental policies coexist to ensure we have a balanced evolution in a clean and healthy environment.

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[1] For more details on the matter see also: WHO (World Health Organisation) (2000). *Electromagnetic Fields and Public Health Cautionary Policies*, Geneva: World Health Organization. Retrieved from: http://www.who.int/docstore/peh-emf/publications/facts_press/EMF-Precaution.htm; Aasen S., Johnsson A., Bratlid D., Christensen T. (1996). Fifty-Hertz magnetic field exposures of premature infants in a neonatal intensive care unit. *Biol Neonate*, 70, 249-264.

[2] The Wingspread Conference on the Precautionary Principle was a three-day academic conference where the precautionary principle was defined. It took place in January 23-26, 1998 at Wingspread, in Racine, Wisconsin, and involved 35 scientists, lawyers, policy makers and environmentalists from the United States, Canada and Europe.

[3] The Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances (the Bonn Agreement) was signed in Bonn, Germany on June 9, 1969.

[4] As example: Convention on the Protection and Sustainable Use of the Danube of 29 June 1994, evoking the precautionary principle in order to preserve water quality.

[5] Custom can exist outside the law, it can become binding law and can replace its gaps. In this case it does not conflict with the law. See Laroumet, C. (1995). *Droit civil, Introduction à l'étude du droit civil*, Paris: Economica, 1995, 183.

[6] The Decision of Hague International Court of Justice (ICJ) from september 25, 1997, Hongrie contre Slovaquie quoted by N. de Sadeleer, *cited work*, p. 143.

[7] „La perspective Communautaire du principe de Précaution", art. quoted by N. de Sadeleer, p. 449, *Revue du Marché Commun et de l'Union Européenne*, No. 450.

[8] Directive 93/67 EEC and 15 Directive 90/219 EEC states that the more stringent protective measures to be applied in the absence of convincing evidence that less stringent measures are sufficient.

[9] Monsanto owned, at firm merger agreement, 30% of the GMO world market, with 1,700 patents, with turnover of $ 15 billion and a net profit of 2.31 billion $ annually in 2015, with a presence in major markets Brazil, Argentina, India, China, Philippines, Canada and Mexico, and in Europe in Spain, Portugal, Bulgaria, Malta, Ireland. In Romania, from 2013 has a processing plant and seed conditioning in the locality Sineşti, jud. Ialomița, 30 km from Bucharest, being the largest processing unit of Americans in Europe.

[10] Innocuity: Attribute of a physical chemical or biological agent to not constitute a danger to the body.

[11] CJEU decision from November 13, 1990, Fedesa aff. C-331/88 rec. I-4023

[12] CJEU decision from July 1, 1996 Royaume Uni c. Commision, aff. C 180/96 (see note N. de Sadeleer, op. cit. p. 146)

[13] The law no. 95-101 from February 2, 1995 on strengthening the protection of the environment

[14] Duddridge Case: a high voltage electric cable buried near a school and presenting a risk of leukemia.

[15] Civil Sentence no. 8164 from june 24, 2009, given in Case no. 17703/299/2008, Judecătoria (First degree court) Sector 1, Bucureşti.

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ORIGINAL PAPER

# The Consignement Agreement

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**Abstract**
If until 1989, trading goods through consignment agreement was rarely used, the structural changes in the economy have imposed a broad application of the agreement in trade in post-revolutionary period. The consignment agreement has the following legal characteristics: main agreement, synallagmatic, for good and valuable consideration, intuitu personae, commutative, consensual, with no transfer of property and it is a named agreement. The conclusion of this agreement gives rise to obligations on the consignor and consignee. On the other hand, the execution of the consignment agreement gives rise to legal effects in relations between the consignee and third parties (buyers).

**Keywords:** *movable property*, *consignor*, *consignee*, *commission*, *mandate without representation.*

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**Definition and regulation of the consignement agreement**

The term "consignment" has two meanings. The first one has the meaning of store where there are submitted for sale certain objects belonging to individuals. The second meaning is submission for sale under contract, of certain objects at a business unit that is specialized in such sales. The term is a neologism borrowed from French - "Consignation".

The consignment agreement has advantages for both contracting parties: for the consignors, owners of goods who reduce their launching costs and advertising directly addressing to markets known and the consignees have deposits and their own network of marketing and they do not have to immobilize funds in the received goods therefore they do not bear any interest on eventual loans (Uliescu, 2015: 452; Anghelescu, Deteșan and Hutira, 1980: 116; Schiau, 2009: 458 – 464).

Through the consignment agreement there may be sold consumer goods, clothing, footwear, handicrafts, art, goods that can be delivered to the consignee all at once or gradually, on the basis of successive notes or invoices. For consignment, NACE code is 4779 - Retail sale of second-hand goods in stores. Law no. 178 of 30 July 1934 covered for the first time the consignment agreement. According to art. 1 of the normative act mentioned, the consignment contract is "A convention whereby one party, called the consignor, entrusts to the other party named consignee, goods or movable objects to sell them on behalf of the consignor. The goods that are entrusted to the consignor can be delivered to it, all at once or gradually, through successive notes or invoices issued under the contract". Law no. 178/1934 was abrogated by art. 230 letter e) of Law no. 71/2011. Currently, according to art. 2054 par. (1) Civil Code, the consignment agreement is a type of commission agreement whose object is the sale of movable property which the consignor delivered to the consignee for that purpose. In the literature, the consignment agreement was defined as the agreement whereby one party, called the consignor, entrusts to the other party named consignee, certain movables in order to be sold on behalf of the consignee, but on account of the consignor, the consignee has the obligation to give the consignor the price obtained or to return the unsold good (Cărpenaru, 2014: 561; Pătrașcu, 2010: 63 – 71; Dumitrașcu, 2007: 121-122; Găină, 2003: 145 – 153; Motica and Bercea, 2005: 308 – 313). In accordance with Art. 2054 par. (2) of the Civil Code, the consignment agreement is governed by the rules of Section 3 of Chapter IX, Title IX of the Civil Code (Art. 2054 – 2063), the special law and the provisions on the commission and mandate agreement, to the extent that the latter do not contravene the provisions of Section 3.

The consignment agreement differs from the commission agreement through its own characteristics: empowerment given to the consignee has as object the selling of the consignor`s movables of; selling the goods is made at a price fixed in advance by the parties of the consignment agreement or, failing that, at the current price of goods on the relevant market at the time of sale; the consignee is obliged to give the consignor the amount obtained as the sale price of the asset or, if the property could not be sold to return the property in kind to the consignor; the sale on credit, the deadline for payment of the price of the goods if the contract consignment is up to 90 days, and guaranteeing payment of the price of goods is done by issuing bills of exchange or promissory notes by the third party buyer that can only be a professional; in case of an unauthorized credit sales, unless otherwise provided by contract, the consignee is jointly liable with the third party buyer against the consignor, while the commissioner is personally liable to the principal, according to art. 2047 par. (1) Civil Code, having to pay, at the request of the principal, immediately with interest loans and other benefits that would result; in the absence of a

contrary stipulation, unlike the commissionnary that enjoys liens for receivables on the principal, the consignee does not have this right. In our assessment, the differentiation regarding the lien between the two contracts is unjustified.

In legal literature it was pointed out that there are two species of mandate without representation: *1)* commission with its two varieties (consignment and shipment of goods) and *2)* the mandate without representation in relations between ordinary individuals (Baias et al, 2012: 2042). Under the mandate without representation, the representative has the right to sign legal acts in his own name but on behalf of the principal. The consignment agreement is, according to art. 2054 of the Civil Code a variety of commission agreement, the latter being the "mandate" the consignee acts on the behalf of the principal, but on his own behalf, that is "the type" of mandate without representation, without details of the quality of the parties (Uliescu, 2015: 453).

**Legal characteristics of the consignement agreement**

We distinguish the following legal characteristics of the consignment agreement: main agreement, synallagmatic, for good and valuable consideration, intuitu personae, commutative, consensual, not transfering any property rights and named. The consignment agreement is *a main agreement* because it has an independent existence and its own legal regime. The consignment agreement is a *synallagmatic contract* (bilateral) because it generates, since the date of its conclusion, reciprocal and interdependent obligations borne by both parties. The consignment agreement is *an agreement for good and valuable consideration* as each party aims to achieve a material benefit: to the consignor the assets are sold and to the consignee the remuneration shall be paid. According to art. 2058 of the Civil Code, the consignment agreement is presumed for good and valuable consideration. The consignment agreement is *an intuitu personae agreement* because it is based on the trust of the consignor granted to the consignee. The consignment agreement *does not transfer any property rights* because the consignor remains owner of the goods given on consignment. The consignee is a precarious holder of goods received on consignment.

The consignment agreement is *a commutative agreement* because right from the moment of its conclusion, the parties are aware of the certain rights and obligations, as well as the extent of services. The consignment agreement is *a consensual agreement*, as mere agreement of the parties, *solo consensu.* Regarding this aspect, art. 2055 of the Civil Code with the marginal name called "Sample" rules*: "The consignment agreement is concluded in writing. Unless the law provides otherwise, the written form is required only for evidence of the contract".* So, the consignment agreement is concluded in written form *ad probationem*, not *ad validitatem.* A similar regulation was contained in art. 2 of Law no. 178/1934: "The consignment contract, as well as any other conventions relating to the modification, conversion or termination, may be proved only by documentary evidence". If the consignor is a natural person and the assets entrusted to be sold have a low value, it is not necessary the conclusion of the agreement in writing. However, if the consignor is a legal person submitting the sale of movables of high values and gradually it is necessary to conclude a written agreement. Depending on the formation, some authors have classified the consignment agreement in the category of the real contracts. According to art. 1174 of the Civil Code, the contract is real when, for its validity, it is necessary the work remittance. So, this type of contracts is defined and justified precisely because, for their valid birth, handing over the property is mandatory as one who receives the detention of the good can not meet their obligations without this detention. Or, there it was

considered that the situation is similar for the the consignment agreement (Baias et al, 2012: 2060). According to another opinion that we agree with, "the remittance of the movables" does not mean the delivery of the good at the conclusion of the agreement (real) but it is an effect of the contract, respectively its restitution (Stănciulescu, 2014: 391; Cărpenaru, 2014: 561).

The consignment agreement is *an agreement named* because it is provided and regulated by art. 2054 - 2063 of the Civil Code.

**Conditions for validity of the consignement agreement**

The consignment agreement must meet the main conditions required for the validity of any contract, namely: capacity to contract, consent of the parties, a specific and lawful object, a legal and moral cause, according to art. 1179 par. (1) Civil Code.

The two parties must have an adequate capacity to meet the obligations assumed (Boroi, 2012: 492). The consignee must have full capacity to act because legal agreements with third parties are entered on his own behalf. The consignor must not have capacity to enter into legal acts to be completed by the consignee.

The consent of the parties must be serious, expressed freely and knowingly, according to art. 1204 of the Civil Code. The consignor and consignee's consent may be express or implied. There are applicable the provisions of Art. 2014 par. (1) of the Civil Code, according to which, in the absence of refusal without delay, the mandate shall be deemed accepted if the acts, whose conclusion enter into the profession of the agent or for which it offered its services either publicly or directly to the principal. This regulation confirms the doctrine and case law. As it is stated in Decision No. 225/03.19.1996 of the Bucharest Sector 1 Court, Commercial Division, „the conclusion of the contract may be tacit; it may result from the execution of the assignment received by the consignee from the consignor".

The material object of the contract is movables entrusted to be sold by the consignee. It is worth mentioning that these goods do not become the property of the consignee, but they enter into his possession from the moment that they are entrusted by the consignor up to the date on which they are sold to third parties. Once movable goods are sold, the consignee shall remit the consignor the amount of money representing the sale price. On the other hand, if the goods cannot be sold, they must be returned to the consignor in kind. These goods shall meet the following conditions for the sale to be permitted by law: must be in the civil circuit; must be at the moment of conclusion of the contract; must be determined or determinable; must be possible, lawful and moral; must be owned by the consignor (Nistorescu, 2013: 55).

**Effects of the consignment agreement**

The conclusion of the consignment agreement gives rise to obligations on the consignor and consignee. On the other hand, the performance of the consignment agreement gives rise to legal effects in relations between the consignee and third parties.

**a) The effects of the consignment agreement between the parties**

The consignor must provide the consignee movables to be sold to third parties. This obligation is mentioned in art. 2057 par. (1) of the Civil Code as it follows: "The consignor will deliver to the consignee the goods to fulfill the contract, retaining the right to inspect and control their condition throughout the contract term". It is worth mentioning that the movable may be delivered to the consignor by "all at once or gradually, through successive notes or invoices" (Nemeș, 2012: 313). This obligation can be also analyzed as

a right of the consignor, and being a consensual agreement, it ends validly by the mere agreement of the parties, without the need for remission of the movables to the consignee. Therefore, after forming the agreement of the contracting parties, the consignor may waive the obligation of delivery of goods and not to entrust them to the consignee; in this situation, the consequence will be that the consignment contract will not be enforced and the consignee will be able to apply for compensation from the consignor for any expenses incurred to date. On the other hand, failure to surrender movables although they do not affect the validity of the consignment agreement, which is a consensual agreement, not a real one, makes it impossible to execute it and produce effects. However, this means the non-existence of the consignment agreement.

As the owner of entrusted property for sale, the consignor disposes of them throughout the contract term. He can take back the goods at any time, even if the contract was concluded for a fixed period, according to art. 2057 alin. (2) of the Civil Code. But in this case, a consignee will give to the consignor a reasonable notice to prepare the handing over of goods. We appreciate that in case of a refusal to deliver from the consignee, the consignor may use the procedure of presidential ordinance, otherwise he commits the crime of theft. The previous regulation was expressly provided that the resumption of goods by the consignor can be done by presidential ordinance once without summoning the parties, if the consignement agreement it was genuine and summoning them if the contract was under private signature. In the latter case, the deadline for summoning the parties is fixed for the second day of receipt. In this way, the consignor was entitled at any time to raise the goods, even if the contract would have included a clause of notice, according to art. 4 of Law no. 178/1934. Art. 3 of the previous regulation expressly provides: "The contract consignment does not convey ownership of goods that have been entrusted to the consignee".

If the consignor is insolvent, the goods shall become his property and subject to insolvency proceedings instituted against him. But if the consignee is insolvent, the goods do not enter into his patrimony and will be returned to the consignor immediately, according to art. 2057 alin. (4) of the Civil Code .

The consignor may unilaterally amend the selling price of movables that is specified in the consignment agreement. In this case, the consignee will be bound by this change from the moment to which he was notified in writing, according to art. 2056 alin. (2) of the Civil Code. A similar provision is foreseen by article 11 from Law no. 178/1934.

Another obligation of the consignor is the one of payment for the remuneration due to the consignee. The consignee being a professional, the consignment agreement is presumed for good and valuable consideration, according to art. 2058 par. (1) of the Civil Code. On the other hand, the parties may agree that the consignment has a free character. The amount of money the consignee is entitled is named remuneration and shall be determined by agreement in the form of a fixed amount or percentage. In the absence of stipulations regarding the remuneration, it is determined as the difference between the selling price set by the consignor and the actual price of the sale. In our view, to the price negotiated by the consignor it is added remuneration plus value added tax in order to reach the selling price of movables. Also in the remuneration negotiated there may be included other expenses of consignee which are known up to the date of sale of goods such as maintenance costs, storage, insurance and sale. Please note that these expenditures, even though they are highlighted distinctly in the price, they form the content of remuneration (commission), but they can also be established separately (Uliescu, 2015: 467). If the sale is made at the current price, the remuneration shall be determined by the court. The criteria

for establishing a judicial remuneration are: the difficulty of the sale (object of consignment is represented by its rare goods, specialized, historical, cultural, etc.), due diligence of the consignee (the sale is made in a real or virtual store, there is an extension of national or international target of clientele, it is organized to tenders, there is carried out publicity and advertising etc) and remunerations applied to similar products on the relevant market (Baias et al., 2012: 2061). In essence, these ideas can be found in art. 12 of Law no. 178/1934.

If the consignment agreement or instructions of the consignor not provide otherwise, according to art. 2056 par. (3) of the Civil Code, the sale of movables will only be paid in cash, by bank transfer or crossed check only at current prices of goods. Civil Code maintains the solution established in art. 11 of Law no. 178/1934 whereby: "The consignee may not sell or dispose of goods that have been entrusted on consignment, except as provided in the agreement. The consignor may change at any time, unilaterally the conditions of sale, unless the contract provides otherwise. The amendments are required to the consignee when that will be made known in writing. In the silence of the agreement on the terms of sale and in the absence of written instructions from the consignor, the consignee can not sell the goods that have been entrusted but in cash and current market prices".

On the other hand, the consignor is obliged to reimburse expenses incurred to the consignee to fulfill their duty. If the agreement of consignment does not specify otherwise, according to art. 2059 par. (1) of the Civil Code, the consignor will cover the costs of preservation and sale of the goods to the consignee. If the consignor takes over the goods or if he disposes their taking over from the consignee, and if the contract can not be enforced (goods can not be sold) without any fault of the consignee, the expenditure already made in performance of the agreement by the consignee will be the task of the consignor. The expenses related to maintenance and storage of goods fall on the consignor if he ignores to regain his goods. If the agreement is terminated because of the waiver of the consignee, he must retain the storage costs, insurance and property maintenance until they are taken back by the consignor. By law, the consignor has the obligation to take over the goods immediately. Thus, when the goods are immediately taken over by the consignor, these expenses are incumbent to the consignee, as consignment contract is terminated by his renunciation. We note that the new regulation does not resume the provisions contained in art. 10 of Law no. 178/1934 which states that: "All costs of preservation and sale of goods delivered on consignment concern the consignee, besides the contrary stipulations".

The consignee is obliged to receive and keep the goods with the diligence of a good owner. So, the consignee will hand over the goods to the buyer (in case of successful sale) or to the consignee (in case of failure of the sale or termination) in the state in which he received them for sale. Moreover, the consignor has the right to inspect and control the condition of goods throughout the contract term, according to art. 2057 par. (1) of the Civil Code. Essentially, the same ideas can be found in art. 8 of Law no. 178/1934 which provides that "The consignor has the right to control and always check the goods that are entrusted to the consignee and proceed to their inventory. To exercise this right, the consignee will get at any time on request the presidential order (...)". It is pointed out that in the previous legislation in order to identify goods given on consignment, the consignee was obliged to keep the goods received in their original packaging and conserve intact labels, markings and other external signs applied by the consignor. Also, if in the consignment agreement there was mentioned some place to store the goods entrusted, it

was forbidden to the consignee to move or store elsewhere the goods entrusted by the consignor. However, if in the consignment agreement there was foreseen a specific storage location, the consignee was able to store goods only in places whose use was on the basis of written documents with specific date or targeted financial administration and he was obliged to inform at once the consignor about where to store the goods and their every move.

In addition, the consignee has the obligation to provide goods to the value set by the contracting parties or, failing that, to the property price estimate of the receipt of their consignment, according to art. 2060 alin. (2) of the Civil Code. In case of failure to provide goods at their receipt on consignment or if the insurance has expired and it has not been renewed or if the insurance company was not agreed by the consignor, the consignee will be liable to the consignor for damage or loss of the goods due to force majeure or the act of a third party. If the consignee fails to conclude insurance, the consignor will be able to provide goods at the consignee's expense, according to art. 2060 alin. (3) of the Civil Code. The obligation of consignee to ensure goods that have been entrusted to a company which is accepted by the consignor was prescribed by the provisions of art. 6 of Law no. 178/1934.

According to art. 2060 par. (4) of the Civil Code, regardless of payer`s insurance premiums, the insurance is contracted for the benefit of the consignor. The current regulation requires notification to the insurer on consignment contract before payment of compensation. If for any reason the compensation is paid to the consignee, he shall remit it to consignor.

Another obligation incumbent to the consignee is to execute the empowerment given by the consignor, that is to conclude contracts for the sale of movable goods received on consignment with interested third parties. The consignee must act within the limits empowered by the consignor. The mandate of the consignee is strictly regulated, precisely because the object of the obligation is limited to the sale of goods, ie the conclusion of acts of disposition of property of the consignor (Uliescu, 2015:471). The diligence of the consignee aims specifically sale price of goods to interested third parties.The price at which the goods are to be sold is determined by the consignment agreement. Otherwise, there is applied the current price of goods in the relevant market at the time of sale, according to art. 2056 par. (1) of the Civil Code. It is said that the consignor may alter the sale price without the consent of the consignee is obliged to take into account this change from moment it was notified to him in writing, within the meaning of art. 2056 par. (2) of the Civil Code.

According to art. 2061 par. (1) of the Civil Code, the consignee may be authorized by the consignor to sell on credit. In this situation, unless the parties agree otherwise, the consignee may grant the buyer a deadline for payment of the price for up to 90 days. To guarantee payment of the commodity price, the buyer will issue bills of exchange or promissory notes. The consignee is jointly liable with the consignor for the payment of the price of goods which are sold on credit. From the rule of solidarity there can be derogated through the consignment agreement according to art. 2061 par. (2) of the Civil Code. To this regard, we note that there were taken into account the provisions of art. 14 and 16 of Law no. 178/1934.

Also, the consignee is obliged to account the consignor about its management and hand over everything it has received under his empowerment, according to art. 2019 par. (1) of the Civil Code. The consignor shall be informed to the terms agreed, on sales made by third parties and he receives the price of the goods sold. If contract terms are not set,

the consignee must inform the consignor within a reasonable time from the date on which the information was requested. The parties will stipulate in the consignment contract some clauses relating to remuneration, selling arrangements, settlement dates and information on the management of goods, storage, maintenance, preservation, insurance, restitution if they can not be sold. We show that under art. 18 of Law no. 178/1934, the consignee should inform the consignor in relation to sales made by him on the date stated in the contract and he was obliged to indicate precisely the goods sold and sold for cash or for credit in the latter case stating the name and the exact address of each debtor, the amount due, the payment deadline granted, bills or guarantees received. In the absence of a contractual stipulation, notification was made by the consignee not later than the end of each week for all the operations from that week. We would also specify that the obligation to account is the essence of the mandate agreement.

If the price payment was made by check, bills of exchange or promissory notes, the consignee is obliged to remit debt securities to the consignor (Cărpenaru, 2014: 565).

The consignee has the obligation to return the goods to the consignor if they were not sold.

If in the contract there are not specified the consequences of late remittance price of goods sold, there will apply the rules of the mandate, namely art. 2020 of the Civil Code which provides that: "The agent owes interest on the amounts employed for his own use starting with the day of use, and for those who owe, the day that he was put in default".

We should specify that art. 23 of Law no. 178/1934 established criminal liability for infringement of certain obligations (Dogaru, Olteanu and Săuleanu, 2008: 752). Thus, the consignee was sanctioned with imprisonment from 2 months to 2 years and a fine of 10,000 to 100,000 Lei if he appropriated goods delivered on consignment or if he alienates them otherwise or in circumstances other than those provided for contract or if he does not refund them at the request of the consignor; unless the consignor gave money, bills or amounts received as the price for the goods sold on the dates stipulated in the contract and if at the written request of the consignor, the consignee does not notify the debtor about the origin and nature of the claim. For the purposes of art. 24 of the previous regulation, the sanction was imprisonment from one month to one year for the consignee who committed one of the following acts: he did not notify the consignor within three days off from his written request on all sales of goods received on consignment; he intentionally made inaccurate notices on the sales and revenues made by him; he did not notify the consignor of any prosecution against goods entrusted to him or the values resulting from their sale, once acquainted with them; removing, destroying, damaging or making to remove, destroy or damage the packaging, labels, trademarks or any outward signs applied by the consignor on all the goods entrusted on consignment; storing or moving the goods which were entrusted contrary to contractual or legal provisions; he did not provide at the request of the consignor the special registers of consignment if the contract provides keeping of these records.

As a rule, art. 2062 of the Civil Code provides that the consignee does not have a right of retention on the goods received on consignment and money due to the consignor. As an exception, through the consignment agreement the parties may provide for a right of retention of the consignee. In this case, if the right of retention is exercised, the consignee duties on maintainance of goods remain valid and the storage costs are borne by the consignor, if the exercise of the right of retention was established. Therefore, storage costs belong to the consignee if he exercises his right of retention improperly. The legislative solution chosen by the Civil Code differs from the solution given in art. 20 of

the previous regulation that prohibited without exception to the consignee to exercise the lien.

**b) The effects of performance of the consignement contract to third parties**

By concluding contracts of sale between the consignee and others, there are established legal relationships between the consignee (the seller) and third parties (buyers) and not between the consignor and buyers.

Sale-purchase agreements being concluded on the name of the consignee, but on behalf of the consignor, the obligations of contracts are borne by the consignor.

In the absence of direct legal relations with third parties contractors, the transfer of ownership of the consignment goods from consignor to third parties is based on indirect representation, as in the case of the commission agreement (Cărpenaru, 2014: 565).

**Termination of consignment agreement**

In accordance with art. 2063 of the Civil Code, the consignment agreement ceases: by the revocation of the consignor, through the renunciation of the consignee, for the reasons indicated in the agreement, death, dissolution, bankruptcy, ban or deregistration of the consignor or consignee.

If the contract is terminated through the renunciation of the consignee, it remains bound by its obligations to preserve assets, insurance and maintaining them until they are taken up by the consignor. In this case, the consignor is obliged to undertake all necessary efforts to resume supplies immediately after termination of the contract, under the penalty to cover the costs of preservation, storage and maintenance.

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# Considerations over the Institution of the Legal Entity in the Romanian Law

**Andra Maria Brezniceanu***

**Abstract**
Development by expansion of the territorial area of activity deployment allows the legal entities to be commercial companies, associations or non-profit foundations, syndicates etc. setting up of branches, of some structures with legal personality respectively, different from the legal entities that set them up.
Birth and life of these structures, their activities characterized by dynamism and flexibility have been controlled through legal norms took over truncated from foreign legislations and tailored to a new legal reality, created post-communism.
The purpose of this study is an analyze of the legal person branch institution within the lacunar and terse legislative template applied to it.

**Keywords:** *associations, foundations, syndicates, non-profit, branches*

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According to the definition in the Explicative Dictionary of the Romanian, Language, subsidiary is an institution, company, association, organization run and controlled by a central unit (Explicative Dictionary of the Romanian). This definition has not been taken in this meaning by the Romanian legislation in the field of legal entities, in which we can meet the situation of some subsidiaries that are not controlled by their mother-organization or subsidiaries that do not have legal status.

**Commercial Company's Subsidiary**

For commercial companies, the legal framework is given by Law no.31/1990, Company law (Company law, Monitorul Oficial no. 1066/17.11.2004). Thus Article 42 of Law no.31/1990 states that "Subsidiaries are companies with legal status and are established in one of the forms of company listed in art. 2, namely general partnership company, limited partnership company, joint-stock company, joint-stock limited partnership company or company with limited liability under the conditions provisioned for that form. They will have the statutory of the form of society in which they were established". Other details of the relationship between the mother-company and the subsidiary are not in Law no.31/1990, Romanian law being limited to this definition. Compared to Romanian law, the definition provided in the legislation of other countries stipulate clearly the conditions in which a company is considered a subsidiary. Thus, in the Companies Act in the UK (Companies Act, art. 1159), since 2006, Article 1159 has provided that a company is considered a subsidiary of another company in case the latter holds the majority of voting rights or is a member of the shareholders having the right to appoint or remove a majority of the Board, or a member of the company that controls, under an agreement with other members of the majority, the voting rights in the subsidiary.

The same approach is also found in French law (Law no.66-537/1966 art. 354) in which a company is considered a subsidiary of another company where more than half of the joint-stock is owned by another company. In the European law, a subsidiary is defined in Directive 2011/96/ EU regarding common tax regime for mother-companies and their subsidiaries in Member States (Directive 2011/96/ EU). Thus, in Directive "subsidiary" shall mean that company whose capital includes the holding of at least 10% of another company located in another Member State, directive taken over by the Romanian Fiscal Code by defining the subsidiary of a Member State in article 24 paragraph 5 letter b.

Romanian law did not take over these definitions of a Romanian company subsidiary, the notion of subsidiary being given up to the companies made up by mother-company which gives the name of the subsidiary. Not even the new Civil Code clarifies the regulation of the relations between the subsidiary and its mother-company, the only reference to the existence of this legal entity being in Book VII on the provisions of international private law, where Article 2580, paragraph 3 says that "The organic statute of the subsidiary is subject to the law of the state in whose territory it has established its own premises, regardless of the law applicable to the legal entity that established it". Neither in the Order no. 2594/C/2008 approving the Detailed Rules on the keeping of commerce registers, the record and the release of the information register can we find more information regarding the establishment of the relationships between mother-company and its subsidiary. The only specifications refer to the fact that the subsidiary company can be added, but without being compulsory, the name of subsidiary, according to the registered legal entity's options, the remaining conditions for the registration of the

subsidiaries regulated by art. 93-97 but not providing additional conditions on the establishment of a subsidiary.

Legal literature took over, in defining the company's subsidiary, attributes provided by either French law, focusing on the state of dependency between mother-company and its subsidiary, although, as noted above we do not meet the requirement of economic dependence of the subsidiary in Romanian law. Logical legal arguments, resulting from the practical modality by which companies initiate the establishment of subsidiary companies made legal literature consider this relationship of addiction of the subsidiary to mother-company mandatory. This argument stems from the fact that it is inconceivable that a company sets up a subsidiary for the development of territorial or material area of operation of the activity without the control of the company that has founded it. Thus, the definition frequently used at present considers the subsidiary of the trading company as "a company organized as a self-reliant company, with legal status, economically dependent on the founding company that owns most of the capital" (Belu Madgo, 1998: 33). Economic dependence of the subsidiary to mother-company as a feature of the subsidiary was taken over by most legal literature, the logical and legal argument regarding the purpose of the establishment of the subsidiary leading to the adoption of this approach, the subsidiary considering "that it is constituted, modified or taken over mother-company to achieve the group interests", the way to achieve this goal being achieved by the economically dependence to the mother-company by acquiring control on the subsidiary company (David, Piperea and Stanciu, 2014). In this regard, Ioan Mizga's example is revelant. He consider that "the subsiadiry is constituted by the parent –company in order to develop the business of the latter. The branch relationship with the Parent company is one of special dependence (Mizga, 2011). Another example is that of Ioan Bacanu who sees the subsidiary as being "a company on it's own legal entity , but economically dependent of the Parent company because the latter owns tha capital or at least a majority of it that gives control" (Bacanu, 1998: 107).

We consider that these two definitions are not consistent with the stipulations of the Commercial Companies Law, art. 42 of Law no.31/1990 strictly provides that subsidiaries are "commercial companies with legal status and establish themselves in one of the forms of company listed in art. 2 and under the conditions set for that form. They will have the legal status of the form of society in which they were established".

Or, in case the legislature did not foresee additional conditions for the establishment of a subsidiary, as they were provided in other legislation (i.e. French law, British law, etc.) we do not need to keep in mind other conditions for the establishment and development of an economic activity. The subsidiary can be set up to be the only one by the mother-company, in which case we speak of a sole shareholder company or with other partners or shareholders. In the event that mother-company is a limited liability company with sole shareholder, we consider that the subsidiary cannot be established under the regime of a limited liability company with sole shareholder. In this regard are the provisions of article 14 paragraph 2 of Law no.31/1990 prohibiting the establishment of a limited liability company with a sole shareholder by another limited liability company consisting of one person, the law making no distinction if it is person or entity.

The subsidiary has a full legal autonomy from mother-company provided by law. Mother-company control is strictly economic in nature and arises from the part of capital which it owns. "Mother-company will direct the subsidiary activity only through voting at the general meeting of the shareholders, not being able to directly impose their will by

binding decisions for the subsidiary" (Scheaua, 2002: 67). As long as this control is maintained through most capital control we have a subsidiary as defined by legal practice.

The question is whether we have the sbsidiary in the case in which the other associates or shareholders with different stakes acquire in time from the mother-company social parts or actions which to be determined to have majority control of decisions in the company in general meeting. In this case, we have or do not have a subsidiary in the situation in which the only legal conditions for the establishment of a subsidiary are those established by article 42 of the Commercial Company Law. The answer can only be yes, the loss of the quality of associate or shareholder in the subsidiary by its mother-company does not result in dissolution of the company, the cases of dissolution being limited provided under article 227 of the Commercial Company Law, this situation not being provided.

The only situation in which the loss of the associate or shareholder quality in the subsidiary by the mother-company would result in the dissolution of the company is that in this situation should be expressly provided for in the articles of the establishment act of the subsidiary, thus fulfilling the provisions of articles 227 letter g of Law no. 31/1990.

If there is no such provision in the establishment act, the major associations, even if they are in a company called subsidiary can continue their work independently of the mother-company.

Thus, we believe that a legal definition which respects the legal provisions is that a subsidiary represents a company organized as a stand-alone commercial company with legal status under private law, acquired under Law no. 31/1990 and Law no. 26 / 1990 (Capățână, 1994:86). Since the subsidiary is an independent legal entity with distinct patrimony from the founding company, it will not be bound by its obligations nor will the mother-company be held by the subsidiary obligations. Governing bodies of the mother-company have no quality to hire the subsidiary nor will the governing bodies of the subsidiary represent the founding company (Georgescu, 1946:66).

Another problem with the subsidiary is the form of organization - the subsidiary must take the same form as the mother-company. The answer is negative, the subsidiary can be in any form of organization referred to in article 2 of Law no.31/1990, in other words, if mother-company is organized as a limited liability company, the subsidiary may be a corporation, or any other form as provided by art. 2 of Law no.31/1990.

**The subsidiary of the nonprofit association**

The situation of non-profit associations subsidiaries estblised under Ordinance no. 26/2000 is less regulated. Ordinance no. 26/2000, article 13 on associations and foundations referrs to the fact that the association may establish subsidiaries, as territorial structures, with a minimum number of three members, own governing bodies and a patrimony distinct from that of the association. Paragraph 2 of Article 13 shows that subsidiaries are entities with legal status, which can end in their own name, legal acts under the conditions established by the association in the establishment act of the subsidiary. They can sign legal acts of disposal, in the name of the organisation, only based on the prior decision of the association board. As a way of existence, it is made at the decision of the general assembly of the association, acquiring its legal status from the subsidiary registration in the Register of Associations and Foundations. To register the subsidiary in the Register of Associations and Foundations the representative of the association will submit the application form, together with the decision to set up the subsidiary in authentic form or certified by a lawyer, the status, the establishment act in

original or certified by a lawyer, the attorney documents for the headquarters, and the initial patrimony to the court in whose territorial constituency the subsidiary is to have its headquarters.

The only restriction we meet on the establishment of the subsidiary is related to the name, art. 7 para. 34 Order no. 26/2000 stipulating that it is prohibited, under penalty of absolute nullity of the establishment act and of the statut as subsidiary, to have a name other than that of the association or foundation that constitutes it. The legal relations between the subsidiary and its mother-association, as in the case of commercial companies, may be regulated only by the statute of the association, the law providing that affiliates can undertake legal acts in their own name as provided by the association through the conditions in the subsidiary's establishment act. But to the companies, where the mother-company control over the governing bodies is accomplished by holding the majority of the share capital, in the subsidiary we can not have such control. Since the subsidiary consists of at least three members, not being about the status of a shareholder in the non-profit associations, the subsidiary's control by the governing bodies of the mother-association is almost nonexistent.

The purpose of the subsidiary to expand in territory its mother-association's activities by setting an organizational structure with legal status is put into difficulty by the impossibility of controlling the decision at the general meeting of the subsidiary by the mother-association. Although law does not require it is normal that all founding members come into the same category of members with equal rights and obligations. This status of the founding members does not exclude other categories of members - adherents, sympathizers, supporters or members of honor with or without full or limited voting at the general meeting. The equality of the founding members, of asocitatiei and of the subsidiary, lies in the provisions of article 4 of the ordinance, article showing that "The association is a legal entity of three or more people, according to an agreement, pooling and with no right of returning the material contribution, their knowledge and labor contribution to realise some general interest tasks, of some communities or, where appropriate, in their private non-patrimonial interest". In practice, one may not establish subsidiaries in which to provide the voting right of the mother-association as a founding member of the subsidiary, as having qualified right in comparison with the rest of the members (minimum of two). The existence of some relations of control by the mother-association in the subsidiary's status can be changed by the other founding members at any time after the establishment, without the mother-association's possibility to modify the decisions adopted by the General Assembly of the subsidiary.

Basically, in the field of non-profit associations one cannot insert clauses in the subsidiary's establishment act that cannot be later changed by the members of the subsidiary with or without the mother-association's approval, except the name and the possibility of setting up of other subsidiaries by the subsidiary itself.

The only connections of a subsidiary to its mother-association is the decision of establishment and the name, change that was introduced by Law no. 22/2014 and which dooes not clarify the relationship between the subsidiary and its mother-association. According to this article (article 7 paragraph 3 index 4 of Ordinance no.26/2000 modified) it is forbidden, on the penalty of absolute nullity of the establishment act and of the status, that a subsidiary or branch bear another name than that of associations or foundations which constitute it. This ban lacks legal basis, violating the constitutional right to free association provided by article 40 paragraph 1 of the Constitution, which guarantees freedom of association of Romanian citizens.

Article 7 paragraph 3 index 4 of the Ordinance no.26/2000 was introduced by Law no. 22/2014. According to article II of this law, it was regulated that the subsidiaries were forced modify the name within two years, if at the time of the adoption they had a different name from the mother-association; in case of nonfulfillment of the obligation they will be dissolved by law, and finding dissolution will be realized at the decision of the court in whose jurisdiction the subsidiary's office is located.

This absolute nullity does not fit within the scope of protection of the general interests provided by Civil Code in article 1247. At the same time it violates the right to freedom of association in the Constitution. Given the fact that mother-association may not seek the dissolution of a subsidiary, the argument stated above, namely that lack of majority in the General Assembly, why doeslaw allows the legal dissolution of the subsidiary for a different name from the mother-association. Such sanction is not to be met in companies where the control of the mother-company, at least in practice, is established.

Let's suppose that an association sets up a subsidiary in 2012 under a different name than that of the mother-association and it is registered in this Registry of Associations. In 2014, the mother-association dissolves due to the inability to convene the general meetings or board, if this situation lasts longer than one year from the date when that must have been constituted. What general interest should be protected fo the subsidiary to have the name of the mother-association if there was no mother-association? Or what if the governing bodies of the association do not agree with the return of the subsidiary's name to the association's one and oppose to the name change? Ordinance no.26/2000 in art.55 does not provide grounds for dissolving a subsidiary in case the mother-association dissolves. Thus, by this ban, although freedom of association is stipulated by the Constitution, although the subsidiary has legal status and its own management, although, as we have shown, the regulating of the relations between the mother-association or mother-company and the subsidiary are to be freely regulated by the shareholders or associates through the statute of the subsidiary, the legislature considers that the biggest problem in terms of the subsidiary of the association or foundation is the existence of a different name of the subsidiary from the mother-association one, and sanctions this difference with the nullity of the legal status and of the establishment act of the subsidiary bearing a name other than that of the association or foundation that constitutes it.

It is not about using a prohibited name by using terms that would generate confusions with state institutions (police station, emergency, consumer protection, etc.) but a legal name, which was permitted by law and was reserved by Ministry of Justice, which does not affect the social relationships of the citizens. What could the purpose of such a drastic sanction of dissolution of law be, and why does the legislature consider the need for protection of such interest as being of public policy and not private, we cannot answer, but we consider that a future amendment of the legislation in the field of associations and foundations should consider deleting this provision, which sooner or later, in the situation in which they will not be removed in a future legislative change, will be appealed to the Constitutional Court for violating the right to free association.

**The subsidiary of a nonprofit foundation**

The situation is not much different from the association in the case of the foundation organized under Ordinance no.26/2000. The foundation's subsidiary is an entity with legal status that can conclude in its own name, legal acts under the conditions

established by association thorough the establishment act of the subsidiary. But if in the case of the association's subsidiary a prerequisite is that at least three founders, in the case of the foundation the conditions stipulated by article 18 of Ordinance no.26/2000 for the establishment of the foundation's subsidiary refers to the allocation of the subsidiary's patrimony, based on the decision of the board and on the appointment of a board of directors composed of at least three members. Within the foundation, the governing and management body is the board of directors, which is also the one who decides the establishment of subsidiaries. Changing the component of the board according to how their designation is established by the foundation's status or if it cannot be changed according to the conditions established by status, the component modification can be made by court.

Changing the status of the foundation on the appointment of the board is the board responsibility under article 29 paragraph 2 letter of Ordinance no.26/2000, amending founders with changing powers only on the purpose of the foundation given that the purpose of the foundation was fulfilled or cannot be fulfilled. So, for the foundation's subsidiary, it can carry on further work in complete independence by unilateral modification of the subsidiary's status without being linked to the mother-foundation and without it to have the ability to control the subsidiary established to extend the territorial area of its activity, widowing the mother foundation of the patrimony made available for the establishment of its subsidiary. However, in practice, the method of appointment and change of the component of the board is the exclusive attribute of the founder or founders, with the possibility of a real control of the mother-foundation on the subsidiary. Being the same founder or founders of the subsidiary and of the foundation – the mother or even the mother-foundation of the subsidiary, we can speak of a relationship of more effective and safer decisional subordination between the subsidiary and the foundation than in the relationship between the mother-association with its subsidiary or its subsidiaries. As in the case of the association, the same name of the subsidiary and of the mother-foundation is compulsory, under the penalty of absolute nullity of the constitutive act and the status. In this case too, we support the argument from the case of the subsidiary that this sanction is unjustified and disproportionate to the protected interest, which is clearly a private interest which relates to the relationship between the mother-foundation and the subsidiary, and not to a general interest. Also this penalty is inconsistent, as shown above, with the right to freedom of association, being clearly a violation of constitutional provisions. Under above arguments we support the need to repeal this prohibition by the legislature.

**The subsidiary of trade unions**

The legal framework of the establishment and operation of trade unions is given by Law no. 62/2011 - Social Dialogue Law. This law does not provide expressly the possibility of setting up subsidiaries as forms of territorial organization with legal status. Not even the general frame – namely the Civil Code does not have such a rule on how to establish corporate subsidiaries - we could assume that unions are not allowed to set up subsidiaries as legal status created for developing the territorial area of activity. But neither the law no. 62/2011 nor the Civil Code prohibits the establishment of subsidiaries of trade unions. Freedom of association in trade unions is provided by art. 40 para.1 of the Romanian Constitution. Article 9 of the Romanian Constitution shows that trade unions, employers and professional associations are established and operate according to their statutes, under the law. The establishment, organization, operation, reorganization

and closure of the activity of a trade union are regulated by the statute adopted by its members, with the legal provisions according to art. 5 of Law no.62/2011. We must also mention the International Labor Convention no. 87/1948 on freedom of association and protection of the union right which provides for the right of trade unions to organize themselves.

Judicial practice advocates in this respect that the restriction of the right of association cannot be realized except by express legal provisions. As long as the law does not expressly prohibit the right of trade unions to establish subsidiaries as territorial structures with legal status, which means that trade unions may establish, in compliance with art. 6 para. 1 of Law no.62/2011, under the right of freedom of association subsidiary. Consequently, the courts of Romania granted the applications for setting up trade unions subsidiaries as territorial structures with legal status, which is in fact unions which, through the will expressed in the statute, are subordinated to the mother-union. But the ban to establish organizational structures with legal status is not a ban on the right to association and any limitation of this right. Law no.62/2011 enables individuals to establish or join a union, unions to affiliate with a union federation and confederations with federations. Federations or confederations can make from trade unions some territorial unions.

Thus, the existence of a subsidiary is not justified, i.e. a regional structure with legal status of a union when the organization and membership is expressly required by law. Moreover, in the same law, the social dialogue one, on employers' organizations the legislature has expressly provided for their possibility to sett up these territorial organizational structures with or without legal status. If the legislature had allowed the establishment of organizational territorial structures with legal status for unions, he would have provided expressly this way. We believe that based on the right to freedom of association and organization in the Romanian Constitution, trade unions and trade union organizations may establish territorial structures without legal status, the organization in structures with legal status in trade unions is expressly and exhaustively provided by Law no.62 / 2011.

**The subsidiary of employers' organizations**

The establishment of employers' organizations is governed by Law no.62/2011 on social dialogue. Art. 55 para.2 of this law stipulates that employers' organizations may establish their own territorial organizational structures, with or without legal status. This own territorial organizational structure with legal status is in fact known as subsidiary but can also bear a different name. Unlike associations and foundations established under Ordinance no.26/2000, in the case of subsidiaries of employers' organizations we do not have the requirement of the existence of the same name with the mother-employers' organization. The subsidiary of the employers' organization is established under art. 58 of Law no.62/2011, that requires employers' organization the decision of establishing the subsidiary, the process of setting up the subsidiary, its status, the senior executive member list, and the establishment proof. Since the establishment, organization, operation and dissolution way of an employers' organization or its subsidiary is regulated by the statutes adopted by its members lawfully, this status regulates the relations between the subsidiary and the mother-employers' organization without having, in this situation, legal limitations related to the minimum number of members of the management body to allow the subsidiary to adopt autonomous lines from its mother-organization.

*The subsidiaries of political parties*

Political parties according to art. 1 of the Law no.14/2003 as amended (Law on Political Parties) are political associations of voting Romanian citizens, which freely participate at the formation and exercise of their political will, fulfilling a public mission guaranteed by the Constitution. They are legal entities of public law. Art. 12 of Law no.14/2003 sets forth that political parties can have subregional organizations that have the minimum number of members required by statute, with the possibility of these bodies to represent the party against third parties at the local level and the possibility of opening accounts. We do not have the name subsidiary in Law no. 14/2003, this term being adopted by political parties in their statutes in terms of organization led by a central structure. Therefore, we cannot talk about the political party subsidiary in the direction of the organization with legal status, called subsidiary being given by the party statute, the correct term being local organization - county, municipal, town etc.

**The subsidiaries of religious organizations**

The legal framework on freedom of religion and the religious units of worship is given by Law no. 489 / 2006, republished in the Official Gazette no. 201/2014. Religious communities shall be free to choose the organizational structure that of cult, association or religious group. Cults and religious associations are structures with legal status, while religious groups are structures without legal status. Religious associations acquire legal status by registration in the Register of Religious Associations at the graft court in whose territorial jurisdiction they are established. According to art. 43 of Law no. 489/2006 religious associations can establish subsidiaries with legal status, the conditions being those for the establishment of a religious association, namely the registration act, the articles of association, the profession of faith and status, the documents for the headquarters and initial patrimony, the advisory opinion of the Secretary of State for Cults, and the proof of availability of name issued by the Ministry of Justice. There are no restrictions on the use of other names of the subsidiary towards mother-association, the only restriction being that the name not to be identical or similar to that of a church or other recognized religious association.

The organization and management is left up to the members.

In case in which the religious association has an activity of at least 12 years in Romania and the adhesions of a number of Romanian citizens residing in Romania at least equal to 0.1% of the population, it may require the recognition of the quality of worship. In order to recognize the status of religious association an application must be submitted to the State Secretary for Cults where besides the above mentioned evidence it must submit a confession of faith and the status of organization and functioning, including: the name of religion, its structure as a central and local organization, the driving, management and control way, the representing organs, the way of establishing and dismantling of cult units, the status of its employees, and the provisions of that specific cult. Within 60 days of the filing date, the State Secretary for Cults submits the Government the documentation for recognizing the cult, accompanied by its advisory opinion, drawn on the submitted documentation. Within 60 days from the receipt of the notice, the Government shall decide on the application, by decision of recognition or by motivated rejection. On the subsidiaries of religious cult in the Law no.489/2006 we find, for the first time in Romanian legislation, the subsidiary title with and without legal status. Thus, art.14 para.2 of the law, we have the provision according to which religious

establishments, including their subsidiaries without legal status, are established and organized by cults according to their statutes, rules and canonical codes.

**Conclusions**

The diversity of regulations of intern law generates, as we have shown, confusion about the definition of subsidiary as an organizational structure with legal status, economic dependent of the founding company. Thus the different regulations of the legal entity's subsidiary depart from the economic enterprise's subsidiary with legal status but which can be completely independent to the subsidiary of a cult unit without legal status.

Romanian law legislature aimed to leave a free way of action for the structures with legal status that can lead to strict formalism which is about establishment without real later economic or organizational control. In other words, in most cases the subsidiary, as oranizational structure that aims territorial expansion of the activity, represents only an extension of the territorial area by only using the name of the founding organization. The interpretation of the status of economic dependence is done by fiscal institutions through reference to the status of the affiliated person and not to the name of the subsidiary. Thus, in terms of tax authorities what is important is not the name of the subsidiary but the transfer price at which the tangible or intangible goods are assigned, or if service is provided between the persons defined as related parties.

According to art.7 index 5 section 26 letter c and d of the Fiscal Code (Law 277/2015 as amended) it is considered that a legal entity is affiliated with another person if at least it holds, directly or indirectly, including the holdings of affiliated persons, at least 25 % of the value / number of shares or voting rights to another legal entity or if effectively controls that legal entity or another legal entity affiliated with another legal entity if a person owns it, directly or indirectly, including the holdings of the affiliated persons, at least 25% of the value / number of shares or voting rights to another legal entity or if it effectively controls that legal entity.

The definition of affiliated legal entity is similar to the definitions of the subsidiaries in the legal systems of other european countries that focus not on the way of establishment, but on the character of economic dependence between the subsidiary and the mother-organization. Regarding the name subsidiary in tax law, the Romanian legislator has transposed the provisions of Directive 2011/96/EU, Common system of taxation for mother-companies and their subsidiaries from Member States referring strictly to the situation of the subsidiaries in EU member states which are located in another state than the state where the headquarters of the mother-organisations are. We considered it necessary to have a uniform definition of the subsidiary across the Romanian legislation as a stand-alone company with legal entity, economically dependent on the founding organization, the latter having the right to appoint or remove the majority of the administrative organs of the subsidiary. We also appreciate that in respects of non-profit foundations and associations established under Ordinance no.26/2000 it is necessary to eliminate the mandatory existence of the same name between subsidiary and mother-association or foundation, under the penalty of absolute nullity of the establishment act and statute, as being a rules that violates the right to free association provided by the Romanian Constitution.

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# Romania's Democratic Consolidation in the Last Decade

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**Abstract**
The assumption of the paper is that (a) in comparison with the previous decade, Romania's degree of democratic consolidation did not significantly changed, it still reflecting problems in terms of the rule of law, control of corruption, effective formal and informal institutionalization and behavior of actors, government accountability mechanisms; (b) in comparison with other post-communist new democracies, at present European Union's member states, Romania ranks in the class of apparently consolidated liberal democracies. As such, the paper focuses on (a) the category of democratic consolidation, on the five concepts of democratic consolidation – the avoidance of a democratic disintegration, the avoidance of a democratic erosion, institutionalization of democracy, the completion of democracy and the deepening of democracy –, and especially on the distinctions achieved by Guillermo O'Donnell between the informally and formally institutionalized countries; (b) the measurement of Romania's democratic consolidation in the last decade in comparison with other new democracies, former communist countries; (c) the classification and interpretation of the results.

**Keywords:** *procedural democracy, substantive democracy, electoral democracy, liberal democracy, democracy formal and informal institutionalization, democratic consolidation*

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**Democratic consolidation**

The democratic consolidation is one of the most relevant indicators of the positive evolution of all types of democratic regimes. It is even more important for the European countries, exponents of the "third wave of democratization" occurred in the early 1990s, inasmuch as there is still much confusion as respects the identity of their types of political regimes, particularly regarding the semi-presidentialism – the political regime of Romania and another twelve Central and Eastern European countries –, and the functioning mode of power in these types of regimes.The "consolidation" of a liberal democracy is considered the subsequent stage of what is generally called in the literature the "transition" stage from totalitarianism or authoritarianism to democracy, the both stages representing the "democratization" – the overall process of regime change from beginning to end (Pridham and Vanhanen, 2003: 2) with "a multilevel or multidimensional" dynamics (Pridham, 2000: 4) as well as its outcome. If the "democratic transition" circumscribes the regime change from the point when the previous totalitarian/authoritarian system begins to collapse until the situation in which, with a new constitution, "the democratic structures become routinized and the political elites adjust their behaviour to liberal democratic norms", the "democratic consolidation" – a lengthier process, with wider and possibly deeper effects – "involves in the first instance the gradual removal of the uncertainties that invariably surround transition and then the full institutionalization of the new democracy, the internalization of its rules and procedures and the dissemination of democratic values" (Pridham and Vanhanen, 2003: 3). If the "incipient democracies" come to be "stuck in transition" and do not succeed in establishing consolidated and functioning democratic regimes, they can become "illiberal" (Zakaria, 1997), "delegative" (O'Donnell, 1996), or "hybrid" regimes (Diamond, 2002), namely "ambiguous systems that combine rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits" (Ottaway, 2003, apud Menocal et al., 2008: 30).

As such, fundamental to democratization studies (to "transitology and consolidology") is the major divide between the *formal or procedural* conception on democracy and the *substantive* conception on democracy. Regarding the *formal or procedural democracy*, the most influential presentation is considered (Pridham, 2000: 4) Dahl's concept of' "polyarchy." It stands as reference descriptor for "the democratized regimes" or "the regimes that have been substantially popularized and liberalized, that is, highly inclusive and extensively open to public contestation" (Dahl, 1971: 8). Dahl defined the polyarchy as "a kind of regime" "in which power and authority over public matters are distributed among a plurality of organizations and associations that are relatively autonomous in relation to one another and in many cases in relation to the government of the state as well" (Dahl, 1984: 237), a type of regime that has as key characteristic "the continuing responsiveness of the government to the preferences of its citizens, considered as political equals" (Dahl, 1971: 1). According to Dahl, in order for a government to be responsive to the preferences of its citizens there are necessary three conditions: "all full citizens must have unimpaired opportunities to formulate their preferences," "to signify their preferences to their fellow citizens and the government by individual and collective actions" and "to have their preferences weighed equally in the conduct of the government" (Dahl, 1971: 2). Dahl's assumption was that for these three opportunities to exist among a large number of people "the institutions of the society must provide at least eight guarantees": freedom to form and join organization, freedom of

expression, right to vote, eligibility for public office, right of political leaders to complete for support and votes, alternative sources of information, free and fair elections, institutions for making government policies depend on votes and other expressions of preference (Dahl, 1971: 3). The renowned American author considered also that these eight guarantees "might be fruitfully interpreted as constituting two somehow different theoretical dimension of democratization": (1) the extent of permissible opposition, public contestation, or political competition and (2) the right to participate in public contestation (Dahl, 1971: 4), the right to vote in free and fair elections partaking of both dimensions. In contradistinction, the *substantive democracy* "goes beyond" the *formal democracy* "in demanding key areas in which the quality of democracy may be tested" and consolidated by regulating the power relations in order to "maximize the opportunities for individuals to influence debates about the key decisions that affect society" (Pridham, 2000: 4). As such, in relation to the democratic consolidation of the "new polyarchies" O'Donnell considered that "other attributes need to be added to Dahl's list" (O'Donnell, 1996: 35). So, in the case of various newly democratized countries the democratic consolidation is defined as *institutionalization* of the intermittent elections and of the complex organizations, basically the Executive, Parliament, parties, and the judiciary, highly formalized by detailed and explicit rules (O'Donnell, 1996: 34-35). A fully *formal institutionalization* – of the rules and institutions – is considered as being realized when the behavior of the individuals in institutions and of the individuals interacting with institutions *fits with the rules*. As Philippe Schmitter pointed out, the democracy institutionalization represents "the 'normal' and 'natural' order", the structuring, routinization, stabilization of patterns of interaction and of constant and autonomic institutions in relation to the changes brought about from outside (Schmitter, 1988: 10). Essentially, the democracy institutionalization represents "the internalization" or "appropriation" at institutional and inter-individual levels of a democratic motivating behavior. Generically, the *formal* institutionalization is parallel with a highly *informal* institutionalization – of some influential rules, of a permanent and pervasive *particularism* or *clientelism*. The *particularism* represents various forms of "non-universalistic relationship, ranging from hierarchical particularistic exchanges, patronage, cronyism, and favors to actions that, under the formal rules of the institutional package of polyarchy, would be considered corrupt" (O'Donnell, 1996: 40). The *corrupt character of particularism*, of the concepts and practices (neo-patrimonial and delegative) of political leading is determined by the violation of an essential principle of the formal institutionalization of polyarchies, namely the observance of the "normative, legal and behavioral distinction between public and private spheres," by the infringement of the "universalistic orientation of a version of public good" by those who have leading roles in the state institutions. The *consolidation* occurs when democracy "becomes the only game in town" (Linz, 1990: 156), when the particularism is not an important part of the regime, when is prevented any caesaristic, plebiscitarian Executive which erodes "the horizontal accountability" of powers, favours the generalized lack of control, authoritarian practices, and bias in favor of highly organized and economically powerful interests. According to Schmitter, the consolidation involves the process of converting patterns into structures (Schmitter, 1988: 32-33) or of converting "the accidental arrangements, prudential norms, and contingent solutions… into relationships that are reliably known, regularly practiced and normatively accepted by those persons or collectivities defined as the participants/citizens/ subjects of such institutions" (Schneider and Schmitter, nd: 5). This transforming ensures "channels of access, patterns of

inclusion, resources for action and norms about decision-making conform to one overriding standard" of citizenship (Schneider and Schmitter, nd: 5). In a more systematic defining, the four analytical levels of a theory of democratic consolidation (explanatory model) are considered to be: (1) *constitutional consolidation* or the macrolevel – the level of structures and constitutionally established institutions: the head of state, the executive, legislative, and judicial branches of government, and the electoral system; (2) *representative consolidation* or the mesolevel of collective actors – parties and interest groups; (3) *behavioral consolidation* or the second mesolevel – the level of informal political actors, "the potentially political ones": the armed forces, major land owners, capital, business, and radical movements and groups with potential veto power which can pursue their interests either inside, or outside, or against democratic norms and institutions; (4) *democratic consolidation of the political culture* or the micro-level, the citizens and their culture as the socio-cultural substructure of democracy (Merkel, 2008: 14). In a teleological perspective, the defining of the democratic consolidation includes five concepts: avoiding democratic breakdown, avoiding democratic erosion, institutionalizing democracy, completing democracy, and deepening democracy. The first two, "negative concepts," variants of "negative" consolidation or states of "non-consolidation" – in O'Donnell's inspired terms, "*rapid deaths*" *of democracy* and "*slow deaths*" ("*salient regressions*") *of democracy* – express "the democratic survival," avoidance of regressions and democratic stability. If "the *rapid death*" is identified with the classical coup politics, "the *slow death*" is described as "a progressive diminution of existing spaces for the exercise of civilian power and the effectiveness of the classic guarantees of liberal constitutionalism" (O'Donnell, 1992: 19), as a "slow and at times opaque" (O'Donnell, 1992: 19) "process of successive authoritarian advances" (O'Donnell, 1992: 33), "a silent regressions" which in the end would lead to a *democradura*, a repressive façade democracy (O'Donnell, 1992: 19, 33, apud Schedler, 1997: 15-16). Schedler states that, subsequent to the publication of O'Donnell's article, the reality has ironically shown that "quite some new democracies do not face the danger any more of retroceding to semidemocratic rule – because it is there were they have moved to already" (Schedler, 1997: 16). The Austrian author also cites Samuel Huntington's assertion that with contemporary neo-democracies, "the problem is not overthrow but erosion: the intermittent or gradual weakening of democracy by those elected to lead it," for instance, by "executive led-coups" (Schedler, 1997: 16). The last two concepts – completing democracy, and deepening democracy – "positive notions" indicate "the democratic progress" and the advances in the *quality of democracy* (Schedler, 1997: 10-11). Specifically, the positive formulations of democratic consolidation indicate that the purpose is the obtaining of continuity, permanence, strengthening, sustainability and irreversibility of democracy. The deepening of democracy, as ended transition from the *electoral* to *liberal democracy*, appears as being the stage of democracy wherein "all the protagonists, institutional (e.g. the presidency, the government, parliament) as well as political (e.g. parties and the party system), have achieved significant political stability", the decision-making is effective, exists a fair amount of agreement among the political elites and "there is no undemocratic challenge by significant political actors against the rules of the game" (Pasquino , 2007: 23-24).

**On the methods employed to measure the democratic consolidation**

The decantation of the degree of democratization and democratic consolidation in Romania follows some of the methods employed in the recent decades in the Western

reference research, namely (1) the quantitative measurement, description and analysis, and (2) the comparative analysis. Given the aim of the paper, to measure the variation of democratic consolidation over a decade in the same country and to analyse it by reference to the variation across the region – the countries found in the same type of evolving process –, the quantitative analysis employs empirical indicators and scales provided by renowned statistical research institutions assessed in the literature as accurate, non-deficient and non-distorting. Since the process of democratic consolidation, consistently conceptualized, is much less operationalized in the literature (V. Schneider and Schmitter, nd.: 1), in order to avoid the imprecision in the operationalization of the democratic consolidation process, the paper selects and correlates the indicator of several measurements and their scores. The first method of measurement used in the paper order is that proposed by Carsten Q. Schneider and Philippe Schmitter, a strategy that measures and analyzes the consolidation of democracy in six Central and Eastern European countries between 1980 and 1999 using data matrix of *Economist Intelligence Unit* (EIU). The measurement of democratic consolidation is related by that of the liberalization of autocracy and with the modes of the transition to democracy. The scales obtained are relevant both for the pace of the two democratic processes and for the similarity of their degree of success. The illustration of the variation of democratic consolidation degree in the last decade is obtained by using, as a second method, several parallel measurements covering the interval 2013-2016 and sixteen Central and South-Eastern European countries. The measurements are selected from the annual reports of *Freedom House*, *Bertelsmann Stiftung*, *Economist Intelligence Unit*, *World Bank Global Democracy Ranking* and, more comprehensive, *Worldwide Governance Indicators*. The analysis of their ratings involves not only the comparison of the scores of temporal democratic consolidation but also those of national and zonal one. The third method employed in this democratic consolidation research is a strategy of measuring the public perceptions and attitudes over the legitimacy of the regime and the fundamental institutions and values of democracy, as are recorded in barometers of public opinion. The paper presents data, retrieved from *World Values Survey* Wave 6 and *Standard Eurobarometer*, regarding the confidence in government, political parties, parliament, churches, armed forces, press and justice system of the Romanian public and, for comparison, of the other nine Central and South-Eastern European publics, as well as the attitudes of Romanians towards Romanian political system.

## Measuring democratic consolidation

I. A comprehensive strategy for measuring the democratic consolidation is that proposed by Carsten Q. Schneider and Philippe Schmitter. The components of democratization are measured by 12 indicators that capture especially the behavior of political actors, aiming the structural aspects of the exercise of power, the rules of executive forming and of sharing decision-making powers with local authorities, the formal and informal agreement on the rules of associations forming and social movements behavior, the rules which establish the property right and the access to media. This survey uses the data matrix of *Economist Intelligence Unit* (EIU), presenting the scores on the 12 items as a comparative analysis of the Liberalization of Autocracy (LoA) and the Consolidation of Democracy (CoD) in six Central and Eastern European (CEE) countries – the Bulgaria, Czech Republic, Hungary, Poland, **Romania** and Slovakia. Schneider's and Schmitter's complex strategy of measurement is to relate the consolidation of democracy (CoD) scale with the liberalization of autocracy (LoA) scale and with the

"intermediate" scale for measuring the characteristics of the mode of transition (MoT). According to the cumulative LoA scores, Romania, as well as Bulgaria, came with little or no evidence of liberalization prior to 1989, but "once the process started, the countries very quickly attained a full score of 7" and "by the end of period, all of the CEE countries had converged upon the same 'perfect' score" (Schneider and Schmitter, nd.: 18). According to the raw scores of the MoT, Romania "fits the syndrome" of "**successful imposed transition** in which no public negotiations with opponents took place, some open factionalism within the ruling elite was acknowledged and all the electoral items were positive" (Schneider and Schmitter, nd.: 21), Hungary and Poland being the only countries with "**successful pacted transitions**" and Bulgaria with a "**less successful pacted transition**".

**Table 1. The Twelve Items of the Consolidation of Democracy Scale**

| | |
|---|---|
| C-1 | No significant political party advocates major changes in the existing constitution |
| C-2 | Regular elections are held and their outcomes respected by public authority and major opposition parties |
| C-3 | They have been free and fair |
| C-4 | No significant parties or groups reject previous electoral conditions |
| C-5 | Electoral volatility has diminished significantly |
| C-6 | Elected official and representatives not constrained in their behavior by non-elected veto group within countries |
| C-7 | 1st rotation-in-power or significant shift in alliances of parties occurred within the rules established |
| C-8 | 2nd rotation-in-power or significant shift in alliances of par/ties occurred within the rules established |
| C-9 | Agreement, formal and informal, on association formation and behavior |
| C-10 | Agreement, formal and informal, on executive format |
| C-11 | Agreement, formal and informal, on territorial division of competence |
| C-12 | Agreement, formal and informal, on rules of ownership and access to media |

Source: Schneider, C. Q. and Schmitter Ph. C. (nd), Conceptualizing and Measuring the Liberalization of Autocracy and the Consolidation of Democracy across Regions of the World and from Different Points of Departure, 12 (Figure 3). Retrieved from: http://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/Salamanca2.pdf

The temporal interval in which the democratic consolidation is measured is between 1980 and 2000, and the evaluation score falls between 1 – equivalent of the full fulfillment of any indicator – and 0 (zero) – when the indicator is not fulfilled.

**Table 2. The Cumulative Consolidation of Democracy Scores for All Items: Central and Eastern Europe (1980-1999)**

| | 80-88 | 89 | 90 | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 80-99 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Poland | 0 | 3 | 5 | 7.5 | 8.5 | 9 | 9.5 | 9 | 9.5 | 10 | 11 | 11 | 93 |
| Hungary | 0 | 1 | 6.5 | 6.5 | 6.5 | 6.5 | 9 | 9 | 10 | 10 | 11 | 11 | 87 |
| Czech | 0 | 0 | 6.5 | 7.5 | 8 | 8 | 8.5 | 8.5 | 9 | 9 | 10.5 | 10 | 85.5 |
| Bulgaria | 0 | 0 | 5 | 8 | 7.5 | 6 | 8 | 10 | 10 | 7.5 | 10.5 | 10.5 | 83 |
| Slovakia | 0 | 0 | 7.5 | 7.5 | 7.5 | 7.5 | 7.5 | 7.5 | 8 | 8 | 10.5 | 10.5 | 82 |
| **Romania** | 0 | 0 | 3 | 5.5 | 7 | 7 | 7 | 7 | 10.5 | 10.5 | 10.5 | 10.5 | **78.5** |

Source: Schneider, C. Q. and Schmitter Ph. C. (nd), Conceptualizing and Measuring the Liberalization of Autocracy and the Consolidation of Democracy across Regions of the World and from Different Points of Departure, 23. Retrieved from: http://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/Salamanca2.pdf

The findings infirm the expectation that a rank-order correlation exists between the aggregate LoA and CoD scores. As such, not all the countries that had been most successful in liberalization did also best in the consolidation of their democracies. Hungary illustrates this situation. Contrariwise, Bulgaria illustrates the case of a more success democratization than liberalization. Romania, as well as Czech Republic and Slovakia, are cases of consistency both in liberalization of autocracy and in consolidation of democracy. Romania occupies in this six countries scale the last place for the interval 1980-1999, but its scores for the last four years of the interval are constant high – 10.5. II. Another strategy is the comparative measuring of the transition from the electoral democracy to the liberal democracy, and therefore of the degree of democratic consolidation expressed by different criteria: the compliance of the rights and civil freedoms; the rule of law; the balance and control of public authorities; the institutionalization of the party system; the functionality of public institutions. This type of measuring uses annual reports of certain specialized institutions such as: *Freedom House*, *Bertelsmann Stiftung*, *Economist Intelligence Unit*, or *World Bank Global Democracy Ranking*. In the following, there are presented some findings of these surveys for the interval 2013-2016.

**Table 3. Indicators of the Current State of Democracy in Central and South-Eastern European Countries in *Freedom House's* and *Bertelsmann Stiftung's* Ratings**

| Country | Freedom House Rating | | | | Bertelsmann (Political) Transformation Index (value) | | |
|---|---|---|---|---|---|---|---|
| | 2013 | 2014 | 2015 | 2016 | 2012 | 2014 | 2016 |
| Albania | 3.0 | 3.0 | 3.0 | 3.0 | 7.25 | 6.70 | 6.95 |
| Bosnia and | 3.0 | 3.5 | 3.5 | 4.0↓ | 6.40 | 6.35 | 6.30 |
| Bulgaria | 2.0 | 2.0 | 2.0 | 2.0 | 8.65 | 8.35 | 8.15 |
| Czech Republic | 1.5 | 1.5 | 1.0 | 1.0 | 9.65 | 9.60 | 9.45 |
| Croatia | 1.0 | 1.0 | 1.5 | 1.5 | 8.40 | 8.45 | 8.40 |
| Estonia | 1.0 | 1.0 | 1.0 | 1.0 | 9.55 | 9.70 | 9.70 |
| Hungary | 1.5 | 2.0 | 2.0 | 2.5↓ | 8.35 | 7.95 | 7.60 |
| Latvia | 2.0 | 2.0 | 2.0 | 1.5↑ | 8.80 | 8.75 | 8.75 |
| Lithuania | 1.0 | 1.0 | 1.0 | 1.0 | 9.35 | 9.25 | 9.30 |
| Macedonia | 3.0 | 3.5 | 3.5 | 3.5 | 7.60 | 7.20 | 6.65 |
| Montenegro | 2.5 | 2.5 | 2.5 | 3.0↓ | 7.60 | 7.90 | 7.85 |
| Poland | 1.0 | 1.0 | 1.0 | 1.5↓ | 9.20 | 9.50 | 9.50 |
| **ROMANIA** | **2.0** | **2.0** | **2.0** | **2.0** | **8.55** | **7.90** | **8.15** |
| Serbia | 2.0 | 2.0 | 2.0 | 2.5↓ | 8.05 | 7.95 | 7.85 |
| Slovakia | 1.0 | 1.0 | 1.0 | 1.0 | 9.00 | 9.05 | 8.85 |
| Slovenia | 1.0 | 1.0 | 1.0 | 1.0 | 9.65 | 9.30 | 9.20 |

Sources: *Freedom in the World 2017*, 20-24. Retrieved from: https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf
***Bertelsmann Stiftung's Transformations Index*.** Retrieved from: https://www.btiproject.org/en/index/status-index/

*Freedom House Rating* (FHR) expresses the average between political rights (PR) and civil liberties (CL); 1 represents the most free and 7 the least free rating. *Freedom House Rating* indicated as having as country's status in 2016 the "electoral democracy" all the 15 Baltic, Balkan and Central European countries, except Macedonia, as

"consolidated democracies" Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia; as "semi-consolidated democracies" Bulgaria, Croatia, Hungary, Montenegro, **Romania**, Serbia; as "transitional governments or hybrid regimes" Albania, Bosnia and Herzegovina, Macedonia. *Bertelsmann Democracy Status or State of political transformation* (BT) evaluates – maximum being 10 – the stateness, political participation, rule of law, stability of democratic institutions, political and social integration. According to *Bertelsmann Democracy Status* 2016, "democracies in consolidation" are Estonia, Czech Republic, Poland, Lithuania, Slovenia, Slovakia, Latvia, **Romania**, Croatia, Bulgaria; and "defective democracies" Hungary, Montenegro, Serbia, Macedonia, Albania, Bosnia and Herzegovina.

**Table 4. Indicators of the Current State of Democracy in Central and South-Eastern European Countries in *Economist Intelligence Unit's* and *Global Democracy's* Ratings**

| Country | Economist Intelligence Unit Index of Democracy | | | | | Global Democracy ranking 15 December 2015 | | |
|---|---|---|---|---|---|---|---|---|
| | 2012 | 2013 | 2014 | 2015 | 2016 | Total score 2010-2011 | Total score 2013-2014 | Rank Change loss /gain |
| Albania | 5.67 hybrid | 5.91 hybrid | 5.67 hybrid | 5.91 hybrid | 5.92 hybrid | 57.2 | 59.7 | +3 |
| Bosnia & Herzegovina | 5.11 hybrid | 5.78 hybrid | 4.78 hybrid | 4.83 hybrid | 4.87 hybrid | 51.5 | 51.5 | -4 |
| Bulgaria | 6.72 | 7.10 | 7.37 | 7.14 | 7.01 | 64.4 | 65.0 | 0 |
| Croatia | 6.93 | 7.04 | 6.93 | 6.93 | 6.75 | 67.8 | 67.6 | +1 |
| Czech Republic | 8.19 full | 8.17 full | 7.94 | 7.94 | 7.82 | 70.7 | 71.3 | -1 |
| Estonia | 7.61 | 7.74 | 7.74 | 7.85 | 7.85 | 71.9 | 74.5 | +3 |
| Hungary | 6.96 | 7.53 | 6.90 | 6.84 | 6.72 | 68.1 | 67.6 | -2 |
| Latvia | 7.05 | 7.37 | 7.48 | 7.37 | 7.31 | 69.0 | 71.2 | +2 |
| Lithuania | 7.24 | 7.43 | 7.54 | 7.54 | 7.47 | 70.2 | 71.8 | +5 |
| Macedonia | 6.16 | 6.33 | 6.25 | 6.02 | 5.23 hybrid | 54.8 | 54.4 | -10 |
| Montenegro | 6.05 | 6.57 | 5.94 hybrid | 6.01 | 5.72 | | | |
| Poland | 7.12 | 7.30 | 7.47 | 7.09 | 6.83 | 70.3 | 71.3 | 0 |
| **ROMANIA** | **6.54** | **7.06** | **6.68** | **6.68** | **6.62** | **63.7** | **64.5** | **-1** |
| Serbia | 6.33 | 6.62 | 6.71 | 6.71 | 6.57 | 60.4 | 61.2 | +2 |
| Slovakia | 7.35 | 7.40 | 7.35 | 7.29 | 7.29 | 67.9 | 68.3 | +2 |
| Slovenia | 7.88 | 7.96 full | 7.57 | 7.57 | 7.51 | 74.2 | 76.1 | +1 |

Sources: *Economist Intelligence Unit Index of Democracy.* Retrieved from: http://pages.eiu.com/rs/783-XMC-194/images/Democracy_Index_2016.pdf
*Global Democracy: The Democracy Ranking of the Quality of Democracy*. Retrieved from: http://democracyranking.org/ranking/2015/data/Scores_of_the_Democracy_Ranking_2015_letter.pdf

*Economist Intelligence Unit Index of Democracy* (EIU) is based on five categories: electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture. Based on their scores on a range of 60 indicators within these categories, each country is classified – on a scale of 0 to 10 – as

one of four types of regime: "full democracies" (8-10), "flawed democracies" (6-8), "hybrid regimes" (4-6), and "authoritarian regimes" (0-4). In compliance with *Economist Intelligence Unit Index of Democracy* 2015 and 2016, there are not "full democracies" among recently democratized countries. There are indicated as "flawed democracies" Czech Republic, Estonia, Slovenia, Lithuania, Latvia, Slovakia, Poland, Croatia, **Romania**, Serbia, Bulgaria, Hungary, Macedonia, Montenegro, and as "hybrid democracies": Albania and Bosnia & Herzegovina.

*The Democracy Ranking of the Quality of Democracy* (Global Democracy rankings 2010-2011 & 2013-2014) weighs the following political variables: Political rights (Freedom House, 25%), Civil liberties (Freedom House, 25%), Global Gender Gap Report (World Economic Forum, 25%), Press freedom (Freedom House, 10%), Corruption Perceptions Index (Transparency International, 10%), Change of the head of government (last 13 years, peaceful, 2.5%), Political party change of the head of government (last 13 years, peaceful, 2.5%). Each variable averages high/100.0 and low/1.0, except Press freedom in which averages high 1.0 and low 100.0. In the table: green: indicates "Within the highest third of all countries," blue: indicates "Within the medium third of all countries," red: indicates "Within the lowest third of all countries". In *Rank Change: loss/gain* are indicated with green "Country has gained in rank since the previous period": Albania, Croatia, Estonia, Latvia, Lithuania, Serbia, Slovakia, Slovenia; with red "Country has lost in rank since the previous period": Bosnia & Herzegovina, Czech Republic, Hungary, Macedonia, **Romania**; and with white "Country's rank has remained stable over the two periods": Bulgaria and Poland.

**Table 5. Central and South-Eastern European Countries' Current State of Democracy in *Worldwide Governance Indicators***

| Country | Worldwide Governance Indicators | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Voice & Accountability | | | | Rule of Law | | | | Control of corruption | | | |
| | 2012 | 2013 | 2014 | 2015 | 2012 | 2013 | 2014 | 2015 | 2012 | 2013 | 2014 | 2015 |
| Albania | 0.00 | 0.04 | 0.16 | 0.16 | -0.57 | -0.57 | -0.37 | -0.36 | -0.72 | -0.72 | -0.55 | -0.44 |
| Bosnia & Herzegovina | -0.14 | -0.16 | -0.09 | -0.11 | -0.23 | -0.17 | -0.20 | -0.29 | -0.30 | -0.22 | -0.28 | -0.37 |
| Bulgaria | 0.38 | 0.32 | 0.34 | 0.39 | -0.12 | -0.14 | -0.08 | -0.12 | -0.24 | -0.29 | -0.28 | -0.31 |
| Croatia | 0.50 | 0.47 | 0.49 | 0.50 | 0.21 | 0.26 | 0.31 | 0.20 | -0.04 | 0.11 | 0.19 | 0.20 |
| Czech Republic | 0.94 | 0.96 | 1.03 | 1.02 | 1.01 | 1.00 | 1.14 | 1.12 | 0.23 | 0.19 | 0.32 | 0.39 |
| Estonia | 1.09 | 1.09 | 1.17 | 1.17 | 1.13 | 1.16 | 1.36 | 1.33 | 0.98 | 1.11 | 1.27 | 1.25 |
| Hungary | 0.74 | 0.73 | 0.54 | 0.52 | 0.60 | 0.56 | 0.50 | 0.40 | 0.28 | 0.29 | 0.13 | 0.10 |
| Latvia | 0.74 | 0.74 | 0.83 | 0.82 | 0.76 | 0.75 | 0.87 | 0.79 | 0.15 | 0.26 | 0.34 | 0.40 |
| Lithuania | 0.91 | 0.92 | 0.96 | 0.97 | 0.81 | 0.79 | 0.91 | 0.98 | 0.31 | 0.36 | 0.48 | 0.56 |
| Macedonia | -0.01 | -0.04 | -0.13 | -0.18 | -0.24 | -0.20 | -0.03 | -0.17 | 0.02 | 0.02 | 0.09 | -0.13 |
| Montenegro | 0.23 | 0.18 | 0.18 | 0.15 | -0.01 | 0.02 | 0.07 | 0.03 | -0.10 | -0.25 | -0.01 | -0.09 |
| Poland | 1.04 | 0.97 | 1.10 | 1.04 | 0.74 | 0.79 | 0.82 | 0.80 | 0.58 | 0.55 | 0.59 | 0.58 |
| ROMANIA | **0.30** | **0.29** | **0.38** | **0.43** | **0.02** | **0.11** | **0.15** | **0.15** | **-0.26** | **-0.19** | **-0.14** | **-0.05** |
| Serbia | 0.18 | 0.29 | 0.23 | 0.23 | -0.39 | -0.34 | -0.16 | -0.09 | -0.31 | -0.27 | -0.19 | -0.24 |
| Slovakia | 0.95 | 0.94 | 0.98 | 0.97 | 0.46 | 0.45 | 0.47 | 0.48 | 0.07 | 0.06 | 0.12 | 0.15 |
| Slovenia | 0.98 | 0.98 | 0.95 | 0.95 | 0.98 | 0.97 | 0.98 | 0.95 | 0.81 | 0.70 | 0.69 | 0.73 |

Source: *Worldwide Governance Indicators*. Retrieved from: http://info.worldbank.org/governance/wgi/#reports

*Worldwide Governance Indicators* (WGI) represent "one of the largest compilations of cross-country data on governance publicly available" ("a survey of surveys approach"). They are aggregates of various perception-based indices ("unobserved components model"), of several hundred individual underlying variables, taken from 35 data sources from 33 organizations around the world. They "capture perceptions of fundamental governance concepts" and report on six key dimensions of governance: Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law, Control of Corruption. In this paper there are selected only three of them: *Voice and Accountability*, which "captures perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association and a free media", *Rule of Law*, which "captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence", and *Control of Corruption*, which "captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as 'capture' of the state by elites and private interests." (WGI, http://info.worldbank.org/governance/wgi/#doc). Governance score estimates the governance measured on a scale from approximately -2.5 to 2.50. Higher values correspond to better governance. Level 0 (zero) is taken for the perception of the rule of law functioning.

**Tabel 6. Romania on Several Indicators**

| | Absolute scores | Scale | Higher score is |
|---|---|---|---|
| **FHR** | **2.0** | 1-7 | Worse |
| **BTI** | **8.15** | 0-10 | Better |
| **EIU** | **6.68** | 0-10 | Better |
| **GDR** | **64.5** | 100-0 | Worse |
| **WGI Voice & Accountability** | **0.43** | -2.50-2.50 | Better |
| **WGI Rule of law** | **0.15** | -2.50-2.50 | Better |
| **WGI Control of corruption** | **-0.05** | -2.50-2.50 | Better |

Source: Author's synthesis

Having an aggregate average index of 2 in *Freedom House*'s evaluation (FHR), equal to that of Bulgaria, Romania can be considered as belonging more to the group of liberal democracies than as occupying a position at the border or outside it, but as a "semi-consolidated country". Countries like the Czech Republic, Hungary, Lithuania, Poland, Slovenia, Slovakia, Estonia, do occupy "almost always" higher positions in the group of liberal democracies ("consolidated").

According to *Bertelsmann (Political) Transformation Index* (BTI) – that evaluates the modes of political representation and mediation between society and state, the political culture, system of political parties, interest groups, citizens' consensus on democratic norms and procedures, the development of social capital and voluntary participation – Romania, as a "democracy in consolidation", is also at the lower limit of the group of liberal democracies.

*Economist Intelligence Unit Index of Democracy* (EIU) survey highlights that, in comparison with other recently democratized countries, Romania, as a "flawed

democracy", minimally satisfies criteria such functionality of the governing and of the party pluralism, social and political integration of the groups in the civil society, the participation and political culture.

In *The Democracy Ranking of the Quality of Democracy* Romania is situated in the medium third of the CEE countries, with a lost in rank since the previous period. In compliance with *Worldwide Governance Indicators* (WGI), Romania has the lowest score for the rule of law criterion, significantly lower than those received by Czech Republic, Poland, and Hungary. In what concerns the horizontal responsibilities (voice and accountability), Romania does not meet the requirements of a consolidated democracy. Romania obtains a value two or three times lower as respects the degree of compliance with the balance and control of public powers (*checks and balances*), in comparison with Slovenia, Slovakia, Estonia, Poland, the Czech Republic, Hungary Latvia, and Lithuania. Also Romania is in first quarter of the most strongly affected countries by corruption.

III. A complementary strategy of measuring the consolidation of the democratic regimes emphasizes the cultural orientation of the citizens and of the political class, reflected in the attitudes, preferences, support or hostility toward the values and institutions of democracy. Barometers of public opinion and the research of culture and political values provide important clues regarding the perceptions and attitudes over the legitimacy of the regime and the fundamental institutions of democracy.

**Table 7. Confidence in Public Institutions Romania 1995-2014**

| | 1995-1999 | 2005-2009 | 2010-2014 |
|---|---|---|---|
| Confidence: The national government | 3.1%<br>A great deal | 2.3%<br>A great deal | 4.4%<br>A great deal |
| Confidence: Political Parties | 2.1%<br>A great deal | 1.2%<br>A great deal | 2.6%<br>A great deal |
| Confidence: Parliament | 2.7%<br>A great deal | 1.4%<br>A great deal | 3.6%<br>A great deal |
| Confidence: Churches | 43.6%<br>A great deal | 58.8%<br>A great deal | 43.0%<br>A great deal |
| Confidence: Armed Forces | 34.7%<br>A great deal | 31.8%<br>A great deal | 27.2%<br>A great deal |
| Confidence: The Press | 6.8%<br>A great deal | 7.6%<br>A great deal | 7.3%<br>A great deal |
| Confidence: Justice System | 12.2%<br>A great deal | 3.6%<br>A great deal | 7.3%<br>A great deal |
| Country is run by a few big interests looking out for themselves or that for the benefit of all the people | 66.3%<br>Run by a few big interests | | 62%<br>Run by a few big interests |
| Life satisfaction | 2.7%<br>Satisfied | 4.3%<br>Satisfied | 13.2%<br>Completely |
| Respect for individual human rights | | 53.7%<br>Not much | 60.7%<br>Not much |

Source: World Values Survey Wave 6. Retrieved from: www.worldvaluessurvey.org/

**Table 8. Confidence in Public Institutions CEE countries, EU's members**

| Country | Political Parties | | | Parliament | | | Government | | | Justice | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 2008 | 2015 | 2016 | 2008 | 2015 | 2016 | 2008 | 2015 | 2016 | 2008 | 2016 |
| Bulgaria | 14 | 13 | 11 | 8 | 14 | 12 | 29,9 | 23 | 24 | 17 | 20 |
| Czech Republic | 15 | 13 | 13 | 16 | 17 | 17 | 20 | 29 | 27 | 36 | 43 |
| Estonia | 15 | 15 | 14 | 37 | 35 | 33 | 48 | 43 | 43 | 59 | 62 |
| Hungary | 13 | 16 | 17 | 16 | 30 | 26 | 16 | 33 | 30 | 36 | 45 |
| Latvia | 9 | 8 | 7 | 9 | 21 | 17 | 16 | 25 | 27 | 33 | 42 |
| Lithuania | 16 | 12 | 8 | 11 | 17 | 10 | 16 | 32 | 24 | 25 | 40 |
| Poland | 11 | 14 | 13 | 13 | 19 | 19 | 20 | 20 | 22 | 36 | 42 |
| ROMANIA | **14** | **12** | **13** | **19** | **17** | **14** | **25** | **23** | **24** | 25 | **35** |
| Slovak Republic | 21 | 16 | 16 | 41 | 29 | 32 | 36 | 33 | 33 | 30 | 29 |
| Slovenia | 20 | 16 | 7 | 34 | 11 | 12 | 40 | 16 | 16 | 30 | 19 |

Sources: *Standard Eurobarometer* 84, Autumn 2015. Retrieved from: http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2098
*Standard Eurobarometer* 85, Spring 2016. Retrieved from: http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2130

The average of confidence in public institutions (political parties, parliament, and government) in 2008-2015 is lower in Romania compared with many other recently consolidated democracies or in the process of consolidation. Low threshold of trust in parties and parliament, particularly in Romania (and not only) is mainly due to the weak parties institutionalization.

**Table 9. Attitudes towards the Romanian Political System Romania 2010-2014**

| Attitude | 2010-2014 |
|---|---|
| Having a democratic political system | 46.6% Very good |
| How democratically is this country being governed today | 7.9% Completly democratic |
| How often in country's elections: Voters are threatened with violence at the polls | 6.9% Very often |
| How often in country's elections: Rich people buy elections | 23.9% Very often |
| How often in country's elections: Voters are bribed | 20.3% Very often |
| How often in country's elections: TV news favors the governing party | 18.4% Very often |
| How often in country's elections: Votes are counted fairly | 22.7% Not at all often |

Source: World Values Survey Wave 6. Retrieved from: www.worldvaluessurvey.org/

The interpretation of the data provided by *World Values Survey* (WVS) and *European Values Survey* (EVS) reveals in Romania a reduced satisfaction in respect of democracy. As such, the values recorded reflect a perception of the political system as a system suffering from serious democratic deficiencies, the perception of a poor representation of the citizens' interests, of an uncertain legitimacy of elections results and of a weak institutional performance of the state. In general, the results reveal a *low level of public confidence in state institutions*. The attachment to the *principles* of democratic government and the support for their practical implementation are obvious, instead "the satisfaction in relation to the government," to the concrete reforms and to the political system record *extremely low levels*. Even in respect of the democratic character of government is expressed a highly lack of satisfaction – as indicates also a report released recently under the aegis of the European Commission (Balász et al., 2015: 75) – and even frustration. The values recorded entitle or justify us to consider the attitudes toward democracy as being relevant to the perception of the political system as suffering from serious democratic deficits, as being "poorly consolidated," namely still "vulnerable" in terms of democracy. Also, these values are relevant to the perception of "the political elite" as corrupt, self-interested, dishonest and ineffective.

**Conclusion**

The empirical evidences concerning the consolidation of democracy process in our country – both at institutional level and at the level of attitudes and behaviours on behalf of the political class and citizens –, the comparing of the position of Romania with those of other recently democratized countries, the factual analysis of the political leadership styles, the presidentialization of power for almost 10 years (2005-2014) and the unfortunate recent evolution in the level of political legitimacy of executive power configures the conclusion that in Romania there are rather uncertainties regarding the democratic accumulation. The turning into routine of the mechanisms of democratic governing exertion or setting up the rule of law is in Romania in point of reaching the minimal consolidation threshold, assimilation of defining traits of liberal democracy, respectively. Moreover, not only does the democratic consolidation process stagnate; in the last few years it is more and more threatened by ever greater authoritarian temptations manifested by actors in key positions who are inclined to return to authoritarian, to non-democratic practices.

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ORIGINAL PAPER

# Our Reform Priorities in Public Administration for a Pro-European Country

**Suzana Mehmedi***

**Abstract**
From the very beginnings of the independence of the Republic of Macedonia a lot of importance and value has been given to adjusting reforms in accordance to the new pluralist democratic conditions and those of the economy. Up to 1999, when the process of reforms was incited, a very small part of the specific engagements was accomplished in terms of improving the functionality of the public administration. The main goal to be reached through the implementation of the reforms in the RM is the development of a democratic society and the development of the economy. The reforms in the public administration take a very important role among other priorities of a country that aspires to become a member and integrate in the EU. The integration does not depend on public administration reforms, but the quality of reforms does accelerate the tempo and strengthens the road of a country towards EU integration. The basic idea is to prove that there is a correlation between these two elements or procedures. The process of integration of RM into the EU is very much dependable, among other things, also from the public administration reforms and if the Republic of Macedonia manages to conduct an efficient reformation of the public administration, it will comply with EU integration criteria faster.

***Keywords:*** *public administration, reforms, integration, RM, EU*

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**Introduction**

Since gaining independence, great significance and value have been attached to the adjustment of reforms in Macedonia on the basis of the new pluralist democratic conditions and the economy. Until 1999, when the process of reform was triggered, very little of the specific engagements were conducted within the frames of improving the functionality of public administration. The main objective aimed at implementation of reforms in Macedonia is to develop a democratic society and strengthen the economy. These objectives are boosted by the need for EU membership as a strategic goal of the Republic of Macedonia, and is one of the requirements for EU membership and establishment of a public administration as professional and contemporary as to be able to support the development and economic competitiveness. As soon as the first national states were established, and since the time of Aristotle, Plato and Machiavelli, the focus was set on organization of the state, including the public administration as well. The control of bureaucratic power is a problem of contemporary politics which is difficult to solve. Basically, every public administration itself is a kind of bureaucracy. The times we live in and all the rapid changes technology and science have organized for in all spheres of life, public administration can not afford to be static and bureaucratic. We should follow the changes in society that occur in everyday life and strive to adapt to the external environment. In order to have a society functioning properly, there must be an effective public administration. Public administration is a service for the citizens, it exists because of our needs for its services. The objective of the public administration is to efficiently execute its tasks aimed at improvement of the quality of life of citizens.

**The significance of public administration reforms in the Republic of Macedonia**

Public administration reforms have been made as terminology to be used or applied in the politics of Southeastern Europe, and exceed other themes that are also current, such as economic reforms, human rights and those of minorities. In other words, public administration reforms are not an area where attention is missing; on the contrary, it increases every day.

In the period from the adoption of the Strategy for Public Administration Reforms in 1999, significant progress was achieved particularly in the civil service system of state institutions, central and local government, as well as in the field of financial management. Today it becomes more and more obvious that the development of an efficient public administration is a prerequisite for the development of a country towards integration in the EU. By inserting these issues among other priorities, the Government is expected to define the capacity to implement the reforms in the public administration and transform the public administration in an effective service to serve the citizens and economic entities. A professional, efficient and modern public administration is a necessary precondition for achieving the strategic goals of the Republic of Macedonia for its EU integration.

The current developments in the country, particularly the role of the public administration, its functionality and effectiveness in the intention to improve and harmonize with that of EU, as well as the reform of the public administration which is both a prerequisite and one of the main objectives for further integration, and the reform development in public administration in the Republic of Macedonia being exactly my topic of interest in this Paper, and above everything, reviewing whether reforms show improvement in the internal system of public administration with the slogan of depoliticized, independent, effective, efficient and modern administration, which will be

the bridge to switch to a smoother way out for faster reforms in the public administration as advocated by the Republic of Macedonia.

Accession negotiations between the EU and candidate countries are divided into 31-35 chapters. Most of these relate, partly or exclusively, to the harmonization of public administration and administrative procedures of the respective countries with EU standards. At the political level, a significant part of the Copenhagen criteria relate to the rule of law, as an important feature of the state structure for the candidate countries (Mehmedi, 2015: 11).

**The values in the public sector as a leading principle for administrative reforms**

It is believed that the paradigm of values in the public sector developed by the authors from the leaderships in the public sector (Moore, 1995:41-57) is the matrix for development of the public sector because of its capacity to comprise both the criteria for governance and principles of management. Management refers to the interaction between the public sector and civil society towards collective decision-making (Castro, Mlikota, 2002). In the concept of values in the public sector, public intervention should be aimed at meeting the needs of citizens in a fair, effective and responsible manner.

The concept of values in the public sector emphasizes the need to achieve a balance between the demands of the democratic political processes and those of the effective management of public resources (Concentrating on the importance of focusing on citizens to deliver public values, this paradigm is useful for guiding civil servants towards achieving economic and social results. In the perspective of public values, public interest comes in the center of civil servants' activities; the role of managers in the public sector is highlighted and it contributes to the democratic processes.).

This requires open access to procurement in the civil service (assessment of the benefits of public and private sector) as well as dedication to the credo of the civil service, as defined by Aldridge and Stoker, with five criteria: culture of work: dedication to services for individuals and the community; capacity for support of a universal approach: special responsibility of the public sector; responsible practices for employment: well trained and motivated personnel which acts professionally and is fairly rewarded; contribution to the wellbeing of the community: recognizing the need to work in partnership with others.

The approach of managing values in the public sector opens an alternative way for running the public sector outside the traditional Weberian Bureaucracy and the new theories for management of the public sector. In circumstances where complexity and uncertainty are permanent characteristics, the concept of values in the public sector requires adaptability and flexibility as key factors which are best concretized through constant evaluation and learning, as creation of policies based on proofs. In this sense, efficiency should be assessed against higher goals, as are social wellness, sustainability and responsibility. The theory of management in the public sector is inspired from the experience of practitioners and managers in the public sector who had felt the need of adjusting the concepts to theories and practices and harmonizing conflict values. Democracy and management should be considered as partners in the process of creation of policies to close the gap between policies and management and convert ideology into reality (Joly, 2011).

Managers in the public sector should manage the processes, people and resources, so that they shall think wider and improve leadership, communication and evaluation.

Human resources have a key role in the implementation of administrative reforms. Civil servants are responsible for designing laws, organizational development, administrative restructuring, creation of policies and implementation of laws (to accomplish these crucial tasks they should be well prepared). In order to ensure sustainability of reforms, a quality policy for human resources is necessary and this requires investing in human capital, knowledge, competences and trust.

Major priorities mentioned in the research of administrative reforms in the Balkan countries are depoliticisation and professionalization of the civil service. The modernization of administrative personnel should concentrate on improving ethic standards in the public sector (This presupposes a major change in individual and social relations from the former political regimes which leads to a "cultural gap" between old and new generations.). Governance should implement the changes in relations and mentality by addressing resistance and fears while new values are consolidated and by persuading people to accept the new standards. Balkan countries have numerous consequences in harmonizing procedures in civil service (In this process Balkan countries need to overcome major barriers, such as poor management of changes, poor skills, lack of experience in project management, standing behind the laws and lack of focus on customers). National laws should be accorded with the principles of the European administrative space. Professionalization of administrative personnel presupposes strengthening the local capacities and structures for training when a meritorious system for human resources is established. Lessons learned from the countries of Central and Eastern Europe in the preparation of the accession process are important for the situation of the Balkan transition: reasons for changes have to be explicit and felt; goals have to be clearly defined and accepted; partnerships for reforms have to be built; local ownership has to be matured; specific models can not be transplanted; legal approach has to be an entry point of the reforms in the civil service; proper alignment of reform steps in order to ensure sustainability.

An example of relevant reform steps is that of Croatia in March 2008 when the country developed a whole strategy for reforms in the public administration for 2008-2011 which was called "Strategy for Reforms in Public Administration" and served as strategic frame towards modernization of the country. The plan of the reforms included the following goals (Kandžija, Mance, Godec, 2010: 105 - 118): strengthening the competences and effectiveness of public administration; enhancing expertise, professionalism, knowledge and transparency; developing electronic administration; reducing the operational costs and simplification of regulations.

The management paradigm of the public sector emphasizes the need to find out new ways of cooperation towards collective decision-making (Stoker, 2006: 41-57). In this context, interdependence of many actors which involve individuals and organizations is constantly increasing. It is believed that policy is crucial for coordination of social demands. Many reports in the Balkan countries underline the importance of political will in achieving real reforms. Real progress in anti-corruptive policies can not be achieved unless there is political will and apathy among the citizens (Igric, 2010: 18-28). Due to the above, coordination of social actors has the greatest importance in the implementation of changes. In order to overpass the lack of citizens' trust in political institutions, it is necessary to show greater transparency of political decisions and administrative procedures, as well as stronger and independent media and judicial authorities (Zuka, 2011: 43-44).

To deal with corruption and ensure democratic political processes, civil society has a key role in achieving political changes, since it is the key actor in the implementation of reforms. Civil society has two major functions in implementing democratization of the society (Miljenko, 2010: 29-31): to follow the steps of the governments in their reforms towards new standards; to motivate support and participation in the European accession processes. Wide participation of interested parties from the civil society may be accomplished only if people engage themselves in a practical manner and at the same time keep ownership over the process of changes. In this context, the role of the guards, that is non-government organizations and media, should be strengthened and supplied with capacity for revision of the reforms by enhancing their expertise and further encourage debates for strategic decisions. The reports of the European Commission on the Balkan accession countries emphasize the importance of civil society in the reform process. The Croatian Progress Report 2010 confirmed the role of civil organizations in promoting and protecting human rights and democracy, but regretted its exclusion from the political process, and their weak capacity to monitor the political development. As far as Serbia is concerned, the Commission informs about the active role of the civil society in social, political and economic life, but for insufficient operational capacity and uneven cooperation with the state, too.

**Management of changes and the public administration**

The changes in the public administration must be permanent. They provide quality of services, efficiency and effectiveness in working and achieving goals. Public administration does not have to stick to the past, not even to the current situation nor routine works which are being implemented now, procedures that functioned sufficiently in the last year do not imply that they will be good enough for this or next year. Today changes happen everywhere. Public administration can not afford itself to be static. If we want to be successful we should embrace the changes as an opportunity to advance and reach results. We should all the time consider ideas and findings in order to identify the areas that need changes and prepare for the future. Changes in the public administration are inevitable. The only safe thing in every organization is changes.

Institutions that are part of the public administration have to be sure that they have established processes to prevent failure of the factor of changes. These processes include assessment of the needs of the organization and awareness of all members of the organization about the foreseen changes. The employees have to recognize the reason for changes and be involved in their implementation. The assessment and interaction of employees are of vital importance since they will reduce the level of resistance and contribute to successful transformation. When implementing changes in the public administration we should have in mind the effects of changes over the behaviour of employees in the organization and the delivery of services provided for the citizens. The governance of the organization should create a vision of the future of the organization in a way that will make the plight in the process of changes be worth the efforts. The vision is of essential importance for long-lasting success. Each programme for changes requires a strategic plan. The process of four steps developed by Kurt Levin and Edgar Shane has proved to be an efficient method for changes: the employees in the public administration have to accept the changes. This can be achieved upon the creation of discontent with the old way of working; this undesired behavior must be abandoned (defrosting), the members of organizations must quit the old way of behaving and replace it with the desired one and motivate themselves for changes; the members of organizations must be presented a

feasible model of the new behaviour (changing). Employees in organizations should be aware of what benefits change will bring along; in addition, changing requires communication and time for people in organizations to understand the change; the new behavior should be strengthened (freezing back), and the employees will accept the new way of working and behaving.

One of the objectives of changes in public administration is creation of a system of public administration which shall work under the principles of equal treatment in exercising and protecting citizens' rights, or public administration - service to citizens. Thus, in the Republic of Macedonia, the relation between the public administration and the work of administrators who believe that they are above the system, and not service to the citizens, should be changed.

Through proper use of the resources and offering quality services to citizens, public administration increases the efficiency and quality of services, but, also the trust of citizens. Goal of any organizational change is allow the organization to work more efficiently, which means: efficient - the degree of utilization of resources against results; effective - whether products and services meet the needs of the client; legitimate – accepted and recognized in areas where it acts; flexible- ability to adapt to changes, and sustainable - ability to conduct activities for a longer term.

Efficiency of public administration is objective of every democratic country. Efficiency of public administration is an indicator of successfulness of the country, and society, too. The work of the public administration and the services it provides to citizens results in the need to increase efficiency. Employees in the public administration are the main resource and the efficiency of public administration might be determined through employees' performances, i.e. through their way of working, the knowledge they have, their motivation, interpersonal communication, cooperation, governance, coordination.

In the last years, the Republic of Macedonia and the rest of the countries of Western Balkan and Eastern Europe, which aspire to become EU and NATO members, have been making huge efforts to increase efficiency and effectiveness of public administration. The need of more responsible and quality public administration is high, because of the harmonization of legal frameworks and reforms related to public administration taken over by the candidate countries. The Republic of Macedonia should show greater flexibility and political understanding towards the issue of public administration reforms, the efficiency of the public service allows the foreign, and domestic investors, to easily achieve their goals. Investments in economy positively affect the changes in public administration which should be professional and able to deliver quality services, at the same time requiring better observance of laws and regulations, and institutional stability. It is these standards required by the public administration that represent an opportunity for creation of favorable business climate and possibility to draw foreign investments ( Zuka, 2011: 55). To date, expectations of citizens, especially of the business community in the Republic of Macedonia, as well as the private sector, are huge due to the increasing competition both from outside and inside. There must be a consensus that the previous orientation towards administration based on rules has to be replaced by general orientation towards results in which the needs of the users or more precisely citizens, play a significant role.

**Administrative harmonization**

EU requirements for administrative harmonization of the candidate countries are an essential step towards their full accession to EU by ensuring compatibility of their public administration systems with a certain set of EU standards, or it comes down to additional, secret way to impose additional political conditions which otherwise would be considered as unacceptable interference in the internal affairs of independent states in order to find out the nature of the various EU requirements either as structural needs or policy measures that impose certain patterns of behavior in the internal political scene of the respective countries, not only during the enlargement process, but also within the European partnership for democracy.

Developing professional and accountable administrative systems in the newly developed countries in the Balkans is not an easy mission. As in other post-communist countries, there is an urgent need for support of weakened public institutions to discontinue former practice of management and finish their basic role of embodiment of law and democracy. The principles of European administrative space are treated as a starting point for administrative reconstruction of the Balkan countries. The criteria for the management of public values that combine efficiency and democratic imperatives to guide the public administration are presented as potential drivers of institutional change in the region. Human resource management and collaboration with stakeholders in civil society are critical factors for the creation of high quality public sector. In addition, the tools of information technology can significantly contribute to greater openness and transparency of public administration when used to enhance the dialogue between the administration and society. European Administrative Space should be seen as "an environment in which national administrations are called upon to ensure homogeneous levels of efficiency and quality of service." It is important to learn from the historical context to be able to study the trends of future organizations and challenges of public service (Grizo, Davitkovski, Pavlovska-Daneva, 2008: 170). The need for collaboration and evaluation is growing rapidly and is connected with the need to control the globalization of the economy.

This new and complex situation leads almost to crisis of the state, because countries are incapable of managing their own territories. This new situation can be resolved through international cooperation, supranational organizations and networking the public sector. But these new trends could result in a review of state power. In Europe specifically, the interaction has increased significantly, which is partly based on the process of unification. The new approach developed after 2000, triggered formally by the Millennium Declaration of the United Nations, aspires to institutionalize and encourage cooperation and strengthen public services in each country. In Europe and especially in the Balkan region, public administration also experienced this new trend, but is still facing challenges. In the future, EU will turn to positive common policies that lead to administrative homogenization. To make this effective, it is necessary to determine the common goals and the measured performances, but not to adopt a common model for all member states.

In a world that is moving and changing, with interrelated activities that create mutual independence, administrative institutions and systems must be flexible and transparent to adapt to these changes and to create the best conditions for the development of social life in all aspects. The expansion of EU has mainly reduced the capacity of the Balkan countries in adapting their administrative structures and models promoted by EU standards which are based on traditions, economic, social, cultural and administrative

values of the Balkan countries in comparison with those promoted in the Western countries and EU.

**European administrative space as a new European challenge for reforms in public administration in the Republic of Macedonia**

European administrative space should be seen as "an environment in which national administrations are called upon to ensure homogenous levels of efficiency and quality of the service". The need for collaboration and evaluation is growing rapidly and is linked with the need to control the globalization of the economy. This new situation can be resolved through international cooperation, supranational organizations and public sector networking. But these new trends could conclude with a review of the state power. In Europe specifically, the interaction has increased significantly, which is partly based on the process of unification. The new approach developed after 2000, triggered formally by the Millenium Declaration of UN aspires to institutionalize and encourage cooperation and strengthen the public services in each country. The European Administrative Space is an area where increasingly integrated administrations practice together the powers delegated to EU in a system of shared sovereignty. The term of "European Administrative Space" has emerged as a central reference in discussions on trends in European governance. There is probably not much sense in searching for an authoritative definition of the term. EAP tends to connect with several interrelated developments, including in particular the emergence of supranational forum of the European administration, new forms of interaction between the supranational and national administrations, the occurrence of "administration of the Union with multiple levels," the impact of the European integration over national administrations, (Goetz, 2000: 211-231) and that which some view as expansion of common administrative standards in the whole of Europe (Siedentopf and Speer, 2003: 9-28). The need for collaboration is constantly growing and is connected with the need to control economic globalization and transnational companies. The new and complex situation leads almost to the crisis of the state, because it seems that states are incapable to govern their territories. Thus, the latest global developments lead us to the definition of administrative law which encompasses mechanisms, the principles, practices and support of social attitudes that promote or otherwise affect the liability of global administrative bodies, in particular by meeting the appropriate standards of transparency, participation, prudent decision-making, and legality, and with an effective review of the laws and decisions made. In traditional concepts, countries agreed through contracts or other agreements, on regulatory norms which they then implement in the country (Cassese, 2005). Processes of agreement of countries and their implementation, however, are subject to domestic mechanisms of political and legal responsibility. The emergence of global and European regulations completely exceeded the ability of these traditional concepts and control mechanisms and legitimate regulatory decisions. The latest developments in international law show the beginning of an era of global rule of law. One of these developments is the European administrative law that arises where European administrative space is seen to arise from the pragmatic needs of cross-border regulation underpinned by the normative aspiration to European rule of law.

**System of prey and principle of merit**

In the Republic of Macedonia, contrary to declarations for the establishment of a merit system of employment, the reality is slightly different where still operates the spoils system - a system of prey, which means that the public administration turns into a politicized factory that produces inadequate and incompatible or less compatible products which affect the society very unprofessionally and risky for the public service.

If the merit system involves reward and advancement of professionalism that they receive with their expertise and education, the spoils system is the opposite of the merit system, inaccuracy and inefficiency in operation. Unfortunately, in such situations very capable and competent persons do not come to the fore, their knowledge, expertise, experience, simply does not allow them established system. In order to fulfill that consistent implementation of the above principles of meritocracy, it requires major reforms in the public service in the country. In particular, significant changes in recruitment of staff in public administration. You have to apply value criteria such as personal values and qualifications, professional competence, should eradicate nepotism and political structure that creates inadequate, inefficient, unproductive and corrupt administration.

The public administration should be the only key player in the creation of conditions for the development of a professional, politically neutral, competent, responsible and stable civil service, as an efficient service to the citizens. It takes true professionals, people who know well the issues to think independently and decide, love the administration, live professionally by it, pleased and happy to be part of the public sector and such a responsible state legal activity. These professionally trained staff will be ready to realize the social obligations to the benefit of socially useful work, and be a service to the citizens and to the society itself. These officers who have the knowledge, and are willing to respect the criteria of morality and values advocated by our society, can lead to improvement of the public service.

**Conclusion**

The administrative capacity of the Republic of Macedonia plays a vital role in integrating itself into the European Union. Scholars and analysts dealing with the study of integration processes, give great commitment and role to the reforms in the public administration of a country and the EU integration. The Balkan countries, including the Republic of Macedonia also give great importance to this issue, although from a broader perspective, the countries of this region are still preoccupied with the economic and political stability. The development of an effective public administration in other countries, such as those in South-East Europe, was completed prior to their integration into the EU, and the public administration of the Republic of Macedonia as a basis for democracy, rule of law and free economy is a real challenge in the future. Nowadays it is very clear that an effective public administration sector is a prerequisite for the further development of the Republic of Macedonia towards EU integration. Including this issue as one of the major priorities, all previous governments of the Republic of Macedonia put an emphasis on the definition of their involvement in the implementation of reforms in the field of public administration and transform it into a service for citizens and economic entities in the country, since a professional, efficient and modern administration is a necessary predisposition to support the objectives of the government of the Republic of Macedonia for full membership in the EU structures. Theoretically, since gaining independence of the Republic of Macedonia, all government bodies have recognized the importance of reforming the public administration. The reforms were seen as one aspect

of the transition to a democratic society, predisposition to economic development and a prerequisite for entry into EU. idat service of citizens and society. These officers have the knowledge, possessing will and who are willing to respect the criteria of morality and values should have in our society, can lead to improved public service..

In addition to the adopted legislation, institutions also have an impact on the process of public administration reform. With the establishment of the Ministry of Information Society and Administration, which is responsible for coordination and adoption of reforms in the public administration, although functioning since 2011, it has taken over some of the responsibilities of the Agency of Administration (former Agency of Civil Servants). With the establishment of the Agency of Civil Servants and the Ministry of Local Government as part of the process of reforms, great institutional importance has been given to reforms in both fields - public administration and decentralization. If some institutions implement the reforms better than others, then emphasis and efforts should be put to remove the bad experiences of non-implementation and focus on a public administration that is efficient and modern.

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ORIGINAL PAPER

# The Constitutionalisation of Codification in Romanian Law

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**Abstract**
The paper aims to explain the role of codification in our societies, in which degree the objectives of rationalization and unification of law are accomplished in Romania and what is the proper way to conceive the legal system of codification in order to counteract the inflation and instability of the law. The study concerns the evolution of codification in post-totalitarian Romania, in relation to the Civil Code and the Criminal Code. From this perspective, the constitutionalisation of the procedures of codification, of the areas that can be codified and the constitutionality control of the codification can lead to finding the equilibrium between the need to change and adapt the legislation and the imperative of predictability and legal security. The solution to the lack of predictability and the incoherence of the law is to create a new category of normative rules, i.e. the codes, protected from political majorities by a special procedure, with certain areas reserved and a procedure of control, all of these guaranteed by the Constitution.

**Keywords:** *codification, rationalization, legal security, constitutionalisation, legal instability*

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## The Social and Political Role of Codification in the 19th Century

Codification played a particular role in the political and social life of the 19th century. From a political perspective, it represented the clearest manner through which power – by now already centralised – gained a type of legitimation which could hardly be contested anymore. The political role of codification is inherently related to the social impact of codes on human relations. The 19th century could be referred to as the "the golden age of codification" (Cabrillac, 2002: 29), only if we take into account the whole process of consolidation of nation states and the process of unification and simplification of legal rule that has brought about an effervescence to which states could not oppose. "Already present in the course of the compilation of rules drafted by royal power in the previous centuries, political factors play an even more prevailing role in the 18th century. The codification accompanies the end of the process of state centralization revolving around an all-powerful sovereign and the disappearance of complex socio-political structures inherited from the last remains of the feudal age" (Cabrillac, 2002: 25).

Thus, the French codification, which opens the way to codifications, is constantly and enthusiastically requested by the actors of political and social life. Article 19 of the Law on judicial organisation (August 16th 1790) provides that "civil laws shall be revised and reformulated by legislators and a general code of simple and clear laws, appropriated to the Constitution, shall be drafted". The ideas that have campaigned for the waiver of the fragmentation and division of law in favour of a unique and coherent system have not spared the Anglo-Saxon environment, to this day impregnated with the prevalence of customary law over written law. It is Jeremy Bentham's case who, "convinced by the superiority of law, militates for the adaptation of a universal and integral code, the Pannomion, drafted in a language which is accessible to all, of absolute completeness which would give leeway to no interpretation" (Cabrillac, 2002: 33).

Driven by the great Napoleonic codification work, European states had to meet the demand for a simple and clear legislation. From an ideological point of view, Germany was divided between the supporters of codification and the supporters of the Historical School, who considered that customary law reflected best the need of the society for justice. Thus, the representatives of the opposed trends concisely expressed the need for reform, present during the age. In *De la nécessité d'un Code civil général pour l'Allemagne*, F. Thibaut fights against legal insecurity as follows: "Let us sum up all of this: any patriot should subsume to the desire that a simple Code, the work of our own power and mastery, be created according to the needs of the people, to root and fortify correspondingly the state of our civil relations and that all German governments, by forming a patriotic league, eternally bestow on the ensemble of the empire the blessings of the same civil constitution" (apud. Duffour, 1996: 54).

On the other hand, in *De la vocation de notre temps pour la législation et la science du droit*, Savigny rejects the idea regarding the confiscation of legislative sovereignty by a state organ, awarding local particularities and case-law the primordial role in the customary and jurisprudential creation of law: "Civil law already presents a determined character, specific to each people, similar to its language, principles and constitution… any law is created in such a way that current language qualifies it as customary, i.e. it is first produced through the use and the opinion of the people and through case-law" (apud. Duffour, 1996: 55).

The French Civil Code of March 21st 1804, which represented the starting point and source of ideological, liberal and conservative inspiration for most European legal

systems and for others as well, triggered a cascade process of codification in the newly formed nation states and in those states which were under French political and cultural influence. This was also the case of the Romanian Civil Code of 1865 which was a natural consequence of the 1859 Union of the Romanian Principalities and which contributed, if not to the union of local customs, at least to the typically Romanian political unification, on the basis of the recognition of a unique source of the rule of law, i.e. the legislator of the new national state.

The notion of codification designates a "body which restores law by putting an end to the plurality of its sources. It particularly designates the movement of transformation of the sources of law which was driven by actions undertaken by modern states, through the crossover from customary law to written law" (Zenati-Castaing, 2011: 356). In the 19th century the code, i.e. the product of codification, received a new definition which "resulted from the Philosophy of Lights and from Iusnaturalism which praised the law as expression of the general will and manifestation of human reason. The code was conceived as a coherent body of rules which reformed existing law, a new conception which would generalise fast" (Cabrillac, 2002: 55). Nonetheless, this body of rules does not confine to its role as instrument, but is rather necessarily "animated by the philosophy of the School of modern natural law, according to which positive law is an attempt to reveal natural law, a type of law which is common to all people, and this revelation can only be performed through the exercise of reason" (Zenati-Castaing, 2011: 356).

Codification pursues the imposition of human reason against all other circumstantial, political or power-related grounds. Hence, the philosophy which has animated codification is based on objectives of systematisation, simplification and unification of different disparate regulations, in order to extract the true meaning of the rules of social conduct and to guarantee legal security. The three essential principles of codification can be synthetically rendered through three generic objectives assigned to it: "To codify means firstly to systematise a scattered legal matter; it then means to accomplish a work of political unification by means of prioritising fundamental values; lastly, it means to guarantee the legal security of citizens against arbitrariness" (Blanco, 1998: 510). Thus, codification is much more than merely a legislative technique; it is "an instrument of Power whose symbolical, political and legal aptitudes go much further than if it were a simple collection of laws" (Blanco, 1998: 510).

**The Transformation of Objectives and of the Social Goal of Codification**

Subsequent to the 19th century codification, marked by a desire for the rationalisation and reformation of law and its sources, the following century witnessed the settling and sedimentation of the work of codification, which led to "an abandonment of the scheme of codification of the 19th century in favour of codifications called 'à droit constant', which consisted of the rational regrouping of existing law without modifying it" (Cabrillac, 2002: 45). Although in certain areas of the law we no longer speak of an original codification, but only about a recodification of the matter for the purpose of the systematisation and updating of primary regulations, the process of codification maintains a certain, almost mythical aura. As regards the objective of the rationalisation of law, extremely valued in the Iusnaturalist age, its place seems to have been replaced by other benefits which codification can bring to public power. Thus, "codification does not limit itself to the science and the ensemble of techniques which ensure the rationalisation of law, it also responds to the challenges of power" (Sakrani, 2008: 462).

Current societies are confronted with changes in the nature of codification, as a result of the priority which state intervention seems to obtain over the practice that society does to law. "The state is no longer content to ratify the law which is produced by civil society, such as it had done until then and as it did on the occasion of codification, it has taken over the task of telling the law. It has complicated law which codification had in mind to contrarily simplify, creating vast spaces of regulation populated with special laws and hence ruining the effect of exhaustiveness which the code was meant to produce. In contrast, it has brought about the deconstruction of certain codified parts, striking a heavy blow at the principle of 'code' itself" (Zenati-Castaing, 2011: 362).

The multiplication of special laws has led to the unravelling of the coherence of codes, to the dilution of the significance of their authority, hence to a process which is diametrically opposed to the process of codification. General principles have been replaced with particular rules which are meant to respond to some special momentary needs (Dănișor, 2013: 12-28), which leads in turn to a spectacle-legislation that imposes quantity in the detriment of quality, compromising the very fundament of rational law. "Today, more than ever, legal rationality is nothing more than the rationality of a type of politics which has grown to be reasonable" (Blanco, 1998: 516). The codification specific to the 19$^{th}$ century was followed by the consolidation of existing legislation through punctual amendments and updates, which is referred to in French doctrine, in its own style and out of its own need for categorisation, 'codification à droit constant'. This attenuation of the effects of codification has concretised into the loss of the authority of the codes, into the exponential growth of the number of special laws and, eventually, into decodification. "The decodification and development of special laws sketch a different vision from that of the age of codification, a vision in which the cult of general principles which form the basic structure of modern codes has gone into decline. Today, we rather regulate naturally in detail than put emphasis on maxims and the fecundity of common law" (Zenati-Castaing, 2011: 362-363). In this context, the challenge that current societies face is to conceive the concrete way to recodify law by returning to principles. Consequently, it is decisive to establish which those principles are that recodification must put its basis on and whether traditional objectives can still be assigned to the codes. In other words, we must outgrow the relationship codification – consolidation – decodification.

## The Objectives of Codification – The Case of Post-Totalitarian Romania

Similar to the nation states that have consolidated their legitimacy through centralised law, monopolised by state power and, hence, codified, contemporary states tend to use codification again in order to counteract the practice of the multiplication of special regulations. We witness a paradoxical situation: on the one hand, the political power seems unable to resist the temptation of frantic law-making, meant to tackle the tiniest change in social reality; on the other hand, states preach the legal security persons ought to enjoy and promote the need for more stable codes. The paradox springs from the impossibility of political power to find a balance between the immobility of legislation which is indispensable to legal security and predictability and the mutability of law, as vector of adaptation to the evolution of society. Hence, state law seems to alternate between periods of legislative inflation and periods when the stability provided by the codes is acutely felt. Codification, as legislative technique, would bring "a welcomed symbolic surplus for surmounting the legitimacy crisis which institutions suffer of" (Blanco, 1998: 522).

The Romanian state confronts with this paradox in a particular way, if we take into consideration the crossover from authoritarian totalitarianism to liberalism, which has not been accompanied by the development of civil society and by full internalisation, by the political power, values and procedures of liberal democracy. The new political regime was legally founded by a new Constitution, animated by the precepts of the philosophy of liberal democracy, but which was not followed in the downstream of normative hierarchy by new branch constitutions. Thus, until the moment of the adoption of new Civil and Criminal Codes, the legislator tried, through primary regulations, to keep up with the principles of liberal constitution. There were actually legislative interventions that brought punctual amendments, dependent on political and partisan circumstances, frail implants in a system immobilised by time, habit and obedience, which had no chance of success on the reformation of the legal system.

Until it could achieve recodification on other ideological and philosophical bases, the Romanian society suffered from destructuring through the multiplication of the sources of law, from the invasion of special laws, from the severe damage of the rationality and security of the legal system, due to lack of clear philosophy. Thus, alongside the codes, numerous special provisions coexisted, the laws and law-making acts of the executive led to substantial and constant amendments in the codified legislation, so as to adapt it to the new liberal logic, which consequently brought about insurmountable problems for the recipients of the law. On the one hand, there is an extremely low chance to decipher the legislator's will amongst the jumble of norms, on the other hand, there are the ambiguity, lack of predictability, clarity, coherence and unity that have transformed the rules of law into an irrational ensemble (as it could only be a sum of unorganised norms in the system, since a system is essentially defined by rationality). "The rationality that is released from this form of codification exemplarily translates the essential property of any system, according to which the ensemble has more important value than the sum of its elements; systematisation itself determines the emergence of nascent properties that each element, in isolated state, did not exhibit" (Van de Kerchove and Ost, 1988: 114).

The constant oscillation of the political power and the civil society between the practices of the old regime and the new liberal philosophy, normatively imposed through the fundamental law, has led to the creation of the above mentioned paradoxical situation. Codification has had two important moments in post-totalitarian Romania. The first is represented by the attempts to adapt the Civil and Criminal codes and the Codes of Procedure to the novel project of democratic and liberal society, concretised in punctual amendments, legislative repeals, the multiplication of special laws, overlapping of regulations from several normative levels, a codification 'à droit constant' specific to the Romanian society. This type of codification "is rather a matter of simple compilation and constitutes no more than a comfortable assemblage of some disparate rules. It is neither structured nor subject to a well-defined plan nor organised, coherent and systematised. It is not necessarily a model of logical and orderly architecture" (Baudouin, 2005: 615). The second moment was brought about by the need to adopt new codes, as a result of the dismantling of the legislative system through the belittlement of the normative value of codes. This phase concerns the movement from decodification to recodification. It is important to further analyse if there was a clear philosophical direction which guided the evolution of legislation throughout the two above mentioned moments.

The alternative to the regime of totalitarian dictatorship known by the Romanian state could not be, according to the revolutionary people and to the constituent power that it invested, other than liberal democracy. Thus began a long process of reconstruction that

should have led to the foundation of a new type of society. Although it seemed clear that, in order to put the basis of the new political regime, a new constitution establishing the new principles of the political and social structure was indispensable, things were less evident for the other fields of law, due to the fact that new "branch constitutions" were not adopted in these areas as well. Subsequently to the revolutionization of the totalitarian regime and until the new Civil and Criminal Codes were adopted in 2009 and entered into force in 2011 and 2014 respectively, the normative ensemble was bombarded with uncoordinated amendments and could be characterised as lacking any systemic logic, due to the fact that the adaptation to the new project of society was conducted by philosophically confused institutions. "Indeed, a code is a whole, an ensemble, an organised, logical structure whose elements are all interdependent… fragmentation thus risks causing contradictions or, at least, harming the unity of thought and philosophy, which would not be desirable" (Baudouin, 1992: 16).

It is sufficient to analyse a few situations in order to uphold the conclusion of a lack of clear philosophical direction. Such a case concerns the legal regime of property and the regulation of the legal situation of some state-owned residential real estate properties. The legislation was intended to regulate the restitution of nationalised properties for the purpose of solving the disputes between former owners or their inheritors and the tenants who became the owners of those properties. Law no 112/1995 was amended, supplemented and implemented by a large number of normative acts (L. no 112/1995, supplemented by L. no 10/2001 regarding the legal regime of some properties taken over abusively in the period 6 March 1945 – 22 December 1989. L. no 10/2001 was amended and supplemented by: the Emergency Ordinance of the Government no 209/2005, L. no 247/2005, L. no 74/2007, L. no 1/2009, L. no 302/2009, L. no 202/2010, L. no 165/2013 (amended by L. no 386/2013), L. no 187/2012, L. no 135/2014 and the Emergency Ordinance of the Government no 98/2016), which has led to the disruption of the normative frame in question, to the deprivation of the legal security of the persons who were affected by these measures through the amendment of the legislative solution, to the creation of situations of legal unpredictability concerning the properties subject to restitution, to numerous internal disputes, to decisions of unconstitutionality and condemnations of the Romanian state from the ECHR, both for violating the right to property, as well as for the climate of legal insecurity and unpredictability caused by constant amendments (Judgment of the ECtHR in case Brumărescu c. România). Furthermore, we must not forget that all this special legislation has developed in parallel with the Civil Code and the Code of Civil Procedure.

As regards criminal matters, we find a similarly complex and convoluted situation. In this case, given that we speak of particularly coercive norms, the principles of legal security and predictability play an even greater role. Moreover, the former Criminal Code was adopted during the totalitarian age and, even if it has been substantially amended either as a result of the legislator's will (acts that amended and supplemented the 1968 Criminal Code: D.L. nr. 12/1990, D.L. nr. 112/1990, L. nr. 20/1990, L. nr. 65/1992, L. no 88/1992, L. no 104/1992, L. no 140/1996 – amended punishments and increased their amount, L. no 197/2000, Emergency Ordinance of the Government no 207/2000, Emergency Ordinance of the Government no 295/2000, Emergency Ordinance of the Government no 10/2001, Emergency Ordinance of the Government no 89/2001, L. no 456/2001, L. no 61/2002, Emergency Ordinance of the Government no 58/2002, Emergency Ordinance of the Government no 93/2002, Emergency Ordinance of the Government no 143/2002, L. no 85/2005, L. no 278/2006, L. no 58/2008, L. no 27/2012)

or as a result of the unconstitutionality of certain provisions (title IV – crimes against public wealth, was repealed as a result of the decisions of unconstitutionality no 32/1993, no 33/1993, no 49/1993, no 18/1994; decision no 81/1994 regarding the unconstitutionality of the provision which incriminated homosexual relationships forewent the decriminalisation of homosexual acts in 2000), these amendments have not succeeded in altering the philosophical stand.

In this context of legal unpredictability, the need for the repeal of old regulations and for the recodification of the civil and criminal fields has become more obvious. However, in order to do so, we would require the affirmation and adherence to a philosophy that would manage to overcome the past in order to create a coherent, unitary, systematised, clear and rational legislation (Putinei (Dănișor), 2011: 83-94). There is no indication from the general analysis of the new codes that their drafters have any philosophical coherence, or that the new codifications are apt to achieve specific objectives. Thus, codification should unify and systematise the norms pertaining to a particular field. Just as the first codes initially gathered all customary legal practices and made them accessible through the centralisation and standardisation of law, perceived now as a system, the new codes should have assembled all the special laws around certain clear principles and should have regulated coherently. The recodification should have simplified the legislation through the suppression of all infra-legislative regulations. Unfortunately, this is not the case with civil law, due to the fact that commercial law aspects (L. no 31/1990 regarding companies; L. no 85/2006 regarding the procedure of insolvency; L. no 249/2005 for the amendment of L. no 64/1995 regarding the procedure of judiciary reorganisation and bankruptcy; Emergency Ordinance of the Government no 54/2016 regarding the compulsory insurance against civil liability in respect of the use of motor vehicles for damage caused to third persons through motor vehicle and tram accidents, which amended L. no 136/1995 regarding insurances and reinsurances in Romania) have not been introduced in the new Civil Code, leaving this domain exposed to amendments which, be they even inadvertent, have become a habit in the Romanian legislative landscape. This has also been the situation in criminal law, where the new Code has yet failed to unify legislation, numerous criminal norms still being found in special laws (L. no 78/2000 regarding the prevention, discovery and punishment of corruption acts, amended by L. no 187/2012; L. no 143/2000 regarding the fight against illicit drug trafficking and consumption; L. no 196/2003 regarding the prevention and fight against pornography).

This is not an argument for the repeal of all special laws that also have criminal provisions, as they are not incompatible with the existence of a criminal code, but only for the repeal of those laws that are essentially criminal. Taking into account the fact that the standardisation of legislation has not occurred, the new codes are merely compilations of texts that decided to incorporate certain regulations, so that others may remain the subject of special regulations. "A criminal regulation made up only of special laws would fragment the system and would possibly introduce foreign logic, attacking individuals' security and the principle of minimal intervention which are still constitutionally guaranteed" (Blanco, 1998: 523).

The incapacity of the new codes to attain the objectives of systematisation, simplification and creation of a coherent legislation is also highlighted by the case-law of the constitutional court. Thus, on the basis of this already rich case-law regarding the control of the constitutionality of the new codes, we notice the invalidation of a large number of provisions pertaining to both the Civil Code or the Code of Civil Procedure

and, particularly, to the Criminal Code and the Code of Criminal Procedure (Decisions of the Constitutional Court of Romania: no 712/2014; no 17/2017; no 625/2016; no 169/2016; no 44/2016; no 866/2015; no 839/2015; no 603/2015; no 485/2015; no 11/2015; no 508/2014). The obligation of the body issuing the unconstitutionally declared normative acts to align the provisions in question with the provisions of the Constitution has generated a series of new problems for the coherence and predictability of the codes. Therefore, although the constitutionality vice has been covered through the intervention of the Parliament or, as appropriate, through that of the Government, we cannot but ask ourselves in what way the internal logic of the codes thus amended is affected, once the legislator has had a certain idea concerning the realisation of criminal politics, into which have been subsequently implanted new provisions in accordance with the decisions of the Constitutional Court.

This problem of legislative instability caused by the multiplication of amending norms is recurrent in all legal branches, but the situation in the coercive fields is worse. A clear example is given by Law no 227/2015 regarding the Fiscal Code, which entered into force on January 1st 2016 and has undergone an impressive number of amendments and additions so far, especially through emergency ordinances of the Government, four of which having brought changes in the Fiscal Code even before its entry into force (Emergency Ordinances of the Government: no 41/2015; no 50/2015; no 57/2015; no 50/2015; no 8/2016; no 41/2015; no 32/2016; no 46/2016; no 84/2016; no 3/2017; no 9/2017; L. no 2/2017; L. no 57/2016). This exceptional state of emergency that constantly resumed several times during one calendar year, has transformed it from being the exception to becoming the rule. Punctual regulations give birth to legal instability and unpredictability in the field of fiscal constraint and deny the idea of 'code'.

**The Crisis of Legitimacy and the Need for a Change of Paradigm**

The Romanian legislative system is in crisis. Its core structure is being mined. Moreover, the entire legal system suffers from the loss of legitimacy, because the principles that should fundament its functioning have lost their significance and rank, being transformed in simple norms, left at the disposal of the original or delegated legislative power. The solution to the legitimacy crisis lies in awarding the codes a special constitutional statute in the normative hierarchy, in the context in which "the legal scheme inherited from Kelsen is being questioned today. The pyramidal law is replaced with 'a type of law in network' produced by dispersed power centres, inspired by political and technocratic reasons" (Blanco, 1998: 529).

The loss of the symbols and authority of the codes has happened as a result of the lack of procedural protection provided by the fundamental law, which could acknowledge the existence of a new category of normative acts, superior to organic and ordinary laws, and which could be removed from the power of manoeuvre held by the circumstantial political majority. This change of paradigm is necessary due to the fact that the lack of protection procedures has led to the birth of a normative system which is devoid of guiding principles and which is, consequently, irrational, fragmented, incoherent, unstructured, caused by normative inflation.

Current codes are nothing else but laws. Even their title reflects this conclusion, as it contains the formulation *"Law regarding the Code…"*. Only the interpretation of constitutional provisions, which reserves organic law certain fields of regulation leads to the conclusion that the codes are generally organic laws, when they intervene in these fields. The procedure, overwhelmed by the amendment and supplementation of organic

law, does not represent a real protection for the stability of the codes, due to the fact that, in Romania, the emergency ordinances of the Government can intervene in the field of organic law as well, according to the interpretation of article 115 (5) and (6) of the Constitution and to the case-law of the Constitutional Court. Moreover, the limits imposed to regulation through emergency ordinances provided by article 115 (6) of the Constitution are inefficient, because they were invalidated in practice when the Government adopted ordinances, thus affecting the rights and liberties provided in the Constitution, but what prevailed was the extraordinary situation which justified, in the light of the Government, the emergency of the regulation.

The situation was similar in respect of the Civil and Criminal Codes, and the Codes of Civil and Criminal Procedure alike, because their adoption was hastened and, hence, the opportunity, necessity and normative content of the provisions were rapidly debated. Thus, the Criminal Code was adopted through government liability, according to article 114 (3) of the Constitution, it was then amended after the adoption, but before its entry into force. Likewise, the other codes were amended and supplemented, and their unconstitutionally declared provisions were put into compliance with the Constitution. A special case is represented by the Law regarding the Fiscal Code, where instability has already reached other dimensions. Another problem is also the way in which state organs have decided to fulfil the constitutional obligation to align the unconstitutionally declared provisions with the provisions of the Constitution. Article 147 (1) of the Constitution clear establishes that the obligation is incumbent upon the issuing body, i.e. the Parliament or, as appropriate, the Government. This principle was not taken into consideration because, although the body which issues the codes is the Parliament, regardless of the fact that the legislative procedure has been finalised in the Parliament or through government liability, the Government has frequently aligned the unconstitutional norms with the Constitution through emergency ordinances. Actually, this obligation has not been executed in a valid way, which underlines the idea that the unconstitutionally declared norms and for which the Parliament has not intervened in order to align them with the Constitution, loose their legal effects, according to article 147 (1) of the Constitution. One of the possible solutions for breaking this vicious circle of legislative patchwork presupposes awarding the codes a different constitutional statute.

**The Constitutionalisation of the Codification Procedures and of the Matters**

Under the circumstances in which organic law is left at Government's disposal, which can amend it through emergency ordinances, the constitutionalisation of codification procedures and matters is equivalent to the cutting of the Gordian knot. Considering that "a code, like a constitution, is founded on the unified national will and translates the main options of general consensus" (Blanco, 1998: 523), it should also enjoy special adoption and amendment procedures, apt to confer it stability and predictability.

Firstly, the Constitution should provide, within the normative hierarchy, a separate category of normative acts, i.e. the codes, and a special adoption and amendment procedure which should presuppose the presence of a qualified majority, superior to the majority required for the adoption of organic laws, eventually a majority of two thirds of the number of the members of each chamber, which is required for the review of the Constitution. "Actually, […] in as far as it regards the constitutionally protected fundamental rights, the Code should be consequently approved by special majority" (Blanco, 1998: 513). We should also mention the opinions sustaining that the codification procedure should not lead to the creation of a new category of normative acts, because

"codification is not magically gifted: it does not operate any transmutation" (Cerda-Guzman, 2011: 140).

Secondly, as supplementary protection, the fundamental law should establish certain fields which should be reserved to the codes, in order to limit regulation through special laws. Of course, the constitutionalisation of codification procedures and matters cannot be efficient unless a revision of the regime of emergency ordinances is made, in order to impede the Government from encroaching on the legislative competences of the Parliament. From this point of view, the Government would not enjoy, under any circumstance, the competence to regulate in the fields reserved to the codes, either through liability actions or through the adoption of emergency ordinances for the amendment or supplementation of the codes. Of course, such a solution requires the review of the Constitution, both for the consecration of a new category of normative acts, of its competence fields, as well as for the reconfiguration of the legal regime of the acts issued by the Government, as delegated legislator.

From the analysis of the Romanian legislative system, it transpires that such procedures similar to the ones described above as solution to legislative instability have been inefficient, due to the fact that institutional practice has invalidated them many times. Therefore, taking view of the fact that current constitutional regulations concerning the competences of state authorities have been conceived by the constituent body within the logic of the principle of the separation and equilibrium of powers, it is necessary that the compliance with these procedures be guaranteed by an intrinsic and extrinsic constitutionality control of the codification, which would allow the Court to rule on codification, decodification or recodification.

**Conclusions**

The legislative instability and inflation, the lack of legal security, of clarity, structure and predictability of current normative systems cannot be contested. The most convenient solution seems to be the attempt to decelerate the rhythm of law-making and to increase the quality of the norms, with the help of codification. Any codification is originally a technical response to a need of legal security. This need of legal security translates concretely into the search for a rationalisation of law, its most elaborate form being that of the codification (Molfessis, 2000: 661).

Despite the many advantages that codification brings along, the perverse effects of the objective of law rationalisation cannot be ignored. A legal system that seeks only the rationalisation of the rules of law may eventually privilege form over substance and create a 'beautiful law' in the detriment of a 'good law'. Thus, we can already notice that, many times, "we have lost sight of the search for a just law in order to adhere to the simple expression of the codified norm" (Oppetit, 1996: 17). A further risk which we must take into account concerns the fact that, if the exhaustive regulation of law is the sole goal of codification, the consequence will then be a too rigid legal system, ossified around certain values which can hardly be changed. In this regard, Max Weber observed that the code tends to lean towards completeness and towards the creation of a closed system: "the codification has a tendency towards exhaustiveness and believes it can achieve it" (Weber, 1986: 204). On the other hand, the opposite idea of an open system cannot be fully upheld: "we can always dream of an open, mobile code which would follow the flux of history relentlessly. But it is not therein that the genius of codification lies" (Carbonnier, 1996). A period of legislative respite is consequently necessary. "Codification must always be accompanied by a period of respite which isolates the completed work so as to better allow

it to detach itself amidst an ever-moving legislative whirlwind and which gives the legislator time to breathe, just like the Creator who, once He had finished His work, allowed Himself a day of rest" (Cabrillac, 2002: 120). This is why only the principles that guide codification should be perennial, so as to allow the legal system to be sufficiently malleable to integrate social changes and yet stable enough to avoid turmoil caused by redundant regulations.

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ORIGINAL PAPER

# Application of the Provisions of art. 102 (2) and (3) of the Criminal Procedure Code in Relation to Special Surveillance Measures Listed under art.138 (1) (a) and (c) of the Criminal Procedure Code Enforced before the Publication in the Official Journal of Decision no. 51/2016 of the Constitutional Court

**Mircea Mugurel Şelea***

**Abstract**
The use of the special surveillance methods provided for in art. 138 (1) (a) and (c) of the Criminal Procedure Code by a body lacking jurisdiction to carry out such activities is not grounds for absolute nullity of procedure, since none of the specific and fully inclusive cases provided under art. 281 (1) a) to f) of the Criminal Procedure Code apply. However, the parties or the main litigants claiming an infringement of their rights may raise an application for relative nullity of the evidentiary process. Where the preliminary hearing was completed prior to the publication of Decision no. 51/2016 of the Constitutional Court in the Official Journal no. 190 of 14 March 2016, relative nullity could be raised before the Court at the time of the first main hearing with procedure dully fulfilled set after the publication of the Decision of the Constitutional Court. In this context, it is noteworthy that, until the Decision was published, the litigants were not aware that the evidence was obtained using an evidentiary process undertaken by a body without jurisdiction. At the same time, the poor quality of the law – caused by lack of clarity, precision, predictability and accessibility – cannot be attributed to the persons claiming that, by the enforcement of such law, their rights were infringed.

**Keywords***: nullity, evidentiary process, body lacking jurisdiction*

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The right to privacy in general and privacy of correspondence, in particular, is of particular importance to anyone, and limitations to these rights can produce very serious, sometimes irreparable, consequences to both the owner of those rights, as well as family members, and his friends, affecting family and social relations. "Private life cannot be defined precisely. It is a contingent concept whose content varies with time, environment and society in which the individual lives." (Sudre, 2006: 315). The Romanian Constitution in article 53 and European Convention on Human Rights in article 8 par. 2 see the possibility of interference for public authorities in the exercise of specific rights of privacy, not in any way, but under conditions related to the necessity of limiting rights, and proportionality of the produced effects, with the wanted purpose. "Limitation of fundamental rights is imposed on behalf of a certain pragmatism that fits concern for efficacy: the absolutism of human rights would certainly lead at a high enough ineffectiveness, which would be unpleasant." (Renucci, 2009: 815).

The ECHR case law, it was stated that the ability to secretly monitor citizens, "characteristic of the police state (...) cannot be tolerated only to the extent strictly necessary to preserve democratic institutions" and if accompanied by adequate and effective safeguards against abuse, such as the establishment of conditions by law, independent institutions' control over the admission and enforcement surveillance measures, since such a system "carries the risk of undermining or even destroying democracy it claims to defend." (Klass vs. Germany, Request no. 5029 / 71, ECHR September 6, 1978 from 42.49 to 50).

To no risk of misinterpretation of constitutional and conventional norms, but also to prevent the abusive use of regulations that allow certain interference in people's privacy, the legislator authority has a positive obligation to create a normative system to provide a clear procedure to be followed where it is necessary to restrict certain rights.

However, the state must act with the *necessary prudence and diligence* to reach that result, so the obligation is a conduct of prudence and diligence. (Bîrsan, 2005: 18).

Thus, certain issues must be concretely established, regarding: the reasons underlying limitations; competent State authorities are to assess whether the conditions for interference in the exercise of rights are met; bodies that may exempt interference; how interference decisions are enforced; public authorities' representatives that have powers for the intrusive implementation measures; procedure to be followed by persons who claim that their rights were unlawfully infringed and request for removing the effects and provide compensation for damages.

In Romania, one of the reasons specified in Art. 53 par. 1 of the Constitution, for which the exercise of certain rights and freedoms may be restricted, regards a criminal investigation, but the purpose of judicial bodies participating in the criminal proceedings is to find the offenses in time, applying the penalties provided by law to persons who have committed them, but at the same time no innocent person would be punished.

This article may not be invoked automatically, some procedural limitations should be imposed on the State when invoking its functionality and general interest, perfectionist values, the repressive or preventive system must not become ends, but just remain means (Dănișor, 2014: 229).

Art. 138 par. 1 letters a, c Criminal Procedure Code governs the possibility of interception of communications and any kind of distance communication and of video, audio, or photographing surveillance, which are part of the special surveillance methods.

Given the importance of these methods, both in terms of consequences caused to the rights of persons surveyed and regarding the contribution to the establishment of the

truth and therefore in the judicial decision, the Romanian legislator has tried to limit the cases where surveillance measures can be used, either by listing the offenses that can be investigated by these methods, either by specifying a minimum limit of punishment that reflects the seriousness of the facts raised.

It also attributed the power to decide whether there are met the conditions on the appropriateness, proportionally limiting the rights of a person with the general interest of society, in the task of a judge - a judge of rights and liberties of the competent court to hear the case in the first instance, and a declaration of technical surveillance may only be made by the prosecutor. However, in urgent cases, the prosecutor may also order provisionally, for a period of 48 hours, conducting surveillance, with the obligation to notify the judge in the shortest time possible, but no later than 24 hours, to check whether the conditions provided by law were met. "The Judge for rights and freedoms must verify proportionality of the measure – of the technical supervision process of evidence - based on one of the following alternative criteria: particular circumstances, the importance of information or evidence to be obtained or gravity of the offense." (Chirita, 2015: 338).

Given that the procedure governing the special measures of surveillance, is not just limited to the first stage, e.g. approval of surveillance, but that regarding the consequences of limiting the right to privacy, utterly important is the next step regarding how the surveillance is done, there should be no fact creating doubt about how the information obtained is used, where it is stored, what people have access to them. "The conditions under which the exercise of rights and freedoms may be restricted should be analyzed in steps. This means we have to start from the condition of competence and analyze the performance of each condition separately" (Dănișor, 2008: 3).

In this regard, the state through its authorities has a positive obligation to prevent the risk of disclosure of private telephone conversations, through the establishment of effective measures, and to conduct an effective investigation to uncover the causes that led to such deeds (Craxi no. 2 vs. Italy, Request no. 25337 / 94 ECHR, July 17, 2003: 73-76).

The reference on how the supervisory methods are enforced, the legislature is required to adopt clear rules that do not allow situations of an alleged reason that would justify restricting the right to privacy of a person, but in reality, aiming supervision of another person, regarding whom legal conditions for approval of surveillance were not met, or to ascertain the circumstances would belong to another judge of the superior court. For example, the judge in the court issues the surveillance warrant for a suspect against whom there is reasonable suspicion that he committed a crime within the jurisdiction of the court, but when enforcing the mandate, another person is supervised, friends with the suspect, against whom there is no evidence that he committed any crime, and, moreover, has a special quality (notary, lawyer, judge, an MP, minister, etc.) that would attract the competence of higher court respectively appeals court or supreme court.

If, in addition to the person shown in the surveillance mandate, the right to privacy of other people using a phone line that did not belong to him is limited, in that over a long period of time are also recorded his conversations in breach of Article 8 of the ECHR (Lambert vs. France, Request no. 23618 / 94 ECHR, august 24, 1998: 35-41).

Regarding public authorities that enforce the technical surveillance measures, the current Code of Criminal Procedure, art. 142 paragraph 1, in addition to the prosecutor, criminal investigation authorities or the specialized police officers or other specialized state bodies are authorised.

Until 14.03.2016 - publication of the RCC decision no. 51 of 16.02.2016, in the interception of communications, RIS was the only national authority designated by decision of the Supreme Council of National Defence, interception being made through the National Centre of communications interception or through collaboration with suppliers of electronic communication services.

Moreover, due to lack of facilities of technical systems required to enforce the surveillance mandates, both the prosecutor and criminal investigation bodies or workers in the police, have addressed RIS staff for interception and recording of communications in many cases, and based on storage media, containing the results of interceptions, drew up the minutes in written form of the conversations.

RCC by decision no. 51 of 16.02.2016 published in the Official Gazette 190 of 14.03.2016, was admitted the exception of unconstitutionality and it was found that the term "or other specialized organs of the state" from the provisions of article 142, paragraph 1 Criminal Procedure code is unconstitutional, in the decision's recitals being stated that, in essence, the phrase in question "appears as lacking clarity, precision and predictability, not allowing subjects to understand that these bodies are empowered to carry out measures with a high degree of intrusion in people's personal life", being violated provisions of article 1, paragraph 3 of the Romanian Constitution "on the State law, regarding ensuring citizens' rights" and the provisions of Article 1 paragraph 5 of the Basic law "which enshrines the principle of legality".

On the date of publication of the decision in the Official Gazette, before the Courts there were registered many cases, in both the preliminary stage room, judgment on the merits or before the court of appeal, cases in which there were used evidence and means of evidence obtained through surveillance measures enforced by technical workers in the RIS.

In this context, there were discussed the effects of the decision regarding evidence resulting from the interception and recording of communications from RIS, provided they were made before the publication of the decision in the Official Gazette, some even under the empire of the previous criminal procedure code, and according to the provisions of Article 147 paragraph 4 of the Constitution, the decisions are only enforceable for the future and are generally binding from the date of publication.

RCC, in par. 52 decision recitals tried to eliminate the risk of non-unitary practice in ordinary judges' activity, indicating that "throughout the whole activity of a law, it enjoys the presumption of constitutionality, so the decision is not to be applied to the cases definitively settled until its publication, however, appropriate applying in cases pending before the courts (...)".

Although at the date of execution of the technical supervision warrants there was a presumption of constitutionality of criminal procedure provisions that regulated supervisory measures, the question is why RCC did not mention that the evidence obtained before the publication of the decision are not affected, given that, to that date, a law has been respected, not violating the Constitution, but mentioned that the decision does not apply to criminal cases resolved by final judgment?

Arguably, taking into account the fact that although probation procedures - communication interceptions at the time of their realization were regulated by a law that respects the fundamental law, evidence effects obtained in such way, occur after publication of the decision in RCC in the Official Gazette, in the sense that all the evidence administered in criminal cases are analysed throughout the process until delivery of the definitive judgments. But evidence is considered by Panels of judges to determine the true

state of fact, and on that basis decide on the guilt or innocence of persons accused of offenses object of criminal cases.

Regarding causes specified by RCC, a question of interpretation of the phrase "role of the courts" has to be cleared up, for the purposes of determining whether the envisaged broad sense was considered, that of court of law, under Article 126 paragraph 1 of the Constitution, or the narrow sense, that of judicial body specialized in criminal matters, under Article 30 Criminal Procedure Code. "Outside the High Court of Cassation and Justice, the judiciary power also includes courts. The Constitution evokes them only generically, leaving ordinary materialization to the legislator." (Constantinescu, Iorgovan, Muraru and Tanasescu, 2004: 270).

In our opinion, the court of contentious considered the broad sense, because there is no reason leading to the conclusion that the decision takes effect only on cases in which was ordered judgment, given that also the judge of rights and freedoms and also the preliminary chamber judge, at the judgments, analyses the evidence that are based on technical surveillance methods enforced by RIS.

Moreover, preliminary chamber procedure cannot be regarded as exempt from the effects of RCC decision, given that at this stage is controlled, inter alia, the legality of the way in which evidence was taken during prosecution. "By evidence legality we understand the legality of acts by which the evidence is administered, and *verify the legality of evidence* consists of checking the legality of the following: the act whereby the evidence and evidence means were ordered, approved and confirmed; the evidence means; the process by which the evidence was obtained." (Kuglay in Udroiu (coordinator), 2015: 906). And if the RCC decision would not have been applied also to criminal cases under preliminary stage room at the publication date of the decision in the Official Gazette, this procedure would have been meaningless as there was only theoretical, given that the judge would not have been able to verify the legality of evidence through the evidentiary method.

On the other hand, the preliminary chamber must have the role of shortening and simplifying the whole procedure of criminal proceedings by setting deadlines within which individuals may invoke aspects regarding non-legal issues. If the judge for preliminary chamber rules that the claims or exceptions to the legality of evidence and criminal prosecution are unsubstantiated, they cannot be raised again during trial, or if under the final conclusion terminating the preliminary room procedure, certain evidence are excluded, they will not be considered at court or when judging the merits or in the appeal. Therefore, given the importance of Pre-Trial Chamber in relation to other phases of the criminal proceedings, taking into account the consequences of concluding handed down by the judge of preliminary chamber, both in terms of the evidence during the investigation, but also on how to carry judgment, we can say that the constitutional contentious judges had no intention to exclude the pending cases from the application of the decision, at the decision publication date in the preliminary procedure room.

Turning to cases where by the conclusion, the preliminary chamber judge ordered the judgment begins, we identified several issues that require some discussion regarding the applicable sanction to evidence obtained through technical surveillance methods enforced before the publication of the decision No. 51 / 2016 of RCC, by the RIS workers, the legal regime of the penalty, the period within which it may be invoked, the situation of the causes in which the preliminary chamber judge rejected claims or exceptions related to the evidence, noting that they were legally administered.

Regarding these issues of significant importance are the recitals of the decision No. 51 / 2016 RCC contained in paragraph 32 which states that "illegality of disposition, authorization, deposit or administration of the measure draws absolute or relative nullity, according to the distinctions set in art. 281 and 282 of the criminal procedure Code. Thus, achieving technical supervision, as evidentiary process, in violation of the legal requirements laid down in art 138-146 of the Code of Criminal Procedure, including those relating to state authorities enforceing the mandate of surveillance, has the effect of invalidity of the evidence obtained, and therefore the inability to use them in criminal proceedings under Article 102 par. (3) of the criminal procedure Code."

Regarding the absolute or relative nullity, it can only be applied to acts that have violated rules governing the way in which a criminal proceeding is developed, as from the provisions of art. 280 paragraph 1 Criminal Procedure Code, and if the judge for preliminary chamber or the court finds that an act which underpins obtaining evidence, is null, that evidence will be excluded, so that it will not be used in the criminal proceedings under article 102 paragraphs 2 and 3 Criminal Procedure Code. This idea also results from the grounds of the RCC Decision no. 383 / May 27, 2015, published in the Official Gazette no. 535 of 17.07.2015, par. 21, showing that "nullities, as regulated in art. 280-282 in the Criminal Procedure Code, concern only procedural and process documents, e.g. evidence and probation procedures, and not the evidence itself, that are only facts".

In case of evidence obtained through technical surveillance measures, the act of supervision is the conclusion of the judge for rights and freedoms under Article 140 paragraph 1 Criminal Procedure code, or, in urgent cases where the prosecutor may authorize a provisional supervision for a period not exceeding 48 hours, the prosecutor having the obligation to later inform the judge to consider whether the conditions laid down in Article 141, paragraph 1 Criminal Procedure Code were met.

After technical supervision has been ordered, follows work enforcing the provisions of the Judge's conclusion, that is the prosecutor's order by the bodies provided by article 142 paragraph 1 Criminal Procedure Code, whose acts constitute probative procedures based on which the prosecutor or criminal investigation body realizes the evidence consisting in the reports drawn up according to art. 143 par.1 Criminal Procedure Code, which record the surveillance results. As seen from the grounds of the Decision no. 51 / 2016 - par. 32, the Constitutional Court refers to Articles 281 and 282 Criminal Procedure Code, governing absolute nullity, respectively, relative nullity, without clearly establishing which of the two penalties apply to evidentiary procedures performed by RIS workers. In this context, an ordinary judge has the power to decide whether any sanctions must be applied before the publication of the RCC decision no. 51 / 2016 in the Official Gazette, and to determine whether the rules governing nullity or concerning the relative nullity are incident.

To analyse the evidence and probation procedures and to ascertain whether any penalties are required, the ordinary judge will consider both cases of absolute nullity and relative nullity provided for by the rules of criminal procedure, but also the reasons envisaged by constitutional court to adjudicate decision no. 51 / 2016. Thus, RCC took into account the effects produced by the execution of technical surveillance measures, limiting the right to private life, family, privacy and the right to privacy of correspondence showing in par. 48 of the decision that should "exist a framework that expressly establishes in a clear, precise and predictable way which are the bodies authorized to carry out operations which constitute interference in the sphere of protected rights."

In this context, enforcement technical supervision methods must be carried out by State bodies, on which the law expressly established competence to perform these evidence procedures, such as the prosecutor and criminal investigation bodies, which are judicial organs under article 30 Criminal procedure code, or specialized workers from the police, who received the assent of the general prosecutor attached to the High Court of Cassation and Justice, as special criminal investigation bodies, according to Article 55 par. 5 Criminal procedure code. Therefore, RIS workers lacked competence established by the Code of Criminal Procedure or other law, to enforce technical supervision warrants, not having the capacity of judicial bodies or prosecution organs, context in which they could not perform procedures underlying evidentiary procedures that can be used in criminal proceedings."Nullity sanction by applying it, has the function to remove the contents of the criminal acts which contain violations and that are alleged or proven harmful to criminal justice." (Iliescu in Dongoroz (coordinator), 2003: 406.

With reference to the cases of absolute nullity provided exhaustively by art. 281 paragraph 1, letters a) -f) Criminal procedure Code, we find that only in case of legal infringements on material competence and personal jurisdiction of the courts, this penalty occurs, but not always, but only when a court of lower degree performed the judgment although competence belonged to the higher court. In these circumstances, we will consider whether the evidence can be excluded by evidentiary procedures obtained by state bodies to which the law did not established that competence, due to the existence of relative nullity provided for by art. 282 par.1 Criminal procedure Code.

An important aspect which is required to be discussed is regarding the time limit to be raised relative nullity of the act - evidence, which administered the evidence resulting from interception of communications or video, audio or photograph surveillance. Technical surveillance methods are enforced during prosecution, and, according to art. 282 paragraph 4 letter a) Criminal procedure code, where the violation of the law occurred during the investigation, relative nullity can be amenable to closure of the procedure in preliminary chamber. In cases where preliminary stage room was not completed until the publication of RCC decision no. 51 / 2016 in the Official Gazette, not many questions arose about the possibility of invoking relative nullity of evidentiary procedures and of evidence means, but difficulties arose in criminal proceedings in which the preliminary chamber judge had ordered opening of the judgment. Thus, in the preliminary procedure room, the situation may call into question the evidence resulting from the temporary authorization issued by the prosecutor to carry out technical surveillance measures, under Article 141 paragraph 1 Criminal procedure Code, given that according to Article 3 of the same article, the prosecutor is obliged to submit to the judge of rights and freedoms in order to confirm the measure, the case file and the minutes edited, in summary form, surveillance activities conducted. If the judge for rights and freedoms confirmed by conclusion the measure provisionally authorized by the prosecutor, the question is whether the evidence thus obtained can be appealed in the preliminary phase? In our opinion, the answer is yes, because the judge for rights and freedoms didn't verify which of the state bodies have enforced the measure of supervision, but just analysed whether the conditions provided for by article 139 paragraphs 1 and 2 criminal procedure Code are met; conditions on: the existence of reasonable suspicion of committing or preparing one or more of offenses listed in paragraph 2; the proportionality of the interference with the seriousness of the action and importance of proof was sought to be achieved; the subsidiary character of the evidence, reported to the inability to obtain otherwise, or of danger to the safety of persons or valuables.

Regarding the main causes in which the preliminary chamber procedure was over until the publication of the RCC decision no. 51 / 2016 in the Official Gazette, of particular importance are the provisions of Article 4, paragraph 2 of Law no. 255/2013 implementing law no. 135 / 2010 on the criminal procedure Code, according to which "invalidity of any act or work performed before the entry into force of the new law can only be invoked under the Code of criminal procedure". That is, according to art. 282 paragraph 3 Criminal procedure Code "relative nullity is raised during or immediately after the act or at the latest within the time specified in paragraph 4", e.g. until the termination of the pre-chamber procedure, when non-compliance occurred during legal prosecution. Given these legal provisions one could tell at first glance that after the conclusion by the judge for preliminary chamber, who ordered commencement of trial, participants at criminal proceedings who claim that their rights have been harmed by the fact that RIS workers have enforced the technical supervision mandate, can no longer invoke the relative nullity of the documents that were administered as evidence during prosecution.

This idea would be justified only if during the preliminary chamber procedure there would be grounds forecast by law or RCC, which could support the conclusion that probation procedures and evidence do not comply with legal provisions; the rules governing the relative nullity are incidents.

In jurisprudence (conclusion issued by the High Court of Cassation and Justice on 18.03.2016 in case no. 2826 / 1/2015), showed that only in cases where RCC admitted unconstitutional exceptions of the substantive rules that allowed the principle of retroactivity of a more lenient penal law, the contentious constitutional court stated that the effects of decisions are applicable to pending cases, even if from a procedural point of view it had exceeded the time until which the text could be invoked. In this regard, it was the decision no.1483 / 2011 which found that the provisions of art. 320 criminal procedure code of 1969 are unconstitutional to the extent that the application removes more lenient penal law, and the decision nr. 932 of December 14, 2016 which established that Article 10 par. 1 thesis I of Law no. 241 / 2005 on preventing and combating tax evasion also apply to criminal legal relations arising before the entry into force of the law, according to the principle of applying a more lenient penal law, thus the first hearing can be found immediately following the entry into force of the law. In our view, given that until the publication of the RCC decision no. 51 / 2016 in the Official Gazette, there was a presumption of constitutionality of the provisions of article 142 paragraph 1 Criminal procedure code, and the decision was published in the Official Gazette after completion of the Pre-Trial Chamber phase, if they would accept the idea that relative nullity can no longer be invoked during trial, we could say that the RCC decision would have no effect, and secondly the right to defence and the right to fair trial would not exist effectively. However, lack of quality of the law due to non-compliance of clarity, precision, predictability and accessibility cannot be attributed to individuals who claim that by applying that law, their rights have been violated. The state has a positive obligation to enact quality laws, as Hans Kelsen describes it "as a reality consisting of the independently existing state of law as social reality that firstly creates the right and then willingly subjects to that right" (Kelsen, 2000: 367).

Therefore, we can say that the parties or major proceeding subjects who complained about a violation of their rights, were able to invoke the relative nullity before the court, who judged either merits or appeal at the first complete procedure term, which was established after the publication of the Constitutional Court decision.

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Abbreviations

Art. - Article

ECHR - European Court of Human Rights

RCC - Romanian Constitutional Court

Par. - paragraph

RIS - Romanian Intelligence Service

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# The Contribution of the Romanian Constitutional Court to the Application and Development of the Law: Interpretive and Suppletive Jurisprudence

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**Abstract**
Judicial practice of the Constitutional Court is particularly important from the point of view of law enforcement and development. This jurisprudence can be of two kinds: interpretive and suppletive jurisprudence. When certain constitutional or legal rules give rise to several interpretations, the court which performs control of constitutionality is trying to give a fair and uniform interpretation of these legal texts, in which case the interpretation becomes part of the norm (interpretative jurisprudence). The Constitutional Court of Romania has contributed to the clarification of the meaning of certain terms (public property, freedom of contract, discrimination, autonomy, etc.) and to the explanation and development of the principles of law. On the other hand, if the constitutional text is incomplete or ignores certain institutions which are absolutely necessary, it is judicially completed through court order (suppletive jurisprudence). For example, in this way, in Romania, even before there was a settlement of the constitutional review, the judgment of the Ilfov Court in the famous „trams affair" in 1912 resulted subsequently in filling, judicially, the Constitution of the 1866 with rules on the control of laws' constitutionality. Another issue addressed in this article refers to the Constitutional Court's jurisprudence concerning the relationship national law - Community/European law. In some cases, the Constitutional Court considered itself competent to analyse compliance of national law with the Community norms; in others, however, the Court interpreted Community law in order to be able to exercise the control of compliance. As methodology, the author has used comparative and interpretative method, aiming to achieve an overview of the jurisprudence of the Constitutional Court of Romania.

**Keywords:** *Constitutional Court, control, decision, exception of unconstitutionality, jurisprudence*

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**General considerations**

Among the institutions implemented in Romania, after the Revolution from December, with the purpose to defend the rights and freedoms of the citizens, there appeared occidental institutions too, introduced for the first time in the Romanian history: People's Advocate, Legislative Council, law constitutionality control and the Constitutional Court (Deaconu, 2013: 148; Ionescu, 2002: 249-271).

The Constitutional Court is the only constitutional jurisdiction authority in Romania, having an exclusive character of competence (Avram and Radu, 2007: 301). Representing "the guarantee of the Constitution supremacy" (art. 1, section 1, from Law no. 47/1992), the Constitutional Court "shall remain a special and specialised institution, independent from any other state institution" (Deaconu, 2013: 149), situated outside other state institutions or authorities, including outside the judicial system, as "a guarantee for the power separation in state, and, also, a further testimony of for the rule of law" (Deaconu, 2013: 149).

Unlike the control of legality on addressing the enforcement of rules, which can be a hierarchical or a judicial one, and can be done in different forms and manners at the disposal of the parties participant to that specific judicial relation, the control of normative action legality, presents a system of specific guarantees. A way in which it is manifested the later type of control, the one exercised by the Constitutional Court, "is manifested as an extension of will and significance stated by the legislator, evidence viable until the moment the legislator interferes himself" (Kerkhove and Ost, 1988: 232).

By exercising the control of law constitutionality, the Constitutional Court emits decisions that can be registered, according to the specialised authors, in two categories: interpretative jurisprudence and suppletive jurisprudence (Dănişor, 2003: 124).

**Interpretative jurisprudence**

When the judicial norms are susceptible for interpretations, the control body for constitutionality tries to offer a unitary and righteous interpretation of the texts, developing the so-called "*interpretative jurisprudence*". In this case, the interpretation becomes an integrant part of the norm (Dănişor, 2003: 124).

For example, on addressing the concept of common property, the Court, after few contradictory decisions (The Constitutional Court Decisions no. 9, no. 10, no. 11, no. 12, no. 13, no. 16, no. 17, no. 18/1993 and Decision no. 38/1993), clarified the meaning of this term, through the Plenum Decision no. 1 from the 7$^{th}$ of September 1993, in which it was established that "the Penal Code dispositions referring to the crimes against the common property are partially abrogated, according to art.150, section (1) from the Constitution and, therefore, they are to be applied only for the goods stipulated by art.135, section (4), from the Constitution, goods that represent exclusively the object of state private property" (Constitutional Court Decision no. 35/1993)

In the acceptation established by the Romanian Constitutional Court, "the freedom of contract is the acknowledged possibility of any rightful individual to conclude an agreement, a mutuus consensus, a result of their will manifestation that converges with the other part or parts, to determine its content and to determine its object, gaining rights and assuming obligations, which have to be observed by the parties" (Constitutional Court Decision no. 365/2005).

The Constitutional Court brought its contribution to define more accurately the meaning of certain terms, along with the explanation and development of some law

principles. Consequently, through a decision from 2001, the Constitutional Court specified the content of local autonomy principle, showing that the art. 120 dispositions from Constitution "refer to the principle of local autonomy within a public administration organization, from the administrative-territorial units, and not to the existence of a decisional autonomy outside the legal framework, which is generally mandatory" (Constitutional Court decision no. 136/2001). Later on, the constitutional jurisdiction court further mentioned that "the principle of local autonomy does not exclude the obligation of the local public administration authorities to observe the general laws, applicable on the entire Romanian territory, acknowledging the existence of some specific local interests, also distinct, but which are in contradiction to the national interests" (Constitutional Court Decision no. 127/2009).

In the Constitutional Court jurisprudence, the notion of "non-discrimination", ignored for a lot of time, has evolved significantly, passing from the expressly forbidden discriminations to the allowed discriminations, which are those special measures provisioned by the law, for the protection of certain categories or groups of people (positive discriminations) (Radu, 2008: 197).

In a restrictive interpretation given by the Constitutional Court for the principle of non-discrimination, in the period following the revolution from December 1989, it was established that "… through its content, article 16, section 1, from the Constitution, is to be correlated to the dispositions provisioned by article 4, section 2, of the fundamental law that determines the criteria for non-discrimination, which are race, nationality, ethnicity, language, religion, sex, opinion, politic affiliation, wealth and social origin" (Constitutional Court Decision no. 70/1993). As it was underlined in the doctrine (Radu, 2008: 201), if we admitted such an interpretation, it would mean that "only what it is expressly forbidden by the constitutional text as discrimination, is contrary to equality, otherwise, equality is presumed" (Tănăsescu, 1999: 30). This would be equivalent to the admitting of the fact that the principle of non-discrimination forbids not only the discrimination based on the restricted enumerated criteria from the fundamental law, other forms of discrimination based on different criteria, but has the same purposes and, nonetheless, the same effects as discrimination, being, consequently, allowed, according to the law. Nevertheless, such an interpretation provided by the Constitutional Court for the principle of non-discrimination was not accepted in the specialised literature, due to the fact that there are many other criteria of non-discrimination expressly mentioned in the international law sources, or, even if they are not mentioned in the juridical norms, put into practice, they produce the same effects as the ones expressly stated (Radu, 2008: 201).

As regarding the introduction of a new discriminatory criterion, taking into account the fact that article 6, section 5, from Law no. 202/2002 on equality of chances and treatment between women and men stipulates that there is not considered an act of discrimination "the difference of treatment based on gender when, due to the nature of the specific professional activities, or the background in which they take place, it constitutes an authentic and determined professional request, as long as the objective is legitimate and the request is proportional", a distinction that has been extended, for the identity of reason, to other differences of treatment, based on other characteristics besides the gender, remained the duty of the constitutional judge to sentence whether the purpose expected through the introduction of the criterion was legitimate, and if the request was necessary and proportional. The judge had to consider both the effect generated by the apparently discriminatory action/fact on the individual, and the "reasonable necessity" that determined the legislator to emit such a document (the real and reasonable need that

determined the legislator to emit the norm). For example, in the Decision no. 630 from the 3rd of October 2006, the Constitutional Court considered that the provisions from art. $12^2$ section 3 of G.E.O. no. 95/2002, according to which there are exempted from the monthly income benefit of supplementation the people who do not meet the conditions provisioned by law for establishing of unemployment indemnity are constitutional because "the people who have a certain level income are, obviously, in a different situation than those who do not have such income, an objective and rational circumstance that justifies and imposes the instituting of a reasonable differentiated juridical treatment. Thus, if there is not granted the supplemented monthly income to the people who do not meet the terms specified by the law for the establishing of unemployment indemnity, this is a reasonable and rational measure, being accordingly to the provisions from art. 16, section 1 from the Constitution" (Constitutional Court Decision no. 630/2006).

Another controversial aspect that the Constitutional Court considered, was the obligation of the employer to periodically communicate to the employees the economic and financial situation of the unit to which the text from art. 40, section 2, letter d), of the Labour Code refers. By rejecting the unconstitutionality criteria from these provisions, the Constitutional Court established that these legal dispositions does not obligate the employer to communicate professional secrets or confidential information, which can prejudice the activity of the unit, and the obligation of the communication refers to the general data on the economic and financial situation of the unit, information that also have to be made public, through the periodic accountancy balance that is published in the Romanian Official Gazette, exactly for assuring the observing of the market economy principles and the requests of the loyal competition (Radu, 2015: 247).

Another issue noticed by the Constitutional Court was that the organisation of local and parliamentary elections from 2012, on the same date, due to reasons that involved the reducing of expenses, imposed by the economic crisis, and the covering of the expenses from the same budget – the state one, infringed the right to be elected, provisioned by art. 37 from the Constitution (Constitutional Court Decision no. 51/2012). The reason for the admitting of the unconstitutionality exception was that, if a candidate who had not obtained a local mandate (mayor or county council president), would have wanted to participate to the national elections for a parliamentary mandate (deputy or senator), this would have been impossible, the local and the parliamentary elections taking place on the same date (Putinei, 2012: 152-160).

Besides the extremely important role played by the Constitutional Court in the process of applying and interpretation of law, it must be underlined that there are also situations in which the Court had a reserved attitude. For example, in the specialised literature, it is generally admitted that the including of human dignity in the very first chapter of the Constitution, among the supreme values (Deleanu, 2007: 454), confers itself the significance of fundamental constitutional principle (Buta, 2013: 26). Nonetheless, the Romanian legislator manifested reticence on addressing the definition of this concept, and the attitude of the Constitutional Court to invoke it in its decision, was a precautious one: "The functions and the content of these values in our constitutional system are not too clear, owing to the fact that, on one side, they give the impression of some meta-juridical concepts, with a vague content, sometimes impossible to be transposed in clear juridical terms, and, on the other side, the Constitutional Court usually avoids to resort directly to these values, and when it does, it avoids to determine a clear content for them" (Dănişor, 2009: 50).

Another challenge for the Constitutional Court was represented by the notifications of unconstitutionality, which have as object the discriminations from the national normative documents, as compared to the provisions of the European norms. For example, the procedure to put into force the judicial decisions, is less demanding, as compared to similar procedure, stipulated in the European regulations, a reason for which the Court had to face the criticism of unconstitutionality, through which it was sustained that the national law infringes the principle of equality, because it provisions that the sentences, delivered by the Romanian courts, as enforceable, are subjected to the enforcement procedure, while the Regulation (EC) no. 805/2004 of the European Parliament and Council from the 21st of April 2004 on the establishing of a European Enforcement Order for uncontested claims, provisions that the European enforced court sentences are not subjected to enforcement. The Court rejected as unreasonably the criticism, showing that, essentially, there are similarities between the two procedures, especially on addressing the result, which means that the purpose of the order is the same, only the procedure is different, due to the extraneity element. Considering these circumstances, the Court appreciated that the instituting of different procedures is justified only for the people in different situations, respectively, those who obtain a European enforced court sentence, and those from an internal court.

An issue, for which the Constitutional Court jurisprudence is inconstant, addresses the relation national law – community/European law. In certain circumstances, the Constitutional Court considered itself competent to analyse the conformity of the national law to the community one; in others, the Court interpreted the community law, for being able to exercise this conformity control.

For example, through Decision no. 59 from the 17th of January 2007, the Constitutional Court declared itself competent to verify the compatibility of the internal law, with the community law, showing that, provided that the stipulations of the law subjected to control, are to be correlated to those of the Economic Community Treaty, the Romanian law can be compatible to the original community law. In another case law, the author of the unconstitutionality exception was requesting the control to coordinate the internal law to the European law, for the uniformity of the juridical practice on that matter. The Court showed that the referring norm in the control of constitutionality has to be the Constitution itself, and decided that the national courts were the ones that could, in such a situation, to address to the European Union Court of Justice, for the assurance that the community legislation was enforced effectively and homogenously (Constitutional Court Decision no. 558/2007). Contradicting this last decision, the Court, through the Decision no. 1031 from the 13th of November 2007, established that it was competent to verify the conformity of a national regulation, to the community law, based on art. 148, section (2) from the Constitution. Going even further with the inconstancy of its decisions, in an ulterior case, sentencing the Decision no. 558 from the 7th of June 2007, the Court showed that the establishing of the national legislation concordance to the community one, was not a constitutionality issue, but an aspect that regarded the enforcement of the law, by the instance, reason for which, such an aspect, did not represent the competence of the Constitutional Court. Thus, the Court showed that the instances were the ones requested, in such a situation, to address to the European Union Court of Justice, for ensuring the effective and homogenous enforcement of the community legislation, nonetheless rejecting the act of apprehension of the European Union Court of Justice, remembering only that "there are not met the legal conditions" (Constitutional Court Decision no. 392 and 394/2008).

Without considering the conformity of the national text to the community one, in Decision no. 604 from the 20th of May 2008, the constitutional instance subjected for analysis the margin that the community legislation granted to each state member, establishing the unconstitutionality of the analysed national norm, for the reason that the national legislator infringed the Constitution, by not using the entire margin on the disposal. A similar decision is Decision no. 1258 from the 8th of October 2009, in which the Court admitted the unconstitutionality exception from the provisions of Law no. 298/2008 on the concealing of data generated or processed by service providers of the public electronic communications or the public communication networks, along with the modification of Law no 506/2006 on the personal information processing and the protection of private life in the electronic communications sector, a law through which there were transposed the provisions of some mandatory European documents. The unconstitutionality exception was admitted due to the fact that the imprecise formulation of the transposing norms could infringe the right to personal, family and private life, and the secret of mailing.

In the development of its jurisprudence, on the compatibility of the national legislation to the European one, through the Decision no. 668 from the 18th of May 2011, the Court showed that the use of a European law norm, on addressing the control of constitutionality, as norm interposed with the reference one – the Constitution – implies, as stipulated in art. 148, section (2) and (4) from the Romanian Constitution, the observing of two cumulative conditions: on one side, the European norm to be clear enough, precise and unambiguous in itself, or its meaning to be clearly, precisely and unambiguously established by the European Union Court of Justice and, on the other side, "the norm ought to be circumscribed to a certain level of constitutional relevance", meaning that its normative content to indicate the possible infringement, by the national law, of the Constitution – "the only direct norm for reference within the control of constitutionality" (Benke, 2013: 13). Therefore, we consider that the constitutional court established that the European norm is just an indicator for the control of constitutionality, the landmark norm remaining the Constitution. By imposing the two conditions, the Court showed that it understands the fact that it comes to its decision, bearing in mind the enounced terms, to apply the sentences of the European Union Court of Justice within the control of constitutionality, or to formulate preliminary questions for establishing the content of the European norm, within the judicial dialogue, by the national and European constitutional court.

In its later decisions, the Court invoked the mandatory documents of the European Union (Constitutional Court Decision no. 383/2011). Thus, through Decision no. 871 from the 25th of June 2010, the Court considered the European Union Fundamental Rights Charter as a juridical document distinctive from the other international treaties, meaning that it is integrated in art. 148 from the Constitution and affirmed that, its dispositions are mainly applicable in the constitutional control as much as it assures, guarantees and develops the constitutional provisions on the fundamental rights, in other words, to the extent to which the level of protection that it provides in the human rights field, is at least at the level of the constitutional norms.

By analysing the national legislation consistency to the European one, the Constitutional Court also used the dispositions of Decision 2006/928/EC of the European Commission, from the 13th of December 2006, to establish a cooperation and verification mechanism for the progress registered by Romania, to reach certain specific landmark objectives, specific in the area of the judicial system reform, and the fight against

corruption, in order to formulate the ratiocination. Thus, if analysing the constitutionality of Law for the modification and completion of Law no. 317/2004 on the status of judges and prosecutors, and Law no. 317/2004 on addressing the Superior Council of Magistracy for the disciplinary liability of the judges, the Court showed that the national legislator has the obligation to reach the necessary equilibrium between the independence and the responsibility of judges, with the observing of constitutional dispositions and the commitments that Romania made through the treaties that it adhered, respectively those assumed through the above mentioned decision (Constitutional Court Decision no. 2/2012). Moreover, by making an analysis whether the legal dispositions that establish the lawyers' interdiction to exercise their profession in a certain court or prosecutor's office, where the spouse, the relative or the in-law, up until the third degree, and including, exercise their profession of judge or prosecutor, regardless the section, direction, job or the office in which they carried out their activity, are constitutional, the Court showed that they were not necessary, as long as the provisions from the civil and penal codes that refer to abstention and recusation are sufficient to satisfy the exigencies of Decision 2006/928/EC that refer to the existence, in all the states members, of an impartial, independent and efficient juridical and administrative system, endowed with sufficient means, among others, to fight against corruption. Furthermore, the founding of an agency for integrity with responsibilities in the verification of patrimony, incompatibilities and the potential conflicts of interest, along with the capacity to make mandatory decisions that might lead to the application of dissuasive sanctions, does not justify the instituting of such interdictions. Consequently, the Court concluded that this interdiction was not necessary in a democratic society (Constitutional Court Decision no. 1519/2011).

The above mentioned decisions show that the norms of the mandatory European law are an extremely important indicator for the Court, in accomplishing its attributions on the constitutionality of national laws, but not a decisive one in establishing the constitutionality or the unconstitutionality of the criticised legal norms (Benke, 2013: 14).

In the Constitutional Court jurisprudence, another important and relevant stage for the manner in which this instance interprets the provisions of the normative documents, was in the economic crisis that imposed certain budgetary restrictions, reason for which the Court validated some of the measures for balancing the state budget: respectively, the spreading out of some payments provisioned in enforceable titles, having as object the granting of salary rights for the staff working in the budgetary institutions (Constitutional Court Decisions no. 188/2010 and no. 1533/2011), the temporary reduction of the money due of the staff paid from the public funds (Constitutional Court Decisions no. 872/2010, no. 874/2010, no. 1655/2012 and no. 1658/2010), the elimination of public service pensions of some categories of public employees (Decision no. 871/201). Yet, it must be emphasized that the economic and financial difficulties could not justify the elimination of public service pensions of the magistrates, account counsellors or the reduction of contributory pensions, the regulations through which there were instituted such measures being declared unconstitutional (Constitutional Court Decisions no. 873/2010, no.297/2012, no.872/2010 and no. 874/2010). These decisions of the Constitutional Court, referring to the decreasing of the wage quantum and the elimination of the public service pensions are in concordance to the recent jurisprudence of the European Court on Human Rights (ECHR Decisions from the 6th of December 2011 and the 7th of February 2012).

**The suppletive jurisprudence**

In case the constitutional text is incomplete or ignores extremely necessary institutions, it is completed through the jurisprudential manner, the so-called suppletive jurisprudence (Dănişor, 2003: 125). In this way, the French constitutional Council introduced, by prolonging through interpretation the existent texts, new fundamental rights: from the free communication of thoughts and opinions it was taken the freedom of information communication (Décision du Conseil constitutionnel no. 64-27 L du 17 mars 1964), the pluralism as a constitutional value principle, implying, in its turn, the right of the public "to dispose of a sufficient number of publications with different tendencies and characters" and to know "the people who real manage the press companies and the financing conditions of the newspapers" (Décision du Conseil constitutionnel no. 84-181 DC du 11 octobre 1984).

In Romania, such a case in which jurisprudence substituted the deficiency of the constitutional text, was the celebre "tram business" from 1912, which was awarded a solution on the main issue of the matter on trial by Ilfov Court – Section II Commercial, through the sentence delivered on the 2nd of February 1912 (Deaconu, 2005: 111-122). It was later solved with the completion, jurisprudentially, of the 1866 Constitution, with the rules on law constitutionality control. According to art. 128 from the 1866 Constitution, the courts were competent to control the constitutionality of laws. Thus, in case of contradiction between a law, or a legal provision and a constitutional disposition, the judge was obligated to prioritise the constitutional text, which was representing the supreme legislative norm, to which all the other juridical norms were subordinated (Avram, Bică, Bitoleanu, Vlad, Radu and Paraschiv, 2007: 218).

In the matter on trial at Ilfov Court – Section II Commercial, Bucharest Tram Company requested the ceasing in impeding the building of tram lines and the granting of damages for the caused prejudice. In the motivation of the request, it was shown that the Parliament, through the so-called interpretative law from the 18th of December 1911 (laws for which it is admitted, exceptionally, the retroactive principle), imposed new statutes to the society, and, in case the shareholders of the company did not meet the new conditions on the constituting of the society, their right to the shares owning became litigious right of damages. Bucharest Trams Company invoked, before Ilfov Court, the unconstitutionality of false interpretative law, respectively the infringement of separation of powers principle. The instance declared itself competent for applying the control of law constitutionality, invoking the following arguments (Benke, 2013: 2-3): the affirmation of separation of powers in state, the delimitation of each power's role, the distinction between the attributions of the legislative power and the prerogatives of the judicial power; constitutional laws also have the statute of laws, therefore, their applicability in the litigations between parties falls in the competency of judicial power, along with the applicability of ordinary laws. The logical consequence is that, in case of contrariety between the laws, the courts can decide which law is preferred, without being necessary a formal text through which the tribunal is granted the sentencing of law constitutionality, in the cases of its competence, but, on the contrary, to be required a formal text that would stop the exercising of this competence; if the law, invoked before the court, is contrary to the expressed dispositions of the Constitution, the judge is to apply primarily the constitutional dispositions, which should be imposed, through their authority, both to the legislator and the judge; art. 108 from the Penal Code (which was stipulating the punishment of the magistrates that would have stopped or suspended the enforcement of a law) provisioned, in the same time, punishments for the judges that would interfere to

the attributions of the legislative power, and not for those who, having to make a decision between the application of a constitutional disposition and that of an ordinary law, between which there is an obvious contradiction, gives priority, according to the fundamental principles, to the constitutional dispositions, to the detriment of the ordinary law; art. 77 from the Law on the juridical organisation provisioned that the judge, before being appointed to the position, had to swear that he would observe the Constitution and the laws of the country, from this fact resulting the intention of the ordinary judge that, based on the principle of powers separation, to recognise, formally, the judicial power plenitude of attributions to apply the constitution, along with the laws (regardless their degree) and, consequently, to decide, in case of conflict, between them.

Considering the invoked arguments and analysing the data of the case, Ilfov Court sentenced that the law adopted by the Parliament in 1911 was falsely interpretative, the ordinary legislator substituting to the mission of the courts for emitting these laws, and, in this way, infringing the provisions of art. 14 and art. 36 from the Constitution (Muraru and Iancu, 1995: 86-87). Moreover, through the sentence from the 2nd of February 1912, the same court also showed that the mentioned law was unconstitutional, owing to the fact that it did not allow the expropriation of the company from its patrimony, and its shareholders from the property of their shares, besides the cases in which the law admitted the expropriation and, furthermore, without granting a just and previous indemnity to the expropriated.

By exercising its remedy at law against Ilfov Court, the Court of Cassation sentenced on these controversial aspects. Thus, through its decision from the 16th of March 1912, admirably drafted (Duguit, 1913: 101), made with the majority of votes, the Court of Cassation reaffirmed the competency of the courts to control the constitutionality of laws (Alexianu, 1930: 315-317). This decision generated reactions among the magistrates, advisers and author of specialised literature, from that period of tie. Therefore, professor George Alexianu criticised the decision of the Court, showing that, strictly talking, the Court of Cassation did not have the right to exercise this control, because, in that way, the judicial power had an advantage, as confronted to the other powers. Moreover, Alexianu considered that the supreme instance sacrificed the text of the ordinary law, only to be able to support a superior principle, absolutely necessary for the functionality and the organisation of the state. On the opposite side, there was C.C. Dissescu and Constantin Stere, who approved the sentence of the Court of Cassation, appreciating that all the legal texts that are contrary to the constitution, are null.

As a consequence of this episode from the "tram business", the legislative power proved to be more cautious later, on addressing the emitting of laws on the observing of the constitutional dispositions. In their turn, the courts became used to analyse the constitutionality of laws. Through a decision of the Court of Cassation, section III, no. 194/1913, also sentenced in the tram action at law, on the matter on trial, it was reconfirmed the competence of the courts to control the constitutionality of laws (Alexianu, 1930: 317). Later on, the supreme court, in joined sessions, was to sentence, without any problems, on the constitutionality of some dispositions of Decree-Law no. 1420/1920 on the relations between landlords and tenants, and, on the 7th of September 1922, in joined sessions too, on the constitutionality of art. 36 from the Agrarian Law from 1921. Such a position was adopted after the Great Union from 1918, by the courts from Bessarabia and Bucovina, which included very rapidly, in their practice, the control of constitutionality (Criste, 2002: 68).

**Conclusions**

In the view of the *a posteriori* control of constitutional challenge, for the primary regulation normative documents, in the interpretation that was given through sentences on appeal, in the interest of the law (Constitutional Court Decisions no. 854/2011 and no. 515/2012), it ought to be underlined that the role of the Romanian Constitutional Court, in applying and developing the law, lies in an "expressed application of the living law doctrine" (Benke, 2013: 12), the Court considering to be worth mentioning this constitutional exigency, provisioned by art. 1, section (5) from the Fundamental Law, according to which, in Romania, the observing of the Constitution, and its supremacy, is mandatory. From the perspective of the relating to the constitutional provisions, the Constitutional Court verifies the constitutionality of the laws, applicable in the interpretation consecrated in the appeals for the interest of the law. To admit a contrary belief, is to be in opposition to the reason for which the Constitutional Court functions, which would mean the denying of its constitutional role, by accepting a legal text that could be enforced under certain limitations that might collide with the Fundamental Law (Constitutional Court Decision no. 515/2012).

Considering that, in the Romanian constitutional system, there is not regulated a mechanism to verify the sentences, on addressing their observing of the Constitution and the decisions of the Constitutional Court, as in the case of other states, it is represented by the constitutionality complaint, **de lege ferenda**, w considered that the Romanian legislator should expressly attribute such a competence to the Constitutional Court. On one side, such a procedure would prevent the judicial power from not acting within the competences delimited by the Constitution, and would avoid the breaking out of a constitutional juridical conflict, between the judicial power and the legislative one (Constitutional Court Decisions no. 838/2009 and no. 1222/2008). On the other side, there cannot be conceived a juridical means through which the constitutional instance would fully exercise its role of guarantor of the Constitution supremacy (Constitutional Court Decision no. 302/2012). And, equally essential, the *ex post* control of the sentences is as much desirable as there are cases in which the instances refuse the application of the Constitutional Court decisions, by pronouncing sentences contrary to them.

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ORIGINAL PAPER

# The Right to Inclusive Education. Equal Opportunities for All

**Adelina Mihai***

**Abstract**
The right to inclusive education of persons with disabilities involves the reorganizing of the educational system which has the purpose to eliminate discrimination and ensure access to education on an equal manner for all students. The Article 24 of the Convention on the right of persons with disabilities refers to the concept of "inclusion", a concept less used in international legal sources. Inclusive education can be progressively achieved due to the fact that it encounters several obstacles, especially if we take into account that this process includes certain "measures of support" which struggle to satisfy the academic and social demands (needs) of these persons. For some students with disabilities there is a problem of choosing between a special school and an inclusive school, especially if we take into account the type of disability. Inclusive education is an ideal educational system, but for many states it represents a real challenge due to economic and social factors. Some countries such as Italy, have implemented the inclusive education system long time ago, and now, the Italian system has become a model for the others states.
Regarding the situation in Romania, the implementation of inclusive education system is ambiguous. Although there are inclusive schools, they do not involve all the aspects of the inclusive education principles, on the contrary, they just integrate people with disabilities in regular schools. It should be noted that there is a difference between the concepts of integration and inclusion. The right to inclusive education involves more than a simple integration.

**Keywords**: *inclusive education, special education, persons with disabilities, right to education*

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**Introduction**

Inclusive education, or in the broad sense, the right to education of persons with disabilities in mass schools, is the main modality to answer to all educational needs of individuals who suffer from different deficiencies. UNESCO (1983: 167) defines inclusive education as "a form of education provided for those who are not achieving, or are not likely to achieve through ordinary educational provisions, the level of educational, social and other attainments appropriate to their age, and which has the aim of furthering their progress towards these levels".

Process of inclusive education is supported by several international legal sources, especially the Declaration of Salamanca (1994). Within the declaration is stated the fundamental principle of inclusive school, which is "all children should learn together, wherever possible, regardless of any difficulties or differences they may have. Inclusive schools must recognize and respond to the diverse needs of their students, accommodating both different styles and rates of learning and ensuring quality education" (Salamanca Statement, 1994:12). This principle reflects the idea that schools are the ones which must answer to the needs of students and they must ensure the quality of education; more than this, it is in antithesis with the old definition of disability, expressed by several legislative sources, including within Romanian legislation. The first definition of handicap is given within law no. 53/1992, which is "persons with handicap are persons who because of some sensorial, physical or mental deficiencies cannot totally or partially integrate, temporarily or permanently, by their own possibilities, in social and professional life, being necessary special protection measures". "Sensorial, physical or mental deficiencies" are those which limit participation to "social and professional life" of disabled persons. Society is not responsible for the misfit of these persons as considers the social model of disability.

In this case, inclusive education does not have as effect just the transmission of some academic knowledge, but to remove marginalization, teaching the students to accept difference, to learn how to live together and more than this, to understand that they also have an important role in the society. It must be mentioned the fact that people with disabilities were and still are the beneficiaries of the right to education, as well as the persons without problems, but because of the needs hard to satisfy they arrive quite difficultly to fulfil the final academic or social outcome. In this situation occurs a limitation of the performance of the right to education of disabled people in equal measure with the others. This limitation is related to the resources which the schools can offer to students depending on the type of disability. For example a child with mild autism can develop his/her social side and can assimilate the norms of "normality" with less easiness if he/she has the possibility to be integrated into a normal school. Development of social side is a consequence of education, and the implementation of inclusive education in schools is for most students with disabilities an opportunity to fully benefit from the right to education. However, the process of implementation of inclusive education is hard to be carried out, this being mentioned also in the Convention for the Rights of Disables People (CRPD) within which it is about a progressive carrying out of inclusive education, because of several social, economic and legislative factors. With respect to social factors, it is needed a change in the perception of society about the image of disabled people, especially in the case of teachers, of parents and students of a mass school, as change must start from each individual. Reorganization of mass schools and their transformation into inclusion schools depends mostly also on the financial resources allotted to educational system, especially that each deficiency is "educated" with the help of educational materials,

moreover, it is needed the creation of an environment adaptable to educational needs.

Financing is an essential element of inclusion. In case a country pleads for inclusion, then legislation and regulations especially financial must be adapted to this objective. In case these regulations are not compliant with specified objectives, the chances to carry out these objectives are probably reduces. In this respect, financing can be a decisive factor in carrying out inclusion, as financing system can inhibit the inclusion processes, and keeping the student with special needs in mass schools is not enough encouraged (UNESCO, 2016).

Not being fused early, the two educational systems raised certain social barriers between them, more than this, discrimination occurred, and because of this at present it is tried this union of the systems by the process of inclusive education, which consists in the reorganization of mass schools so that the system allows the satisfaction of the needs of disabled persons, too. Legislative factors are closely related to the economic factors if it is taken into consideration the first assertion of art.2 of the First Protocol of the Convention on human rights. The negation at the beginning of art.2 emphasises that the contracting parties do not recognize a right to education which requires them to establish on honour or to substitute education or any particular type or level of education, therefore there is no positive obligation of the states to create a public education system or to substitute private schools. These areas are left at their own choices. However, it cannot be interpreted the fact that the state does not have the obligation to ensure the respect for this right. The law certainly contains a right with a "substance" and obligation which therefore cannot deny the right to education in case of educational institutions which chose to be authorised. The right to education is not absolute, more than this, it also includes an acceptance of some limitations. Consequently, domestic authorities enjoy of a certain limited appreciation as the final decision, as the content of Convention implies, is made in compliance with the appreciations of the court.

Under article 2, protocol 1 of European Convention on Human Rights it is stipulated the right to education, but under other form, as "right to instruction". It must be pointed out the fact that there is a difference between the terms "education" and "instruction" meaning the process of instruction is included in the process of education. By reference to the sense of the concept of "instruction" in the "Explanatory dictionary of Romanian language" it is noticed that the meaning of the term is that of learning, not education. Although the designation of article 2 of the European Convention on Human Rights appears as "right to instruction", within its content the lawmaker refers to the "field of education and instruction", from where it results the emphasise of the differences between the terms. Article 2 of European Convention of Human Rights limits to a certain extent the applicability of inclusive education. First of all the stipulations of the article refer rather to the accumulation of academic learning acquisitions, and inclusive education proposes a pedagogy focused on modelling the personality, and secondly assuring the right to inclusive education needs more obligations from the State as compared to article 2, protocol no.1 to the Convention on Human Rights. In respect to persons with disabilities, there were few cases which were brought before the court. The Court expressed the fact that, whenever possible, a child with disability must be in the sale school with a normal child of the same age. This policy cannot apply to all children with disabilities. There is left an area of accessibility of authorities which are in charge with such children, using the specified resources. (ECHR, 2015).

Until 2006, at international level, the stipulations of obligatory legislative instruments did not focused specifically on persons with disabilities as a target group, but

were included in the general scope for the protection of the right to education for all. Persons with disabilities are not included, but neither excluded from the content of international stipulations, they fall under the scope of protection of human rights without assigning a particular framework of emphasise in respect of education. The appearance of the Convention on the Rights of Persons with Disabilities (2006) succeeded in changing the social perception relating to these persons, more than this, there were 147 ratifications of this instrument, fact which determined the States to approach new influences of integration of persons with disabilities in the general educational system (UNICEF, 2011).

One of the most significant articles of the Convention on the Rights of Persons with Disabilities is article 24 called "education", article which aims at restructuring rights already existing in the instruments of human rights. The attainment of article 24 of the Convention entailed disputes relating to the definition of disability, as well as to the "inclusive" concept within the Convention. In respect of inclusion, the States are not obligated to implement the inclusive system obligatorily in the educational system, as this involves major changes within each general educational system, and it is preferable to ensure this inclusive system only for persons who want to attend an inclusive school.

By elaboration of article 24, as supporter of inclusive education, there is the possibility to change social perceptions, thus promoting certain moral values by which everybody may understand and capitalize diversity. Ideally, the countries will use art. 24 as a model for their own laws and to ensure the access to inclusive education, having as ideal to raise productivity, economic growth, decrease the illiteracy, all these elements being factors in carrying out educational equality and opportunities for disabled persons (Kanter, Damiani and Ferri, 2014). Under article 24, (1) of the Convention on the rights of persons with disabilities, the States Parties recognise the right of persons with disabilities to education. Before continuing the interpretation it is necessary to define the concept of "right to education", therefore reference will be made relating to education within World Declaration on Education for Al (1990), article 1, where is described that "shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time". Education refers to both the acquiring of academic skills and the acquiring of certain values and attitudes. In respect to students with severe deficiencies it is very difficult to talk about education or the accumulation of certain values or academic skills. There are cases where the only education which individuals can acquire is the management of primary instincts. Certain serious deficiencies need another type of educational approach, and in this situation special schools and not the mass schools, at least in the situation in Romania, are capable to provide the necessary education in terms of serious deficiencies. The 1st paragraph of article 24 is a restructuring of articles ensuring the right to education at international level, articles such as Article 26 (1) of Universal Declaration of Human Rights, 28 (1) of Convention on the Rights of the Child, focusing the attention strictly on the right to education of persons with disabilities. Moreover, both paragraph 1 of art.24 of CRPD, enhances the support for the right to education of persons with disabilities saying that this right will be performed "without discrimination" and "on the basis of equal

opportunity". The problem of discrimination in case of persons with disabilities occurred as a reaction of the separation of educational system in mass educational system and special educational system. Although legislation guarantees that, in general, children with disabilities can be enrolled in regular schools, there are still many obstacles in the carrying out of inclusive education. Inclusive education needs a rethinking of education systems, taking into account the special needs of persons with disabilities. Education must not have as purpose the transfer of knowledge, but the consolidation of learning capacities (Beco, 2014).

Researches showed that education of children with disabilities in mass schools is an advantage for everybody. Children with disabilities who are integrated into a mass educational system have more chances to bring advantages in respect of the evolution of the society, especially on the labour market. Inclusive education also helps in building a tolerant society which will determine the future adults to live together in harmony with persons with special educational needs (Kanter et al. 2014).

In those States with strongly separated systems, special schools cannot be closed all of a sudden, because this will lead to a discrimination of children with disabilities in case these children would not receive education anymore. The specialty doctrine proposes a modality of implementing inclusion. The specialists consider that special schools must continue to function being made a gradual passage from segregation to inclusive education systems. Such transition can be made by establishing a mixed form of education. One of the solutions is to bring the two systems in the same campus, so that knowledge and materials from special schools be used in regular schools. Special schools will be then transformed in centres. This learning resource must, of course, remain a temporary solution. It must be taken into account that bringing together the two systems can mean a system separate in reality if the principles of inclusion are not taken into consideration. After a while, the centres of learning resources must be incorporated in regular schools. Resources, also, must be transferred from special schools to mass school (Beco, 2014).

A simple integration is not sufficient. It must be mentioned also the fact that inclusive education is not equal to integrated education, which reflects the idea that the access of children with disabilities to a mass school is not enough if measures necessary to inclusion are not taken, and are taken only the measures necessary to integration. Inclusive education recognises the fact tat all the children are different and despite this reason they must be able to participate into general instruction system (Kanteret al. 2014).

Often confusion occurs between the concept of inclusion and that of integration. The term "integration" is used still from 1960 and required a reformation of the system by the participation of persons with disabilities to education within special schools. In the past many States limited the right to education of persons with disabilities, usually sending them to medical institutions. Thus, by integration was requested the recognition of the right to education through the construction of special schools (Vislie, 2003). Specialists in the field, Sebba and Ainscow, (1996) consider that inclusive education is a process by which are addressed all the needs of students and not only of reduces group of persons, recreating a curriculum adapted to each type of deficiency, not only an adapted curriculum as that specific to special schools, more than this it implies the reorientation of the teaching staff and students towards diversity and understanding of it .

An important aspect which is based on the process of inclusion refers to equality of chances. Therefore no child with deficiencies must be treated differently from one without deficiencies. The purpose of education must be one common for each student, exactly as it is described in the Convention of Children Rights, which is that all the rights

apply in case of all children without discrimination. In respect of rule no. 6 of the Standard Rules on equalization of opportunities of persons with disabilities (1993), inclusive education was defined in a clear way as being a way of equalizing the opportunities, by integration of persons with disabilities into the normal education system (Huei, 2009).

By equal opportunities it is understood, as it is specified in Standard Rules, "the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities". In case of persons with disabilities, equal opportunities refer to materials specially conceived for each type of disability as well as for the adaptation to environment, and they are supported by paragraph 3, letters a,b,c of article 24, determining the States Parties to take measures than can facilitate learning for persons with disabilities. These "support measures" taken by the States Parties are used in order to adapt the general education system. The general measures include provision of personal assistance, including medical assistance, as well as the necessary equipment and materials, including Braille and sign language, as it is stipulated at article 24 paragraph (3) of CRPD. Support measures must also be taken outside schools. They must facilitate the interaction between students with disabilities and the other classmates. To this purpose, it is necessary that schools promote the respect for diversity in order to fight against stereotypes and preconceptions against children with disabilities (Beco, 2014).

**Integration of persons with autism in mass schools**

Legal definitions of disability were a debate matter both in Europe and in the entire world. Despite the efforts made by the World Health Organization, there is no legal universal definition of disability. A recent study on the definitions of disabilities in different EU countries showed that the definitions vary from country to country (Degener and Quin, 2004).

Although the second element of article 1 of CRPD "announces" the definition of "disabilities" as part of specialty literature thinks that there is no definition, rather than a guide containing defining elements for persons covered and protected by the Convention. Therefore, article 1 must be read in compliance with par.(e) of the Convention which stipulated that disability is an evolutive concept, meaning there is not possible a clear definition of disability as long as the content of definition can change. The stipulations of art.1 of the Convention borrow elements of the social model. Focusing of the definition reflects over the barriers and obstacles restricting their full participation in the society. There is no doubt that this definition will determine more other States to review the definition about disability and about persons with disability (Quinlivan,2012).

Although it is nothing specified about autism as being a disability, it must be mentioned the fact that in the USA a child diagnosed with a disability must affect the educational performance so that must be required special services. In order to receive special services a student must demonstrate that he/she suffers form a disability falling under the following 13 categories specific to disability, including: autism, handicap in growth, learning disorders, intellectual disorders, emotional or behaviour disorder, communication and language disorder, sight and speech disorders, physical deficiencies, attention disorders, multiple disability and traumatic cerebral lesions (Cordiella and Horowitz, 2014). Falling under the sphere of disabilities, persons with autism are considered as part of a special group of disabilities, as it needs to benefit from continuous learning during the entire life. Referring the educational system to the needs of persons with autism is essential for their development, especially with respect to their social

integration.

Autism European Organization filed a complaint against the French State because there was not respected the right to education of several children with autism, under article 15 of the European Social Charter. The final decision made by the Council of Europe showed that France did not fulfil its educational obligations in respect of persons with autism within the educational system. Specialty literature considers that an effective modality to satisfy the needs of persons with disabilities is to adapt and define education for each person with autism separately. In order to satisfy the educational needs of pupils with autism it is necessary a mass educational system to adapt to each type of autism separately, so that pupils can benefit from a specific instruction, adapted to each individual. Each school must ensure and put in the first place methods of personal development and vocational training for these children, to be an education based on the child and not necessarily on academic performances (Friedel, 2015).

In the case Autism Europe vs. France, the European Committee of Social Rights made some very important decisions, clarifying the content and the field of application of protection which the States must guarantee to persons with autism. Thus, States must use an adequate definition of autism in their legislation and official documents and not an inappropriate restrictive notion. According to the European Committee for social rights, the reference point for national definitions must be that adopted by the World Health Organization and also the States must adopt concrete financing measures and modalities for care and support facilities within a reasonable period using at maximum the available resources. In the case of Action Europeenne des Handicapes (AEH) v. France, the European Committee for social rights arrived at the conclusion that France did not comply with the obligations of education and training in children and teenagers with autism, on the ground that France does not guarantee to children and teenagers education on mass schools and defective schooling of autistic teenagers dos not allow them the access to professional training (Palmisano, 2015).

A great part of the specialty doctrine considers that there are necessary certain legislative measures so that the right to education of persons with autism is assured. Legally, the needs of persons with autism are satisfied better if the autism is recognised as a specific form of disability with deficiencies during the entire life. Indeed, including autism in the categories of invalidity established by law can be a first step to consolidate the rights of persons with autism, in the internal legal order (Della Fina, 2015).

The European Committee for social rights, in the decisions made in the case AEH vs France, found out that autism is a disability and not a temporary disease, with a stable and permanent character. Moreover, States must supply a continuous service of educational assistance during the entire life of the individuals with autism, as if such assistance is not arranged in an adequate manner, this fact can hamper persons with autism to integrate in the professional life (Palmisano, 2015).

Unlike France and other countries, at present in Italy there are laws by which is ensured the access to education of all persons, inclosing persons suffering from autism. No school can refuse access and nor programs adaptable to children with autism or with other disabilities.

Italy has an inclusive system before the adoption of the Convention on the Rights of Persons with Disabilities; moreover, it positively and proactively answered to art. 24 al, also all the recommendations of the European Council. National and regional laws of Italy reflect the commitment of the country to honour international laws including stipulations of the Convention on the Rights of Persons with Disabilities. For example, in

1971 there were adopted laws to assure to students with disabilities compulsory education in common schools except for severe cases. The Italian Parliament adopted a law which guaranteed the right to primary and secondary education for children with disabilities helping them to integrate in a normal class within the State public system. This law includes educational procedures, but also plans for the construction of buildings and adjustment of transportation. Later changes occurred in the general education ensuring the teachers of support for integrated classes. (Kanter et al. 2014).

In Italy, students with disabilities were integrated in regular schools for more than 30 years. Consequently, there is no separate education system for these students, except for some special schools, which continue to function. Integration began in the middle of 70's in "dell'infanzia scuole" and in primary schools and it was extended gradually to secondary educations schools and universities. Integration was introduces for the first time at experimental level and then implemented regularly. Law no. 104 of 1992 established that „students with handicap aged 0-3 are granted enrolment in nurseries" and that the „right to education is guaranteed to children with handicap in alls the sections of the pre-primary schools, in regular class of each type of school and in universities. But the consolidated Law no. 577 of 05 February 1928 compulsory education was, in fact, extended in terms of blind and deaf persons, on the condition they have no other handicap, which could impair the carrying out of compulsory education. Students with psychic handicap were to be integrated in special classes or in institutes for minor offenders. The regulation of year 1967 for the implementation of medicine at school established as follows: „children with somatic or mental anomalies which do not allow them to regularly attend regular schools and who need particular treatments or medical and teaching assistance are oriented towards special schools. Children with no severe intellectual handicap, children who are not adapted to environment or with behaviour anomalies can be integrated in regular schools, or sent to special classes". The Constitution stipulates that the Italian Republic guarantees school for all (article 34) and stipulates that the compulsory solidarity must be fulfilled (article 2). Moreover, it is said that it is the „duty of the Republic to remove any obstacles which limit freedom and equality of citizens, for the purpose to ensure full development of human" (article 3). Educational system in Italy is organized in compliance with the principles of subsidiarity and school autonomy. The State and the regions share legislative competence. In addition, regions should comply with the provisions of national legislation. Schools are autonomous in respect of teaching, organization and research activities (EACEA, 2009).

**Conclusions**

Implementation of inclusive education has as results the promotion of diversity, elimination of discrimination, and equal access for all children to a quality education; moreover, it provides opportunities for employment, of persons with disabilities. Inclusive education is essential for attaining the universality of the right to education, including for handicapped persons. Only the systems with inclusive education can provide both the quality of education and a social development for handicapped persons. Inclusive education presupposes more than introducing the students with disabilities in mass schools. With the help of this process the students are respected and appreciated. Inclusive education is built on values which increase the capability of a person to reach the objectives and to embrace diversity as an opportunity to learn. Students with disabilities need an adequate support in order to participate in conditions of equality with the others in the educational system (UNESCO, 2009). The perfect solution to eliminate

discrimination, according to UNICEF is that "every child should have an equal right to attend school. Making schools accessible and available is an important first step in fulfilling this right but not sufficient to ensure its realization. Equality of opportunity can only be achieved by removing barriers in the community and in schools. Even where schools exist, economic, social and cultural factors – including gender, disability, AIDS, household poverty, ethnicity, minority status, orphanhood and child labour – often interlink to keep children out of school. Governments have obligations to develop legislation, policies and support services to remove barriers in the family and community that impede children's access to school" (UNICEF, 2007: 31).

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ORIGINAL PAPER

# Controversial Issues Relating to Legal Disputes of Constitutional Nature between Public Authorities

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**Abstract**
The legal disputes of a constitutional nature are a relatively new concept in the Romanian space and this is the main reason why they still represent an important and yet a controversial aspect for the institutional framework of the state. The normative coordinates are extremely relevant for the constitutional nature of this legal conflicts due to the fact that they imply a variety of domains: the subjects involved (which can be only public authorities); the situations which may lead to the configurations of such disputes; the specific content of these litigations (represented mainly by the conflicts of jurisdiction, but somehow their sphere was extended through the jurisprudence of the Constitutional Court of Romania); the effects they are capable of produce (which consist in institutional blockages which affect the well functioning of the rule of state) and the examples may continue. Their controversial nature was the element that determined the provisions of the Fundamental Law to invest only the Constitutional Court with the settlement of these conflicts, thing that increased the interest of the scholars in this area encouraging them to proceed forward and to seek for answers in the constitutional jurisprudence, studying in detail every decision of the Court which came into notice. Our main objective is to emphasise and in the same time to analyse each one of the normative coordinates of the legal disputes of a constitutional nature throughout the jurisprudence of the Constitutional Court in this domain in order to offer a clear vision of the concept.

**Keywords:** *legal disputes of constitutional nature, Constitutional Court, normative coordinates, public authorities*

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The institution of legal disputes of a constitutional nature between public authorities is a relatively newly concept, which was introduced in the constitutional space of Romania quite late, since 2003- the moment when the fundamental law was reviewed, and, from my point of view, the main purpose of this action was the enhancement of the role of the Constitutional Court of Romania – this representing the moment when the Court became the guardian of the organic litigations- instead of establishing in the best manner possible this controversial category of disputes in order to ease the institutional relations of the Romanian state.

The predictable argument that justifies the need for a more precise and accurate regulation of this typology of conflicts is their controversial and complex nature and the significance they present for the well functioning of the rule of law.Their heterogenic nature in conjunction with the incomplete constitutional provisions which regulate this domain, inevitably place this typology of conflicts in obscurity and also generate many controversies when it comes to the procedure of solving such disputes.Initially the category of constitutional legal disputes between public authorities seemed not to raise many institutional complications, yet, the problems begin to arise as their occurrence inside the state is increasing, and the need for more precise regulations in this direction becomes a primary concern.The aspects which matter most are the normative coordinates of legal disputes of organic nature, the ones which distinguish themselves by the division of the structure which contains them.

Due to the fact that this institution presents a certain interest, some scholars (Gîrleşteanu, 2012b: 41-44) in their attempt to unravel their complexity, identified eight normative coordinates of the organic conflicts: the first coordinate is a procedural element which refers to the way the Romanian Constitutional Court is notified about the appearance and existence of such a dispute; another normative regards the circumstantial subjects between which these disagreements may appear – namely public authorities-; the third element is represented by the objective facts which trigger the conflict; the fourth normative is the concrete content of an organic dispute; the fifth relates to the effect such conflicts may arise in the legal framework of the state - an institutional blockage; and the last three of them refer to the activity of the Constitutional Court in such disputes – it is bound to solve throughout stating a decision any presumed conflict about which it has been noticed about in order to indicate the way those public authorities should act further.From the outset, the elucidation process of the normative coordinates of this institution was a difficult one, due to the fact that unlike other European countries that served as a model for Romania in the domain of the organic litigations, these components of a high importance were not entirely regulated by the provisions of the fundamental law, some of them being left to the subjective judgment of the Constitutional Court according to its new introduced attribution.

In accordance with the fundamental law, the Constitutional Court of Romania settles down the legal disputes of a constitutional nature between public authorities at the request of the President of Romania, one of the Presidents of the two Chambers of Parliament, the prime minister, and the President of the Supreme Council of Magistracy (Constitution of Romania, art. 146, letter e). Analyzing these fundamental provisions, exclusively from the perspective of a grammatical interpretation, only three conclusions can be drawn: which is the institution who has the ability to settle legal conflicts of a constitutional nature – the Constitutional Court of Romania; which are the public authorities which can notify the Court about the appearance of such disputes namely the

President of Romania, one of the Presidents of the two Chambers of Parliament, the prime minister, and the President of the Supreme Council of Magistracy; and which are the subjects which may become parties of this type of disagreement – public authorities of the state.

No other normative coordinate of the legal conflicts of constitutional nature may appear from the constitutional provisions indicated, and, due to the fact that this research could not be resumed to the grammatical interpretation, I proceeded to analyzing in detail this matter, and I reached the following reasoning: since the Fundamental Law establishes in an extremely concrete manner that only the Romanian Constitutional Court is empowered to settle legal disputes of a constitutional nature this means that the Constitutional Court is bound to carry out the settlement of any legal conflict of constitutional nature of which existence it has been noticed about, and shall never be allowed to refuse to solve such a disagreement; moreover, once the Court has proceeded to the settlement of the conflict, her activity should be completed by issuing a decision, a decision which, emanating from the constitutional jurisprudence is likely to be executed.From these hypothesis, another three normative coordinates arise and refer to the fact that the Constitutional Court is required to settle all legal disputes about which it was notified about, while having a constitutional duty to pronounce a decision in order to indicate the way public authorities shall interact in similar further situations, a decision which is capable of being executed.

Any other aspect regarding the concept of organic conflicts cannot even be deduced from the constitutional provisions, thing that raises a series of questions about this domain and also places the Constitutional Court of Romania into a relatively difficult position, who in order to fulfill its role as the guardian of legal disputes of a constitutional nature is obliged to intervene and clarify, in all respects, the enigmatic character of these legal disputes.( Gîrleșteanu,2012a: 381). In such conditions, without having the benefit of a rigorous legal framework and of a judiciary precedent, the Constitutional Court was simply forced on one hand to analyze in a detailed manner any legal conflict of constitutional nature that arose between the public authorities of the state and which was brought in its attention for its settlement and, on the other hand, to discover other constituents of such disputes.

Throughout its own jurisprudence, the Constitutional Court identified a series of defining elements of the organic litigations: the objective situations which favor the emergence and outbreak of such disagreements; their concrete content- which, in fact, is an extremely diverse one due to the multitude of contexts which can generate legal disputes of this nature- and the specific effects that these conflicts must engender so that they can be classified by the Constitutional Court as having a constitutional nature- an institutional blockage in the absence of which the Court shall never proceed to the settlement of the conflict since it considers that it does not have a constitutional nature therefore it does not fit in its competences. These are another three normative coordinates of legal organic disputes, which can exclusively be drawn from the jurispridencial activity of the Constitutional Court. Currently the normative coordinates of the constitutional conflicts can be divided by two criteria namely by how they are regulated and from the point of view of the aspects to which they refer to.

In what concerns the first criteria set there can be identified two sets of coordinates – normative coordinates which are regulated throughout Constitutional provisions – and into this category can be mentioned the institution empowered to settle such conflicts and its obligations toward this action; the persons who have the ability to

notify the Constitutional Court about the existence of organic litigations and the parties of such disagreements; and the second category represented by the normative coordinates which are established throughout the constitutional jurisprudence – namely the triggering fact of the conflicts, their concrete content and their devastating effect towards the institutional framework of the state. Referring to the other criteria, we may indicate procedural coordinates of organic disputes and also the coordinates of content.Taking into consideration these aspects, whenever the constitutional court was seized with the existence of a legal conflict of constitutional nature, it proceeded above all to the analysis of these normative coordinates from all points of view, in order to avoid its involvement in all sorts of disputes, most often political ones, and thus transforming herself into a political arbitrator between public authorities.Should it have not proceeded in such manner, the purpose for which the Constitutional Court has become the guardian of legal conflicts of constitutional nature, namely the insurance of the institutional balance of the state by the well-functioning of the rule of law, would not be a justified one.

Yet, neither the identification nor the classification of the normative coordinates of organic disputes are equivalent to removing all controversy about these concepts, due to the fact that there are some issues which continue to be enlightened within the most significant coordinates of this institution such as the subjects involved and the concrete content of the organic disputes.I have emphasized the importance of these two elements simply because only those two are able to confer for any conflict which may arise inside the state a constitutional nature. Thus, only if a legal conflict appears between public authorities – those who are considered such by the provisions of Title III of the Fundamental Law – and is related to certain competences established by the Constitution on certain authorities, only then, this type of conflict can be considered an organic one who's settlement is exclusively conferred to the Constitutional Court of Romania.

Next, I will proceed to highlight each element of an organic litigation and in order to achieve that, I will introduce a procedural normative coordinate of a great importance for the institution of legal disputes of a constitutional nature which primarily emerges from the provisions of the Fundamental Law and refers to the way the Constitutional Court of Romania is being notified when such situations arise, specifically on the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister or the President of the Supreme Council of Magistracy. (Fundamental Law of Romania, art. 146 letter e). From the interpretation of these provisions it emerges extremely clear that only five people may notify the Constitutional Court about the existence of an organic legal conflict, and these are set out in a restrictive manner in the provisions of the fundamental law.

It is therefore the case of the representatives of the three powers of the state, more precise the heads of the institutional structures of the state; the President and Prime Minister (as heads of Government and representatives of the executive power); presidents of the two Chambers of Parliament (representing the legislative power) and President of the Supreme Judicial Council - the judiciary. In other words, all those authorities who are directly involved in the exercise of separation of powers (Bogdan Dima, 2009;14).

The constitutional provisions concerning this aspect, of notifying the Constitutional Court, should be interpreted in a restrictive manner so as it may lead to the idea that when it comes to legal conflicts of a constitutional nature the Court can never take itself notice of the existence of such dispute and nor can it state about such an existence while it exercises another of its constitutional competences.

I strongly believe that the provisions of the Fundamental Law referring to this normative coordinate are conclusive and relevant and do not over estimate the role of the Constitutional Court in the Romanian institutional system, due to the fact that they do not allow the Court to act on her own, on the contrary they introduce a certain condition - the notification of the constitutional court by certain authorized institutions, which often have an interest in the cause they are making reports for.Due to the fact that the Constitution clearly stated these things, within the constitutional jurisprudence did not appear many controversy from this point of view on the grounds that if certain issues were to emerge from the way the Court was seized, the guardian of the conflicts would have noticed it was not properly notified and as a consequence would proceed to the dismissal of the request as an inadmissible one.Yet, the only matter with a relatively complex aspect and which could be able to generate uncertainty, since the Constitution does not mention it at all, is the term in which this type of request must be introduced before the Constitutional Courts. Taking into account certain aspects, such as the importance conferred to the organic disputes, the nature of the subjects involved in such disagreements, their object and the effects these conflicts may generate within the state, it was also established the term within such a request may be introduced, term with varies from one state to another.

So, in the case of Germany, the provisions of the fundamental law clearly express that the Federal Constitutional Court should be noticed about the existence of an organic litigation within 6 months since the acknowledgment of the measure taken by the opposing party or the latter's failure to accomplish an act that was part of its attributions (National Rapport for the XV th Congress of the Conference of Constitutional European Courts presented by the Constitutional Court of Germany, 2011: 29). Unlike Germany, where it is emphasized the period of time compulsory for introducing this request to the Federal Constitutional Court, in Romania things are not even similar as there is absolutely no mention of the existence such a procedure.Although nobody indicates a period of time within which the Constitutional Court should be notified about the existence of a legal conflict of a constitutional nature of whose resolution it should be invested with, yet, things are being rapidly solved due to the fact that a lot of aspects are of a great importance in this domain.

From my point of view, the procedure of seizing the Court is a rather accelerate one firstly because of the political reasons that imply these conflicts and also of the disastrous effects they can generate within the institutional framework of the rule of law.

A relevant situation was presented in front of the Romanian Constitutional Court (Decision no. 435/2006 pronounced by the Constitutional Court of Romania, 2006) when the President of the Superior Council of Magistracy seized the Court on 4th of April 2006 about the existence of a legal conflict of a constitutional nature between the judicial authority on one hand, and the President of Romania and the Prime Minister of Romanian Governement, on the other hand, dispute generated by the public statements against the judiciary and magistrates, made on several occasions by the President, referring to the "incompetence", "independence of law" and "a high level of corruption".As it can be seen, things developed fast, between 10$^{th}$ of March 2006 and 4$^{th}$ of April - even though certain statements of some authorities of the state referring to the judicial system dated one year ago, they had no relevance since the one who had a legitimate interest in the cause did not consider they represent a reason relevant enough to create legal conflicts of constitutional nature-.

Only in April 2006 these public opinions acquired, according to the vision of the President of the Supreme Council of Magistracy, a more pronounced nature that justified

the necessity of drawing a warning signal, reason for what, shortly after, within a month, this presumed legal conflict of constitutional nature was presented in front of the Court for its settlement.In what concerns the normative coordinate of the parties involved in an organic dispute, I will present in a very short manner their content because it has been the subject of a different study, and I will focus on highlighting certain controversies that may arise about them.Thus, the Fundamental Law of Romania clearly expresses that a legal conflict may appear only between public authorities (Fundamental Law of Romania art. 146 letter e).), and the Court not only that it supports this idea but it also completes it establishing that can be considered parties of organic litigations only the authorities that are included in the category stipulated in the provisions of Title III of the Constitution (Decision no. 838/2009 pronounced by the Constitutional Court of Romania, 2009) .

The first controversy that outlines from this normative coordinate is that if a party involved in the dispute must also be the one that notifies the Court about the disagreement. This hypothesis was immediately solved by the guardian of the organic conflicts concluding that such a condition is not an admissibility one.Another question that arises is why in every organic dispute that has been brought in front of the Constitutional Court the only parties involved were either the President of Romania and the Government, or President and the High Court of Cassation and Justice, or C.S.A.T and the Government, or the Parliament and the President, or the Parliament and the Government, and so on, but never local government bodies, although they had also according to the fundamental law, the ability to be become topics of this type of conflicts?

The answer is difficult to be discovered reason for what I will launch the following hypothesis: concerning the central public administration as a party of organic disputes, the Constitutional Court was notified about the existence of certain conflicts and in this regard I mention the case when the Court was invested with the settlement of a legal conflict of a constitutional nature between the Romanian Government and the Supreme Council of National Defense, disagreement caused by the obstruction of C.S.A.T from accomplishing its constitutional duties, obstruction consisting in the elimination of this authority from the decisional process established by law in its charge (Decision no. 97/2008 pronounced by the Constitutional Court of Romania); yet, regarding local government bodies, they were never a part of a legal conflict of a constitutional nature, thing that can easily be noticed from the constitutional jurisprudence in this domain.

Although in the case of Romania could have been possible such a dispute, due to the fact that the provisions of the Fundamental Law estate that local government bodies can also be a subject of legal conflicts of a constitutional nature, yet until now such a disagreement regarding the relation between central and local government have not appeared, the way they appear inside other European states. Italy, for example, it is considered that in the category of organic disputes are included two types of conflicts taking into account the criteria of subjects involved- the conflicts between constitutional organs of the state and conflicts of competence between state and autonomous regions.

In the last category the parties involved are the state represented by the President of the Council of Ministers and the regions represented by the Presidents of regional executive bodies as in Italy there are twenty regions and two autonomous provinces (Trento and Bolzano), thing that leads to the following conclusion only twenty three subjects of the organic litigations of competence can be admitted -the state, two provinces and 20 regions- (Carpentier Elise, 2006: 385).

A similar situation exists also in Spain, where the constitutional provisions regulate the domain of organic litigations thus assuring the separation of the powers

between the organs of the state – between the Parliament, The Government, and organs of the judicial system, and also between territorial powers of decentralized states as here exist seventeen communities and two autonomous cities who have their own institutional organs and their own system of law which, of course, are in accordance with the constitutional provisions, and that can, for sure, become parties of the legal conflicts of constitutional nature (Favoreu, 1996: 157).

I strongly believe that concerning the local government bodies in Romania, this category can be subjects involved in the legal organic disputes due to the fact they hold, from the constitutional provisions (Fundamental Law of Romania, art. 146 letter e) and Title III), the capacity of becoming parties of such disputes.The simple fact that they have never been party of organic disagreements does not become a strong reason to allow the Constitutional Court to definitely discard them from the category of public authorities between which can appear organic divergences.I do believe that the main reason why local government bodies have never become part of a conflict in order to determine the involvement of the Constitutional Court in their settlement is not because they have not been granted by the fundamental law, but it is due to the fact that they did not have a certain person with a legitimate interest to seize the Court in this direction.

The objective situation that triggers an organic litigation is a material normative coordinate which can be extracted, exclusively constitutional jurisprudence.The complexity of this coordinate primarily appears because there always is a tend to merge the triggering situation with the actual content of these conflicts thing that means the attention is mainly focused on studying the content itself and thus skipping the other normative coordinate - this tendency can be noticed in the attitude of the Constitutional Court of Romania, but which I deeply disagree- and another reason consists in the diversity of these situations – aspect, which on one hand, is easily demonstrated throughout the multitude of complaints made at the Constitutional Court regarding the appearance of constitutional conflicts and which, on the other hand, makes it almost impossible to obtain an accurate classification of this triggering factors.At this time it is almost impossible to make a strict classification of these factors generators of organic litigations, because the area of these situations into which can be involved two or more public authorities is too extensive, conjuncture which is due principally to the characteristics of the institution of legal conflicts of a constitutional nature.

Taking into consideration all of the above and also the relevant jurisprudence of the Court as in Romania this institution does not have the privilege of concrete constitutional provisions as there are in other states, we can conclude that the objective triggering situations certainly imply a lack of collaboration between the public authorities of the state and may consist in judicial acts, actions or omissions (National Rapport for the XVth Congress of the Conference of Constitutional European Courts presented by the Constitutional Court of Romania, 2011: 35).

In what concerns the normative coordinate of the content of organic disputes, this is the most complex and most controversial element of this institutions, features that can be identified by means of two considerations: its complexity is due to the multitude of issues involved in this structure and its controversial profile is emerging as a result of constitutional provisions relevant in this domain, which, according to each state, may have a more or less pronounced nature.

In the case of Romania, this normative coordinate represented the one which arose a lot of queries mainly because the fundamental law of Romania, the only law that governs this typology of conflicts, does not have a concise and concrete content in comparison

with the constitutional provisions of other legal systems. Thus, there are fundamental laws from which one can identify with ease the content of the organic litigations - consisting mainly in conflicts of competence (Fundamental Law of Germany, art. 93. Par. 3,4, Fundamental Law of Spain, art 161, par.1, Fundamental Law of Italy 134, par.1), which cannot be sustained for Romania where the constitutional provisions do not even mention this issue (Fundamental Law of Romania, art. 146 letter e).)

For these reasons, the Constitutional Court of Romania intervened and elucidated, at least for the moment, this domain, expressly establishing that a constitutional legal conflict involves specific acts or actions throughout an authority or more assume powers which according to the Constitution, belong to other public authorities, or the omission of public authorities consisting in declining their competences or the refusal to perform certain acts that are part of their obligations (Decision no. 53/2005 pronounced by the Constitutional Court of Romania, 2005), so it is only about positive or negative conflicts of competence. This hypothesis proved to be extremely useful and relevant at that time given the small number of complaints the Constitutional Court had to solve in this field, and also represented a strong modality though which the Constitutional Court avoided meeting his biggest fears, being involved in the settlement of political conflicts. However, as the activity of the Court in the domain of organic litigations has intensified, it had to extend its vision and include in the category of legal conflicts of constitutional nature also other situations, in fact any conflicting legal situations whose occurrence results directly in the text of the Fundamental Law (Decision no. 98/2008 pronounced by the Constitutional Court of Romania,2008).

It is to be mentioned a decision of the Constitutional Court when it was invested with the settlement of a legal conflict of a constitutional nature between the President and the Government, caused by the refusal of the President to accent the proposal made by the Prime minister regarding the naming of Norica Nicolai as the Minister of Justice.Analyzing the facts, the Constitutional Court notes that both public authorities involved in this constitutional dispute properly fulfilled their duties set out in the Fundamental Law, so it can not be identified a positive or negative conflict of competence.Yet, it was generated an institutional blockage due to the fact that public authorities with conjunct attributions in achieving the same constitutional objective do not cooperate and are unable to agree repeatedly.Therefore, another two controversial issues outline: the institutional blockage inside the state and the hypothesis of constitutional loyalty between the powers of the state.

To put it in a nutshell, the process of defining legal conflicts of a constitutional nature is extremely complex, so complex that sometimes it seems impossible, and therefore it is compulsory, in order to achieve this objective, to take into consideration in the same manner both the constitutional provisions and the constitutional jurisprudence when it comes to the normative coordinates of organic disputes. But it should also be mentioned that no matter how intense we shall explore this domain, it will always be a certain situation of this kind that will take all of us – the Constitutional Court, public authorities, scholars - by surprise as it has and always will have a controversial nature.

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# Foreign Influences in Romanian Legal Terminology

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**Abstract**
The foreign influences that we notice in Romanian terminology can mirror the foreign influences manifested over time in our political history, our culture and hence the legal field. The Roman influence is virtually the mark of our nation. In the legal field it is obvious during the ancient period after the conquest of Dacia and its transformation into a Roman province. The second stage starts in the 15th century, witnessing the transition from customary law to written law through the Codes of the Church. The third stage, resorting to the old Roman encodings, represents the modernization of the Romanian legal system. After the Roman influence, the most important is the Slavic one. The Slavic peoples, in their turn, surrounded our territory like a belt. It was hard to dispel intrusions and, as Ioan Bogdan pointed out: "the influence of the Slavic element in the emergence of our nationality is so obvious that, without exaggerating, we cannot speak about a Romanian people before the absorption of Slavic elements by the Roman local population during the 6th-10th centuries". The Hungarian-German influence in Transylvania and the Turkish influence in Wallachia and Moldavia were also manifest during the Middle Ages. I. Condurachi wrote about the Hungarian-German influence, considering that the organization of the cities, the pre-emption right, the witnesses and gender equality upon inheritance followed the German model. Later, after the establishment of the Romanian medieval states, one can notice, according to I. Peretz, a Turkish influence exerted only in the field of public law and legal language (*agă, divan, caimacam, sinet, adet*). The modern and contemporary period turns the Romanian society towards the West and influences come from this side. We thus make reference to the French influence, foreshadowed during the Phanariot period, and the English influence as an effect of globalization.

**Keywords:** *foreign influences, Romanian legal terminology, Middle Ages, modern period, contemporary period*

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The foreign influences that we notice in Romanian terminology can express how principles, norms and institutions of other legal systems were reflected in Romanian law over time. The Roman influence is virtually the mark of our nation. In the legal field it has three main stages: the ancient period after the conquest of Dacia and its transformation into a Roman province; the second stage, which begins in the 15th century, witnessing the transition from customary law to written law through the Codes of the Church; the third stage, resorting to the old Roman encodings and representing the modernization of the Romanian legal system. After the Roman influence, the most important is the Slavic one. The Slavic peoples, in their turn, surrounded our territory like a belt. It was hard to dispel intrusions and, as Ioan Bogdan points out that the influence of the Slavic element in the emergence of our nationality is so obvious that, without exaggerating, we cannot speak about a Romanian people before the absorption of Slavic elements by the Roman local population during the 6th-10th centuries. The Hungarian-German influence in Transylvania and the Turkish influence in Wallachia and Moldavia were also present during the Middle Ages. I. Condurachi wrote about the Hungarian-German influence, considering that the organization of the cities, the pre-emption right, the witnesses and gender equality upon inheritance followed the German model. Later, after the establishment of the Romanian medieval states, one can notice, according to I. Peretz, a Turkish influence exerted only in the field of public law and legal language (*agă/* 'police prefect', *divan/* 'divan', *caimacam/* 'deputy of a Turkish dignitary', *sinet/* 'document', *adet/* 'tax'). The modern and contemporary period turns the Romanian society towards the West and influences come from this direction. We thus make reference to the French influence, foreshadowed during the Phanariot period, and the English influence as an effect of globalization.

**The Roman influence**

The idea of the Roman origin of our people, language, culture has been deeply rooted in our consciousness. Our Romance origin triggered the construction of a literature, of a whole cultural edifice. There were moments in which Romanian historiography wiped the period before the Roman conquest. There is a tendency that we see even today. In the current dictionaries of the Romanian language there is no word of Geto-Dacian etymology, even though we know that it has such an etymology. For example, the word *zestre/* 'dowry' about which we know it has a Geto-Dacian origin, is listed in the dictionary with a Latin etymology: "dextrae", meaning "solemn promise". All the other words about which there are indications that they have an ancient, Daco-Thracian etymology, occur in dictionaries with Albanian etymology or unknown origin. The theory of the Roman origin of the Romanian people and language starts from early historians. Grigore Ureche wrote in *Letopiseţul Ţării Moldovei/* 'The Chronicle of Moldavia', that: "The Romanians living in the Hungarian Country and Ardeal and Maramureş, have the same origin as the Moldavians and they all come from Rome". Miron Costin mentioned in *De neamul moldovenilor/* 'On the Moldavian People', the country of their ancestors, that: "The beginning of these countries and the Moldavian and Wallachian people and those living in the Hungarian countries and bearing this name even today ..." "... they are all one people and the same origin" ... starting from "Trajan, the Emperor of Rome, a few hundred years over one thousand...".

The same theory was obstinately supported by the representatives of the Transylvanian School and the Latinist trend. Samuil Micu, Gheorghe Şincai and Petru Maior, willing to prove that the Romanians should not be considered "a tolerated nation" removed our Geto-Dacian ancestors from history. Later, in Wallachia and Moldavia such

an opinion was developed by the followers of the Latinist trend. August Treboniu Laurian, in the *History of the Romanians*, started from the founding of Rome, because our history was but a natural continuation of the history of the Roman Empire, and we were simply the descendants of the Romans. Ioan Peretz, in his course on the history of Romanian law, presents in the first part the norms of classical Roman law on the ground that they are "the Roman stock of our law". This Roman stock present in the Romanian customary law system has been analyzed by both Romanian historians and jurists. Andrei Rădulescu tries to make a comparative study on the basis of which he indicates similarities regarding the institution of the family (organization, the rights of the father over his children, the power of a man over his wife, the situation of the husband's wealth, adoption, disinheritance, etc.); the regime of the property (ownership, usufruct, easements); obligations and contracts (mutual agreement, transfer by delivery, agreement by shaking hands, earnest money, resolutive clause, emphyteusis); serfdom (colonate); successions (oral testament, equality between heirs of blood); trial proceedings (summoning, avoidance of judgment in absentia). (Rădulescu, 1939). It should be noted however that during the period of the Roman conquest there was a duality of enforcement of legal rules: the Roman legal rules were enforced, and so was the domestic legal system. Ștefan Longinescu showed that, following the conquest, the customs of the land did not disappear and therefore the customs of the land, those of the settlers and the new rules of Roman law influenced each other.

After the Aurelian withdrawal, as Dimitrie Cantemir noted in *Descrierea Moldovei/* 'The description of Moldavia', "Roman laws began to decline and to be changed by the Dacians". There is a return to old customs and laws of the Geto-Dacians supplemented, of course, by the rules of Roman law. The latter were adapted to the conditions existing in Dacia, as demonstrated by the Triptychs of Transylvania and triptychs or waxed slates discovered at Roşia Montană. The link between Romanian law and Roman law was preserved after the establishment of Romanian medieval states. It is a link determined by the political and spiritual affiliation of the Romanians to the Eastern Roman Empire. Therefore, the Codes of the Church, which make the transition to written law, used as a source of inspiration the statutes of Byzantine emperors. These statutes were in turn inspired from classical Roman law. We can say that the Roman influence on Romanian legal creations is even stronger during this period, because the Codes of the Church merely translate some Byzantine texts, originally into Slavonic and later into Romanian. Further encodings, made by the end of the Phanariot period, keep the rules of Roman law as a source of inspiration, but take into account the local laws and social reality.

In modern times, the Romanian Civil Code of 1864 maintained the relation between Roman law and our law. The connecting element was the French Civil Code, inspired by Justinian's legislation. Being mostly a translation of the Code of Napoleon, the Romanian Civil Code used the same sources. We thus find that all written or unwritten Romanian legal creations are a continuous intake of Roman law. The attitude of our historians and jurists becomes explicable and therefore, Roman law was one the first disciplines studied in law schools in our country. In Transylvania, at the Academy of Law in Sibiu future lawyers studied Roman law, Civil law and civil procedure, Criminal law and Austrian criminal procedure, Ecclesiastical law, Saxon and Hungarian law, History of Austria, History of Transylvanian law, Science of administration, Commercial law and so on. (***Istoria dreptului românesc, vol. II, 1987: 228-229)

In Wallachia, the first elements of legal knowledge were introduced at Colegiul Sfântul Sava (the Saint Sava College) in Bucharest. Among the lecturers one could count great jurists of that time such as Constantin Moroiu, Ştefan Ferechide, Alexandru Racoviţă, Constantin Brăiloiu or bailiff Nestor, who had contributed to the drafting the Caragea law. Roman law was taught by Constantin Moroiu, who had completed his PhD in law, at the beginning of 1825, in Pisa. (Rădulescu, 1991: 141). His Roman law course was entitled "Brief elements of Roman civil law" and was conceived as a dialogue, Roman law being introduced in comparison with "the laws of the country", whereas the periodization of Roman legislation was continued by the History of Romanian law.

In Moldova, Iaşi, law classes were first taught at Academia Mihaileană (the Academy of Mihail), inaugurated on 16 June 1834. Within this academy Damaschin Bojinca was appointed professor of Roman law. Along with Christian Flechtenmacher and Petrache Asachi, he achieved the Romanian version of the Calimach Code. His Roman law course, called "The History of Roman legislation", is the oldest Romanian course that has been preserved. By 1860, Damaschin Bojinca's successors at the Department of Roman law were Nicolae Docan, Petre Suciu and Simion Bărnuţiu. The last of them is the author of lithographed courses entitled "Roman private law institutions" and "History of Roman legislation". The unification of the Principalities and the ascent of Alexandru Ioan Cuza to the throne represented a new stage in the evolution of Romanian legal education. On 25 November 1859, the Faculty of Law became an independent institution, the first dean being Constantin Bosianu, who also lectured on Roman law. From 4 to 16 July 1864, by Decree 765, Alexandru Ioan Cuza approved the establishment of the University of Bucharest, which initially functioned with three faculties: Faculty of Law, Faculty of Sciences and Faculty of Letters and Philosophy. The Faculty of Law in Bucharest initially had six departments: Roman Law, Civil Law, Criminal Law, Commercial Law, Administrative Law and Political Economy, and two additional free courses: State organization and Finances.

In1860, by a Decree, it was decided to establish the University of Iaşi, consisting of four faculties at that time: philosophy, law, theology and medicine. In the beginning, the Faculty of Law had two professors, as resulting from a report of the rector of the University, 22 October - 3 November 1862, to the Ministry of Public Education. With the development of Romanian legal education, a new way was open to Roman law by the time allotted to its study, by the professors and their work in this field. Thus, by 1936, the duration of law studies was three years. Roman law was studied for two years and was exceeded in the number of hours only by civil law. Equally, Roman law was a compulsory subject for being awarded the title of PhD in law at the faculties in Bucharest and Iaşi.

The importance of Roman law was also increased by the rigour and professionalism of the those teaching this course, as well as the quality of studies and research in the field. G. Mârzescu, G. Danielopol, Şt. Longinescu, C. Stoicescu, G. Dimitriu, M. G. Nicolau, V. Al. Georgescu, and more recently, C. Tomulescu, Vl. Hanga, M. V. Jacotă are names that can be seen in history books on the principles and institutions of Roman law. The works of some of them came to be known and appreciated by European Romanists. We thus see a continuous relation between Roman law and Romanian law, as well as a constant highlighting of this relation as reflected in the literature and the interest in the study of Roman law at the faculties of law.

This relation established over time between the Roman legal system and our legal system may be noticed in legal terminology. A brief analysis of the etymology of legal terms and expressions shows that approximately 70% of them are of Latin origin. In legal

language, and even common language, a series of Latin words and phrases are used. A number of principles have also retained unaltered both the wording and applicability.

The field of civil law has retained a great deal of Latin phrases and principles. For example, with regard to the defects affecting the validity of contracts (the so-called vices of consent in Romanian), the error (*error*), the fraud (*dolus*) are similarly classified. The error is: *error iuris* (error of law) regulated in the new Civil Code under art. 1207(3), *error in negotio* (error on the legal nature of the act), *error in corpore* (error on the identity of the object), *error in personam* (error on the identity of the person) and *error in substantiam* (error on the substance). The error is governed by art. 1207 of the new Civil Code. The main classification of fraud remains that of *dolus malus* or serious fraud and *dolus bonus* or admissible, tolerable fraud which was not punished in Roman law. Currently, *dolus bonus* refers to those cunning means admitted in contractual practice, which lack seriousness and are not considered defects affecting the validity of a contract, such as exaggeration, for advertising purposes, regarding the quality of goods offered for sale. (Săuleanu and Răduleţu, 2011: 94-95)

In the case of modalities or fortuitous elements of the civil legal act, we can find the expressions *a quo*, namely the period or time limit (*dies*) or condition (*conditio*) "from which" and *ad quem*, namely the period (*dies*) or condition (*conditio*) "to which". According to the fulfilment or non-fulfilment of a condition, we have two phrases: *pendente conditione*, representing the time between the moment the legal act is concluded and the moment the condition affecting the act is fulfilled or not, and *eveniente conditione*, referring to the situation where the condition affecting that legal act was fulfilled.

A condition of the object of the legal act is to be *in commercio*, i.e. in the civil circuit, a condition regulated under art. 1229 of the new Civil Code.

The legal act generally has two meanings: that of *negotium iuris*,i.e. the act of will, the legal operation performed with the intent to produce certain legal effects and that of *instrumentum probationis* or evidentiary instrument, document.

The effects of a legal act can occur e*x nunc* or "starting now", pursuant to art. 15(2) of the Romanian Constitution and art. 1 of the Civil Code which provides that "the law disposes only for the future". In some cases, the effects of a legal act can also occur *ex tunc* or "starting then", i.e. retrospectively.

According to the principle of relativity of the civil legal act, its effects are produced *inter partes*, towards the authors of the act, without harming or benefiting third parties. There are exceptions to this principle when, by the will of the parties, the act produces effects towards third parties (*penitus extranei*). The acts transferring property are enforceable *erga omnes.*

The performance of a legal act can take place *uno ictu* (suddenly), which requires a single performance on the part of the debtor or can be successive, involving performance in several stages.

Moving from the legal act to real rights, there are several Latin terms. For example, the elements of possession are *animus* or the intent of the holder to behave like a true owner and *corpus* or all materials acts denoting the possession of the thing.

The features of ownership were, in the view of the Roman legislature: *usus*, *fructus* and *abusus*, i.e. the right to use a thing, to collect its fruit and to dispose of that thing. These characteristics have been kept and regulated under art. 555 of the new Civil Code: "private property is the holder's right to possess, use and dispose of property, exclusively, absolutely and perpetually, within the limits established by law".

One of the requirements for the acquisition of ownership by adverse possession is good faith or *bona fides*, which both in the Roman view and in the current one must exist at the time of acquiring possession, as according to a Roman principle, maintained even today, *mala fides superveniens non impedit usucapionem* (subsequent bad faith does not prevent adverse possession). Adverse possession is one of the situations in which the psychological element plays a dominant role. In such a situation we refer to the good faith or erroneous belief of a person in a legal situation which does not exist in reality. Another sense of good faith is that of rule of conduct, where the moral element plays an important role. (Dănişor, 2015: 142-152)

In matters of obligations, there are two quite commonly used expressions: *damnum emergens* and *lucrum cessans*. The failure to perform obligations entails the payment of damages, if the failure was due to the guilt of the debtor. In assessing damage the judge must take into account both the actual loss or *damnum emergens*, and the unrealized gain or *lucrum cessans*.

One of the causes leading to the non-performance of obligations is negligence which, depending on seriousness, is *culpa levis* or slight negligence and *culpa lata* or serious negligence.

As for succession, a distinction has always been made between legal succession or *ab intestat* (without a will) and testamentary succession. Both for the legal succession and the testamentary succession, de cuius (the deceased) is the one that leaves the inheritance or *is de cuius succesione agitur* (the one whose legacy it is about). Some legal phrases are related to the interpretation of the law, while others have entered the common language. For example, in the case of the logical method of interpretation we find the following arguments: *a fortiori* (all the more); *per a contrario* (an argument that starts from the rule of logic according to which when something is asserted, the contrary is denied: *qui dicit de uno, negat de altero*); *ad absurdum* (reduce to absurdity, i.e. only one solution is admissible, the other is an absurdity); *a pari* (it is an application of the rule: *ubi eadem est ratio, eadem lex esse debet* - where the same considerations exist, the same law or the same solution must be applied). (Beleiu, 1992). In the common language we often hear phrases such as: *ab initio* (from the beginning), *ad hoc* (for this, for this purpose), *modus vivendi* (way of living), *quod erat demonstrandum* (which had to be demonstrated), *status quo* (existing state of affairs), *tabula rasa* (erased slate), *ad litteram* (literally), *verba volant, scripta manent* (spoken words fly away, written words remain), *ad calendas graecas* (on the Greek calends, meaning 'when pigs fly'), etc. The list of phrases and terms that are used today in legal language is not limited. It is not confined to the field of civil law, it continues in procedural law, criminal law, international relations. We will provide several examples of principles that keep the same wording and the same applicability. We will continue with the interpretation of the law which, in addition to the above considerations in the case of the logical method, uses a series of rules, namely: *exceptio est strictissimae interpretationis* (exceptions are strictly interpreted), according to which an exception is considered to exist only if it is expressly regulated by law. The following are subject to this rule: texts containing exhaustive enumerations, texts establishing legal presumptions and texts containing an exception (Săuleanu and Răduleţu, 2011: 110-111); *ubi lex non distinguit, nec nos distinguere debemus* (where the law does not distinguish, we must not distinguish). This rule provides that, if a law is general in wording, then its enforcement will be general, as the interpreter must not make any distinctions if the law does not provide them; *ubi cessat ratio legis, cessat lex* (where the reason of law ceases, the law itself ceases). A law ceases when the reasons for which it was adopted disappear.

Other rules of interpretation concern the determination of the effects of the civil legal act which is done in several stages.

The first step or first stage is the proof of the civil legal act. It is an important stage because, if the existence of the act is not proven, there is no question of establishing its effects: *idem est non esse et non probari* (not to exist and not to be proven are the same). The second stage is the interpretation of the provisions of the act and aims to legally qualify the act, as well as to determine the meaning of a clause in order to correctly establish civil rights and obligations. For the correct qualification of a legal act, it is important to determine its content. Consequently, one has to observe whether it is a named act or a typical act, which requires the application of the specific rules of that act, or it is an unnamed, atypical act, where the applicable rules are those of the closest typical act, as they have a special character and, as well known, *specialia generalibus derogant* and *generalia specialibus non derogant*.

Moving from the qualification of the civil legal act to the interpretation of contractual clauses, the basic rule is that contracts are interpreted in accordance with the common intent of the contracting parties, not the literal meaning of the words. If a clause has two meanings, it is interpreted in the sense that it may take effect, not in the sense that it does not take any effect, in accordance with the rule: *actus interpretandus est potius ut valeat quam ut pereat*. This rule receives legal consecration in art. 1268(3) of the new Civil Code (art. 978 of the Civil Code.). The basis of this rule is the principle of mutual agreement (art. 1169 of the new Civil Code, respectively 969 of the Civil Code) and the presumption of good faith - *bona fides presumitur* (art. 1170 of the new Civil Code). If necessary, these two principles can be supplemented by other rules of interpretation such as *in dubio pro reo* (the doubt benefits the one with the debt - art. 1269 par. 1 of the new Civil Code). The principles governing the effects of the civil legal act are rooted in Latin adages or principles of law. Such a principle is *pacta sunt servanda* or the principle of the binding force, i.e. legal agreements have the force of the law between the parties. This principle also applies to international relations, in the case of agreements and treaties concluded between states. Another principle is that of the relativity of the civil act or *res inter alios acta, aliis neque nocere, neque prodesse potest,* according to which agreements have effect only between the contracting parties.

In matters of nullity of the civil legal act, its effects are expressed in the adage *quod nullum est, nullum producit effectum,* i.e. a void act does not produce any legal effect. Three principles must be applied so that this rule will operate. The first principle is the retroactivity of the effects of the nullity of the legal act, which means that nullity produces both *ex nunc* effects (for the future) and *ex tunc* effects (for the past). The second is the principle of restoring the previous situation (*restitutio in integrum*), according to which whatever was performed under an annulled act, must be returned. There are exceptions to this principle. One of these exceptions is based on the principle *nemo auditur propriam turpitudinem allegans* (nobody is allowed to rely on his own unfairness) which, although the subject of much debate in legal literature, was applied in practice.

The third principle refers to the annulment of the subsequent act following the annulment of the initial act (*resoluto iure dantis, resolvitur ius accipientis*). This principle concerns the effects of nullity against third parties and is a consequence of the two principles mentioned above, but also of another great principle of law, namely: *nemo dat quod non habet* or *nemo plus iuris ad alium transferre potest, quam ipse habet* (no one can transfer more rights than he himself has), meaning that if it turns out that the transferor could not transfer a right because his title was abolished, by the annulment of the act any

subsequent acquirer could not acquire more (Beleiu, 1992). Consequently, the annulment of the original, primary act entails the annulment of the subsequent one, due to its connection with the first. Specifically, in practice the principle *resoluto iure dantis, resolvitur ius accipientis* applies to "authorized acts", where the annulment of the administrative authorization, which precedes the civil act, leads to the annulment of the civil act based on that authorization. It also applies in the case of two acts, one of which is principal and the other accessory. The annulment of the principal act entails the annulment of the accessory act, according to the rule: *accesorium sequitur principale* (the accessory follows the principal). The rule *accesorium sequitur principale* has a broad applicability. According to it, the property, contract or right follows the legal fate of the principal property, contract or right. An example is the prescription of the right of action, where the lapse of the right of action regarding a principal right leads to the lapse of the right of action regarding the accessory right. The rule *quod nullum est, nullum producit effectum* is removed from other principles, namely: the principle of the conversion of the legal act, the rule *error communis facit ius* and the principle of tort liability.

Another important legal principle that maintains its applicability and wording concerns exception at the time of the beginning of personality. The rule is that legal personality or a person's capacity to have rights starts from the moment of his birth. But according to the principle formulated on the basis of a text from Paul this time can be placed in the conception period, i.e. during the period between the three hundredth and one hundred and eightieth day (art. 412 and art. 36 of the new Civil Code). This principle is: *infans conceptus pro nato habetur quotiens de commodis eius agitur* (the child conceived is considered born whenever this is in his interest). We cannot list all the principles of Roman law which can be equally found in practice and in the current literature. What we want to highlight is the durability of Roman legal thinking, the power of the Roman jurists to anticipate and create a legal system that can withstand time and space. We also want to note the extent to which legal language is an argument of the influence of the Roman legal system on the Romanian legal system. We will do the same with the Slavic, German, French and Anglo-Saxon influence.

**The Slavic influence**

Of all the peoples that crossed or temporarily lived in the present Romanian space and finally settled here and became our neighbours, the Slavs left the deepest marks. Their presence north or south of the Danube, east or west of the Romanian territory has been attested since the sixth century. Characterizing the period between the Aurelian withdrawal and the establishment of Romanian medieval states, H. H. Stahl thought that it might be called the "tributary order". The explanation could be that: "Overall, their dominance had a nominal character and was exerted especially from a distance - given their settlement in marginal points of the territory inhabited by the native population - alternating sometimes with raids for the purpose of repression and prey. Such domination corresponds to their interest in getting the agricultural products they needed as tribute" (Cernea and Molcuț, 2006). But of all the migrants that crossed the local space, the only ones who settled here were the Slavs to the southwest, south, east and north and the Hungarians to the west. The toponymy of the country and many terms in the political superstructure show that before the native element was dissociated from the Slavic one and before the Slavs settled in the areas mentioned above, one could notice a mixture mentioned in our specialist literature, be it historiography, the linguistic field or the legal one.

Starting from the linguistic similarity, some historians and jurists argued that in old Romanian law the Slavic import was the most important after the Roman one. For example, Paul Negulescu believes that political institutions and certain practices of the old Romanian law are borrowed from the Slavs (Iorga, 1935) and, accordingly, the old law of the Romanians contained Slavic legal borrowings (Oroveanu, 1995). Professor of constitutional law at the Faculty of Law in Bucharest, Constantin Dissescu notes that the Slavic influence was felt until the 19th century, manifested quite strongly on institutions of private law (sworn brotherhood, family community, the pre-emption right, the witnesses, inequality of children upon inheritance) and public law (recruitment of the ruler, the ranks of the boyars, administrative organisation). If the Roman element has been preserved especially in terms of ethnicity, race, language and temperament, the Slavonic one was crucial in the political and legal organization, equally influencing the mores. Arguments would be that "because of the barbarian invasion and the withdrawal of inhabitants from the towns and villages of Dacia to the mountains, the political and legal life based on Roman law faded little by little. Language, habits are transmitted the same, but the political settlements become Slavonic to a great extent. The views and practice of Roman legal customs involved abstractions that people with a pastoral and simplified life no longer understood" (Dissescu, 1915).

The reality is that the Slavic influence cannot be denied, the percentage of words of Slavic origin present in the basic vocabulary of the Romanian language is 20% (Bărbulescu et al., 2003). In earlier research, the share of words of Slavic origin was even 2/3 of the words of the Romanian language. The premise was the use of Slavonic for a long period of time in church, state and even "everyday business of the Romanians" (Bogdan, 1894). Under these circumstances, it has been concluded that certain public and private institutions in the Romanian medieval law have the same origin. But certain similarities are related to language, not the structure of Romanian institutions. For example, the 'cneaz' and the 'voievod', the Slavic leaders of tribal formations, were the Romanian leaders of territorial formations. The territorial community, which represented for the Romanians the foundation of such formations, had long lost the tribal character.

The Slavic origin of some institutions such as the pre-emption right, the inequality of children upon inheritance, sworn brotherhood or the witnesses is questioned as long as it is also found with the Romans and, with regard to sworn brotherhood, the narrative sources attest its older origin on our territory (Cernea, 1976). In other words, without minimizing the Slavic intake, we cannot assign a Slavonic origin to all the institutions that are similar to the Romanian medieval institutions. Moreover, a comparative analysis can often lead to wrong assumptions, and insufficient evidence make research of this kind quite fragile. Eventually, it is quite difficult to establish, if we consider the evolution of the Romanian institutions, how many of them have a certain origin, a certain influence and how many preserve something of the local character. The legal system of a people receives the dynamics that history inspired and, at the same time, its specific features. At present, we find traces of the Slavic influence in the vocabulary of the Romanian language and in toponymy. But the legal vocabulary contains few terms of Slavic origin which have been preserved, some of them are obsolete. Among the terms that have been preserved we can mention the following: *arendă/* 'lease', *dobândă/* 'interest', *dovadă/* 'proof', *învinuit/* 'accused', *jaf/* 'robbery', *pârât/* 'defendant', *plată/* 'payment', *poprire/* 'seizure', *temniță/* 'prison', *vinovăție/* 'guilt'.

In the common language, as well as in the legal one we find the following words: *huliganism/* 'hooliganism', *izvor/* 'source', *îmbogățire/* 'enrichment', *obicei/* 'custom',

*rudenie/* 'kinship', *tăinuire/* 'concealment'. The following terms are outdated: *breaslă* (guild), *cislă* (sum allocated by tax units), *duşegubină* (offense or punishment regulated in the Romanian customary law), *clacă* (days that socmen had to work), *pravilă* (regulation), *zapis* (document), *zălog* (pledge), *cneaz* (free peasant, leader of a territorial formation), *voievod* (military leader, supreme judge). The low number of legal terms of Slavic origin demonstrates that: a) the influence of the Slavic legal system on our legal system was temporary, manifested more in the early medieval period, on customary law; b) in the written law, the Codes of the church, even if they were in Slavonic, could not be applied because the population was not Slavonic-speaking. This language was officially introduced into the royal chancelleries and the church, but in reality very few were those who spoke it. Even the clergy did not all know this language. In fact, the service was held in Romanian. Therefore, starting with the 16th century the statutes of the church were written in Romanian; c) the placement of the Orthodox Church under the authority of the Patriarch of Byzantium and the spiritual and political ties with the Byzantine world involved a series of loans in terms of the organization of the state and the church, via the Slavic language; d) the Codes of the church were nothing but translations of Byzantine statutes, which in turn were inspired by classical Roman law. That is why in the written law, essentially, the influence of Roman law is manifest upon the legal rules and institutions. The Slavic influence goes beyond legal language and ceases when the Romanian principalities turn towards Western civilization.

In conclusion, the medieval period witnessed Slavic legal loans, in the field of customary law and especially public law with regard to the political-administrative organization. The fact that the modernization of the Romanian legal system brought the French influence in particular, this orientation led to the blurring of the Slavic element in the legal field, whether it concerned the form or the content. The Latin intake became dominant in the Romanian culture, despite the permanent tendency of the Slavs, especially the Russians, to maintain the Romanian territory within their sphere of influence.

**The Hungarian-German influence**

It is an influence that is particularly visible in Transylvania because this Romanian territory was for a long time under Hungarian or Austro-Hungarian domination. In Wallachia and Moldavia, the codifications accomplished in the modern period used Austrian codes as a source of inspiration too. However, differences in mentality, culture, the Orthodox religion and the affiliation to the Patriarchate of Byzantium, not the Vatican, rendered these influences insignificant. As we mentioned in the introduction, the Hungarian-German influence was within the scope of I. Condurachi's concerns. He believed that the organization of the towns, the pre-emption right, the witnesses and gender equality upon inheritance followed the German model. As for the pre-emption right and the witnesses, some authors considered that they had been influenced by Roman law, while others believed that these institutions fell within the Slavic influence. We think these are phenomena of acculturation, where it is difficult to say who influences whom. For example, if we talk about the Saxon "seats", the influences (at least in terms of name) are Romanian, after the old *iudices* or seats of judgment.

Under Germanic influence, we find in the Romanian customary law the institution of "ordeals", in the system of evidence, i.e. testimonials. That involved subjecting witnesses or, in the case of women and children, their representatives, to cruel tests, such as the red-hot iron test or boiling water test. It is an institution known in Transylvania,

Wallachia and Moldavia. In written law the influence is expressed by way of sources used in the drafting of legal codes. Thus, the Calimach Code uses as a source of inspiration the Austrian Civil Code as well, with regard to the systematization of the matter. Some voices argue that this influence is much stronger as Christian Flechtenmacher, of Saxon origin, from Braşov, speaking German and having a Ph.D. in philosophy awarded in Vienna, is said to have taken over many more elements from the Austrian Civil Code. Prince Scarlat Calimach's notes on sources and comments of other authors do not prove this theory. Orientations towards the German culture existed in the modern period, but they cannot overcome the French influence in the same period. The differences can be seen in the legal vocabulary too. The number of terms of French origin is significantly higher than that of terms of German origin. The following words are of German origin: *abilita/*'to empower' (to make someone able to perform a legal act), *accept/*'accept' (in the sense of obligation that the drawee undertakes to pay, on maturity, the amount stipulated in the policy to the beneficiary), *arrest/*'arrest', *bloc/*'block' (in the sense of union, group of parties or countries with common interests), *comasare/* 'merging', *procură/* 'power of attorney', *faliment/* 'bankruptcy', *marcă/* 'brand', *comitat/* 'county' (this term denoted, in Transylvania, the Hungarian administrative units) (Hanga and Calciu, 2007). We find, therefore, few words of German origin, which demonstrates a similar influence on the Romanian legal system.

**The Turkish influence**

The long Turkish domination for about 500 years in Wallachia (1391-1877) and 400 years in Moldavia (1511-1877) resulted in the enlargement of the vocabulary of the Romanian language with many words of Turkish origin in various fields, either officially or via the popular language, either at strictly lexical level or by derivation with Turkish suffixes (*-giu, -ciu, -iu, -lâc, -man*).

Until the late 6th century, the Romanian language borrowed very few words of Turkish origin, the Ottoman Porte exercising during this period only political domination by "collecting and sending the tribute, gifts in kind and supplies of war", by "courtesy calls of gentlemen and landowners to the Porte", by "sending hostages". (Rosetti and Cazacu, 1961). Thus, we find in the Law of the Country a few Turkish words, having another meaning in Romanian, namely: *baş* (interest charged on money loans, in Turkish meaning 'head, leader, chief'. The Turkish noun *baş* became in Romanian a pseudoprefix that formed the compounds *baş-boier, hoş-bătăuş, hoş-neghiob*); *haraci*/ 'tribute' (tax that the Christian states, the vassals of the Ottoman Empire had to pay to the suzerain power annually); *olac* (commissioning of work consisting in providing horses for couriers and messengers. In Turkish, *ulak* meant "official messenger with special authorized powers, entitled to requisition whatever he considered necessary to fulfill his mission, especially animals). (Gemil, 1984); *peşcheş* (gifts for the sultan and his dignitaries); *vadea* (payment time limit). The 17th century represents a new stage in the relations between the Romanian Principalities and the Porte, which is characterized by the deepening of the Ottoman rule in parallel with the first signs of the decline of the Empire towards the end of this century (1680-1700) (Stiles, 1995)

The apogee of the Ottoman rule was reached between the 18th century and early 19th century, during the Phanariot era. The establishment of the Phanariot rule had as a premise the conflict of interest between the Ottoman Empire, the Tsarist Empire and the Hapsburg Empire for determining the sphere of influence in South-Eastern Europe, the Romanian Principalities being in most cases the theatre of wars between the Porte, on the

one hand, and Russia and Austria, on the other hand. The major upheavals that occurred during this period in the political, social, economic and military life of the Romanians and implicitly, in the field of justice, had the natural consequence of a new wave of Turkish words imposed by numerous Turkish and Greek officials, that the Ottoman Porte permanently had between the two principalities or the use of terms already present in the vocabulary of the Romanian language (Hristea, 1984).

These include: *agă/*'aghas' (chief of police or gendarmerie in Bucharest or Iaşi. In Turkey, the title held by middle-ranking civil and military officials, as well as some socio-professional leaders in the Empire); *amanet/*'pawn' (valuable thing given to someone as a pledge for the repayment of a debt); *avaet* (feudal tax paid by the person receiving a benefit or office); *bacşiş/*'tip' (money given to a person over the payment due for a service rendered); *berat* (office investiture diploma); *cadiu* (Muslim judge, sometimes with responsibilities within the jurisdiction of the church); *caimacam* (deputy ruler of Moldavia and Wallachia. In the Ottoman Empire, deputy of the grand vizier or a high Ottoman official); *capuchehaie* (representative of the Romanian rulers in Constantinople. In Turkish terminology, official representative of the interests of a high Ottoman official at the Porte); *chirie/* 'rent' (amount paid in exchange for the temporary use of property); *divan* (the name given to the Ruler's counsel from the second half of the 16th century. In Turkey, service as the supreme counsellor, and at the same time the supreme court open to all, regardless of religion or social rank); *dragoman* (official interpreter in the Oriental countries. „Mare dragoman", high officer of the Porte, in charge with the diplomatic relations with European countries); *geiagea* (gift offered to high officials occasioned by promotion to higher office); *geremea* (fine, financial penalty); *hochim* (written order emanating directly from the sultan); *mazil* (ruler in the Romanian Principalities removed from ruling. Boyar without any office, small country landowners forming an intermediate social category between boyars and freeholders. Turkish official in the Ottoman Empire); *mucarer* (annual or triennial confirmation of rule); *telal* (auction crier). Most of these Turkish lexical items became obsolete with the end of the Phanariot rule and, after the declaration of independence of Romania, they even disappeared completely. Therefore, if we were to establish a link between the presence of legal terms of Turkish origin in Romanian and the possibility of an Ottoman influence on Romanian law, we might conclude that such an influence existed only in the vocabulary of our language at that time because today the only Turkish word in legal terminology is *chirie*/'rent'. The other terms, in particular of administrative law, brought no content changes within our legal system.

**The French influence**

The modernization of the Romanian society brings a completely different orientation, as opposed to the traditional one. The Romanians abandon Byzantine models and move towards Western Europe. A contribution in this respect belongs to the Phanariot rulers coming from rich, but educated families. Knowing foreign languages, good translators and diplomats of the Ottoman Porte, they opened for the Romanian Principalities a way to Western culture, modernization and legal reforms.

The French language was the language of diplomacy at the time. Therefore, the rulers of the Romanian Principalities hired French teachers and secretaries. The Russian officers who had come during the wars in Moldavia and Wallachia, spoke French and brought French customs among the boyars. The libraries of wealthy families contained books in French at that time. French newspapers had begun to circulate and be read by the

Romanians, and on the stages in Iaşi and Bucharest actors acted in the language of Voltaire (Panaitescu, 1990). Openness to Western culture meant, at the same time, openness to the philosophical and legal doctrine and the socio-political model of the West. The reforms of Constantin Mavrocordat in the social, administrative, fiscal and judicial fields or of Alexandru Ipsilanti in the field of justice, the codes drafted in the second phase of the Turkish-Phanariot regime represented a first step towards a modern society. For example, *Pravilniceasca Condică*/'Collection of Laws' also used as sources, besides the Romanian custom and the Byzantine statutes, the modern legal doctrine (Montesquieu, Beccaria). The Caragea Law used as source of inspiration, it is true to a lesser extent, the French Civil Code of 1804. The Calimach Code, also called the Civil Code of Moldavia is one of the most modern codes written at that time, which was inspired in a balanced proportion by the Custom of the land, the Byzantine legislation and the western legislation. The French Civil Code and the Austrian Civil Code were the western sources. This was the first step towards French legislation, legal thought and culture. But the decisive step was the French Revolution that opened the door to profound transformations throughout Europe. In our own style and pace we followed the same path, the same model: French society. The two revolutions of the 19th century, the 1821 Revolution and the 1848 Revolution, started from the same ideals: liberty, equality, fraternity and partly pursued the same objectives. Following the 1821 Revolution, the Romanians managed to return to the system involving the rule of native princes and left behind about a hundred years of Phanariot rulers. Most changes in Romanian society were imposed by the 1848 Revolution. Against the background of the Russo-Turkish War, the Romanians achieved two main objectives: the Unification of the Romanian Principalities in 1859 and Romania's Independence on 9 May 1877.

The political revolution equally means a social, economic, cultural revolution. In the legal field, after the Unification of the Principalities and on prince Alexandru Ioan Cuza's initiative there was created a new regulatory framework corresponding to a modern society. The model was mostly French. The four codes drawn up in 1864, coming into force in 1865 were inspired by the French Civil Code of 1804, the French Code of Civil Procedure of 1806, the French Criminal Code of 1810 and the Code of Criminal Instruction of 1808. About the Romanian Civil Code it was said that it was an exact copy of the French Civil Code. Under these circumstances, influences in both form and substance were inevitable. We were at that time a Francophone society, French-speaking and French culture consuming. We left behind the Cyrillic alphabet and the Greek-Levantine influences. The vocabulary of the Romanian language was a page open to the reception of French terms. In legal language this reception can be observed today. After Latin terms (70%), the French language occupies the second place with a percentage of about 20% of words of French origin. The remaining 10% are of Slavic, Greek, German, Hungarian, Turkish and English origin. It is interesting that some of these words are also taken from Latin. Therefore, in the modern period, the influence of Roman law was felt indirectly, via French. The rather large number of French lexical elements leads us to abandon their enumeration. Proven remains that since the 19th century France was a benchmark for our country and that we remain a Francophone country despite the Anglo-American model that today's globalized world imposes.

**The English influence**

The liberalization of international trade after the Second World War, Romania's accession to a number of international organizations before December 1989, and

especially afterwards, the release of the strap of the communist regime in December 1989 fostered other loans. This time the borrowed model is the American one, expanded on a global scale, infiltrated even in radicalized societies despite their opposition. For example, Islamist suicide bombers drink Coca-Cola, but they still set fire, whenever they have the occasion, to the American flag and attack Western targets.

As for us, whether we want it or not, we have taken a series of habits whose origin may remain unknown, and we have become English speakers. In such cases the vocabulary is the most sensitive receiver. All these transformations undergone by our society in the 26 years of "Westernization" and in particular after Romania's accession to the European Union, were felt both in the common language and the language of law. Regarding legal language, most terms are related to international trade relations and intellectual property. Such terms are *cost, insurance, freight*, abbreviated "CAF" or "CIF" (literally "cost, insurance and freight", the contractual clause according to which the sale price of a commodity includes its value, cost of transport and insurance risks); *cec* (from the English "check", the pronunciation is the same in Romanian, only the spelling is different); *copyright* (exclusive rights for use and distribution); *dumping* (exporting products to another country at a price below their normal value, in terms of producing or threatening to cause injury to an existing production or delaying the creation of such a national production in the importer's country); *know-how* (technical or technological knowledge that can be transferred by contract); *marketing* (actions performed by enterprises producing goods and services for knowledge of market requirements in order to organize production to meet these requirements); *management* (knowledge regarding the organization and administration of enterprises, through the development of programs, methods, techniques designed to increase competitiveness).

There are also many English terms used in the field of transport law: *bill of lading* (a document issued by a carrier to the shipper to acknowledge receipt of cargo); *charter-party* (hire or lease contract between the owner of a vessel and the charterer); *sea waybill* (shipping document acknowledging the receipt of the cargo, which is not a document of title), *time-charter* (transport vessel for a fixed period); *demise-charter* (leasing arrangement in which the use of the vessel and expenses pass on to the lessee); *despatch money* (amount paid by a vessel owner to the charterer); *notice of readiness* (a document issued by a shipmaster for the cargo to be loaded or unloaded); *tramp* (cargo carrying merchant vessel with no fixed schedule or definite route); terms relating to different clauses: *free in and out, free in and out stowed, free in, gross terms* etc. (Stanciu, 2015). Other terms belong to the *UNCITRAL* laws or principles - *Principles of International Commercial Contracts* (international conventions, standard laws, uniform rules, guidelines for drafting contracts adopted through the work of levelling the law of international trade within the UNO) or the *INCOTERMS* rules (the word comes from *terms*, representing common practices and techniques in the field of international sales and comparative law studies in matters of commercial terms), e.g. FCA, meaning 'Free Carrier' (when the seller delivers the goods at the seller's premises or another named place). A good illustration of English terms borrowed after Romania's accession to the European Union is *infringement* in the phrase 'procedura de infringment', which refers to the procedure started by the European Commission against Member States which do not perform their community obligations. The scope of legal terms taken from English seems to be confined to these fields. But the 21st century challenges related to computerization and the global issues that the world faces today regarding environmental pollution and terrorism can expand this sphere. Trying to complete this study, the prevailing idea is that

the influence of Roman law has been constant in the Romanian legal system, especially in the field of private law. The French influence has followed the same route and we are practically speaking of twin legal systems connected by a common source of inspiration. Other influences were temporary and affected the form more than the content, they predominantly occurred in the legal vocabulary, being manifest to a lesser extent in the area of rules, principles or institutions of Romanian law.

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# Book & Journal Review

## EUROLIMES: *Ongoing European Security Appraisal*

Journal of the Institute for Euroregional Studies "Jean Monnet" European Centre of Excellence, University of Oradea and University of Debrecen, Oradea University Press
**ISSN-L 1841-9259**

**Anca Parmena Olimid***

With the syntagma "Theoretical approaches and borders' assessment" in title of its 20th Volume (Autumn 2015), the Eurolimes international journal is an editorial "promise" at the celebration of the 10 years of continuous publication.

The volume is a readable and collecting archive of analysis, studies and case reports enabling borders and security regards, cooperation approaches and linking territoriality undertakes.

Volume 20 reflects and assume as prevailing working hypothesis the process of security institutionalization and the challenges to the international relations and European studies. This anniversary issue is edited under the coordination of Professor Ioan Horga (University of Oradea) and Professor Istvan Suli-Zakar (University of Debrecen) with references from Carlos Pacheco Amaral and Ana Maria Costea. The focus of this issue of Eurolimes is divided into four parts.

The first part of the Volume entitled: "Cross-Border's Assessment" comprises three articles and studies and it acknowledges the cross-border infrastructure by disclosing the state-of-art in the field, appropriate case studies and the current status at regional level.

Likewise, the second part entitled "Border and Security Cooperation Approaches" comprises four articles and studies and it locates the typology of the state border(s), the subjective and objective challenges of the participation and assistance within the cross-border regions.

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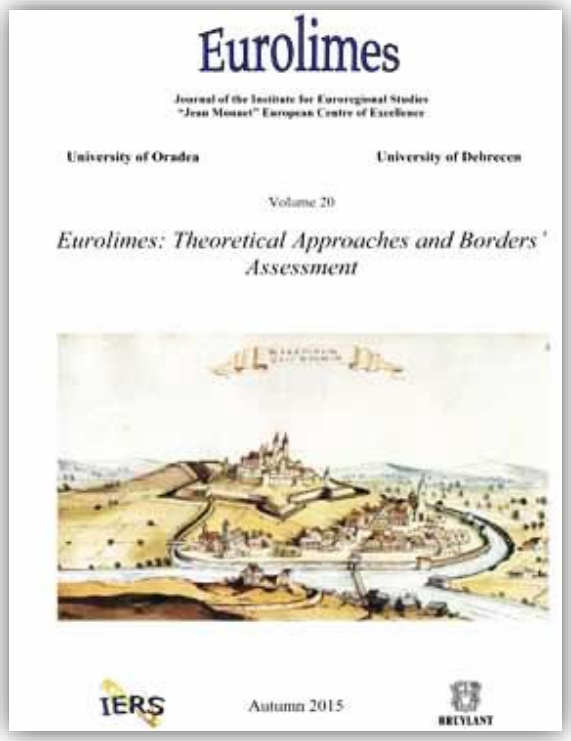
The third part entitled "Borders, Boundaries and Frontiers: Theoretical Approach" contains three articles and studies and provides the inner focus of the debate on the interregional policies and standards interlinking the institutionalization understandings and the fixing theoretical advances of the international relations and European studies notions.




The fourth part of the volume focuses on the past and future editorial and statistical examination of the ten years of regulation publication of the journal Eurolimes addressing journal timeless lens and regular themes and contributions.

This part also identifies the "space" dimension and the regional viewpoints in-between the openness expectations and the security functionalities. The fourth section of the Volume 20 of Eurolimes points the debate over the cross-border regional threats mobilizing regional resources, environmental matters, political interests and social engagements.

As the contents of the Volume 20 is enabled, the case study of the "cross-border security" challenges the field of cooperation and the institutionalization processes tags the path to regional lens of territoriality and security. Eurolimes' ambitious contents provide a broad recognition of the concept of: "border", "frontier", "territory", "external borders", "inclusive frontiers", "trans-border cooperation", "police cooperation" etc.

It also relates diversified topics and indicators in the field of: European institutions, EU governance, social and political developments, border management, regional policies and strategies, information security, digital facts and trends, electronic knowledges and researches.

The Eurolimes' contents advance a new interdisciplinary passage to the latest security theoretical and practical processes and devices.

The journal is an innovative academic and professional statement of the European border security references.

The resources are also enabled as a composite network of new data on the European borders, screening the European security management and configuring territorial divides, regional and national gaps, typical overtures to community, identity and culture indexing facts, figures, trends, statistical outlines and analytical interpretations as essential tools for the study of the security areas and cross-border cooperation.

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# CEPOS NEW CALL FOR PAPERS 2018
# 8TH INTERNATIONAL CONFERENCE AFTER COMMUNISM. EAST AND WEST UNDER SCRUTINY

Craiova (Romania), House of the University,
23-24 March 2018

*Dear Colleagues,*

*We are delighted to invite you to participate in the 8th International Conference AFTER COMMUNISM. EAST AND WEST UNDER SCRUTINY in Craiova, Romania, 23-24 March 2018. More than two decades after, an event is both history and present. The annual conference organized by CEPOS involves both the perspectives of the researches in the field of Communism and Post-Communism: research experiences and scientific knowledge. Like a "pointing puzzle", 29 years after the fall of communism, the conference panels explore emotional detachments, but also a peculiar involvement creating and exploiting the inter-disciplinary developments of the East-West relations before and after the crucial year 1989 in the fields such as: political sciences, history, economics and law. The conference will be hosted by the University House and during two intense and exciting days, participants all over the world (professors, professionals, doctoral and post-doctoral researchers) are invited to raise the issue of the study of recent history of the former communist space in connection with the Western world. We are confident that all of us will focus during these two days on what is important to move the research in the field forward. We dear to state that we even bear the moral obligation to do that.*

Best regards,

The Board of Directors of CEPOS 2018 Conferences and Events Series

## PROPOSED PANELS for CEPOS CONFERENCE 2018

Center of Post-Communist Political Studies (CEPOS) proposes the following panels:
-Communism, transition, democracy;
-Post-communism and colective memory;
-Politics, ideologies and social action in transition;
-Revolution and political history;
-Political culture and citizen participation
-Law, legal studies and justice reform;
-Constitution(s), legality & political reforms;

-Political parties, electoral systems and electoral campaigns;
-Security and diplomacy in national and Euro-Atlantic environment;
-Rights, identities policies & participation;
-Education, media & social communication;
-Administrative history and governance within South-Eastern Europe during transition;
-Political leadership, democratization and regional security;
-Comparative policies, sustainable growth and urban planning;
-Knowledge transfer and competitiveness in regional economies;
-Global environment and cultural heritage;
-Integration, identity, and human rights in European systems;
-Religion, cultural history and education;
-Media, communication and politics;
-Discourse, language and social encounters;
-Bioethics and transition challenges;

**ABSTRACT SUBMITTING (SEE CEPOS CONFERENCE 2018 REGISTRATION FORM-on http://cepos.eu/)**

The proposals must be sent in English and must contain the title of the paper, the abstract (no more than 300 words) and a short presentation of the author(s) (statute, institutional affiliation, short list of relevant scientific contributions).

**DEAD-LINE FOR SUBMITTING A PROPOSAL: 19 FEBRUARY 2018**

Proposals must be submitted until 19 February 2018 at the following address: cepos2013@gmail.com

**CONFERENCE VENUE**

Casa Universitarilor/University House (57 Unirii Street, Craiova, Romania). You can view the Conference location and a map at the following address: http://www.casa-universitarilor.ro/

- More information about the Conference venue can be found at the following address: http://www.ucv.ro/campus/puncte_de_atractie/casa_universitarilor/prezentare.php'
- More photos of the conference room can be viewed at http://www.ucv.ro/campus/puncte_de_atractie/casa_universitarilor/galerie_foto.php

**CEPOS CONFERENCE PAST EDITIONS**

More information, photos and other details about the previous editions of the Conference and CEPOS Workshops, Internships, and other official events organized in 2012-2017 are available on:

- CEPOS official website sections **CEPOS Previous Events Photo gallery CEPOS Events**
- CEPOS FACEBOOK ACCOUNT: https://www.facebook.com/pages/Center-of-Post-Communist-Political-Studies-CEPOS/485957361454074

**TRANSPORT**

The 8th International Conference "After communism. East and West under Scrutiny" (2018) will be held in Craiova, a city located in the South-Western part of Romania, at about 250 km from Bucharest, the national capital.

The airport of Craiova (http://en.aeroportcraiova.ro/) has flights to Timisoara, Dusseldorf, Munchen, Ancone, Rome, Venezia, London, Bergamo etc.
Other airports, such as Bucharest (Romania) (http://www.aeroportul-otopeni.info/) is located at distances less than 240 km from Craiova and accommodate international flights.
Train schedule to Craiova can be consulted at InterRegio CFR (http://www.infofer.ro/) and SOFTRANS (http://softrans.ro/mersul-trenurilor.html).

## CEPOS CONFERENCE 2018 FEES AND REGISTRATION REGISTRATION DESK

The Conference Registration Desk will be opened from Friday, 23rd of March 2018 (from 08.00 a.m. to 18.00 p.m.) until Saturday 24th of March 2018 (from 08.00 a.m. until 14.00 p.m.), for registration and delivery of conference bag with documents to participants. The Conference Registration Desk is located in the lobby of the University House Club, 1st Floor.

## REGISTRATION FEES

90 euros/paper can be paid directly via bank transfer on CEPOS Bank account as follows:
Details for online payment
Banca Romana pentru Dezvoltare (BRD)
Owner: ASOCIATIA CENTRUL DE STUDII POLITICE POSTCOMUNISTE
Reference to be mentioned: CV taxa participare si publicare CEPOS
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## MEALS AND OTHER ORGANIZING DETAILS

The registration fee covers:
* Conference attendance to all common sessions, individual and special panels
* Conference materials (including a printed version of the Book of Abstracts of the Conference)
* Conference special bag - 1 for every single fee paid, no matter the number of authors/paper
* Coffee Breaks-March 23, 2018 – March 24, 2018. During the two days conference, 3 coffee breaks are offered.
* Welcome reception (March 23, 2018)
* Lunch (March 23, 2018) offered in the University House Mihai Eminescu Gala Room
* A Festive Gala Dinner and Cocktail (March 24, 2018) offered in the University House Mihai Eminescu Gala Room
* A Free Cocktail Buffet will be served from 19:00 p.m. to 21.00 p.m.
* A Free Entrance Voucher is provided inside of each Conference Bag.
* Lunch (March 24, 2018)
* Certificate of attendance (offered at the end of the conference March 24, 2018)
* Publication of the Conference Papers in the International Indexed Journal Revista de Stiinte Politice. Revue des Sciences Politiques (previous publication of the 2012-2017 Conference papers is available at
http://cis01.central.ucv.ro/revistadestiintepolitice/acces.php
* One original volume of the International Indexed Journal Revista de Stiinte Politice. Revue des Sciences Politiques (where the personal conference paper was published) will be delivered to the authors (an additional fee of 10 euros is required for the mailing facilities)

* Computer & Internet Facilities. There is available videoproiector and connection to Internet services.
* Language. The official language of the Conference will be English. The Organizing Committee does not provide simultaneous translation.

## NEW! FREE SOCIAL AND CULTURAL PROGRAMME OF THE CEPOS CONFERENCE 2018

* Participants in CEPOS CONFERENCE 2018 have free acces to the Social and Cultural Program of the Seventh Edition of the International Conference After Communism. East and West under Scrutiny, Craiova, 23-24 March 2018: including free guided tours of the:
Craiova Old City Tour and CEPOS Headquarters
Museum of Arts Craiova http://www.muzeuldeartacraiova.ro/
Oltenia Museum (all sections included): http://www.muzeulolteniei.ro/index.php?view=content&c=26
Casa Baniei http://www.muzeulolteniei.ro/index.php?view=content&c=26

## CERTIFICATES OF ATTENDANCE

Certificates of attendance will be offered at the end of the conference on Saturday, March 24, 2018

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http://wwwx.dowling.edu/library/journaldb/keyword4.asp?jname=revista

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http://sfx.bibl.ulaval.ca:9003/sfx_local?url_ver=Z39.88-2004&url_ctx_fmt=info:ofi/fmt:kev:mtx:ctx&ctx_enc=info:ofi/enc:UTF-8&ctx_ver=Z39.88-2004&rfr_id=info:sid/sfxit.com:azlist&sfx.ignore_date_threshold=1&rft.object_id=1000000000726583&rft.object_portfolio_id=&svc.fulltext=yes

For more details about the past issues and international abstracting and indexing, please visit the journal website at the following address:

http://cis01.central.ucv.ro/revistadestiintepolitice/acces.php.

## CONFERENCE INTERNATIONAL INDEXING OF THE PAST EDITIONS (2014-2017)

### CEPOS Conference 2017

The Seventh International Conference After Communism. East and West under Scrutiny (Craiova, House of the University, 24-25March 2017) was evaluated and accepted for indexing in 10 international databases, catalogues and NGO's databases:
Ethic & International Affairs (Carnegie Council), Cambridge University Press-https://www.ethicsandinternationalaffairs.org/2016/upcoming-conferences-interest-2016-2017/
ELSEVIER GLOBAL EVENTS
LIST http://www.globaleventslist.elsevier.com/events/2017/03/7th-international-conference-after-communism-east-and-west-under-scrutiny
CONFERENCE ALERTS-http://www.conferencealerts.com/show-event?id=171792
10TIMES.COM-http://10times.com/after-communism-east-and-west-under-scrutiny
Hiway Conference Discovery System-http://www.hicds.cn/meeting/detail/45826124
Geopolitika (Hungary)-http://www.geopolitika.hu/event/7th-international-conference-after-communism-east-and-west-under-scrutiny/
Academic.net-http://www.academic.net/show-24-4103-1.html
World University Directory-http://www.worlduniversitydirectory.com/conferencedetail.php?AgentID=2001769
Science Research Association-http://www.scirea.org/conferenceinfo?conferenceId=35290
Science Social Community-https://www.science-community.org/ru/node/174892

## CEPOS Conference 2016

The Sixth International Conference After Communism. East and West under Scrutiny (Craiova, House of the University, 8-9 April 2016) was evaluated and accepted for indexing in the following international databases, catalogues and NGO's databases:
ELSEVIER GLOBAL EVENTS-
http://www.globaleventslist.elsevier.com/events/2016/04/6th-international-conference-after-communism-east-and-west-under-scrutiny/
Oxford Journals – Oxford Journal of Church & State-
http://jcs.oxfordjournals.org/content/early/2016/02/06/jcs.csv121.extract
Conference Alerts-http://www.conferencealerts.com/country-listing?country=Romania
Conferences-In - http://conferences-in.com/conference/romania/2016/economics/6th-international-conference-after-communism-east-and-west-under-scrutiny/
Socmag.net - http://www.socmag.net/?p=1562
African Journal of Political Sciences-
http://www.maspolitiques.com/mas/index.php?option=com_content&view=article&id=450:-securiteee-&catid=2:2010-12-09-22-47-00&Itemid=4#.VjUI5PnhCUk
Researchgate-
https://www.researchgate.net/publication/283151988_Call_for_Papers_6TH_International_Conference_After_Communism._East_and_West_under_Scrutiny_8-9_April_2016_Craiova_Romania
World Conference Alerts-
http://www.worldconferencealerts.com/ConferenceDetail.php?EVENT=WLD1442
Edu events-http://eduevents.eu/listings/6th-international-conference-after-communism-east-and-west-under-scrutiny/
Esocsci.org-http://www.esocsci.org.nz/events/list/
Sciencedz.net-http://www.sciencedz.net/index.php?topic=events&page=53
Science-community.org-http://www.science-community.org/ru/node/164404/?did=070216

## CEPOS Conference 2015

The Fifth International Conference After Communism. East and West under Scrutiny (Craiova, House of the University, 24-25 April 2015) was evaluated and accepted for indexing in 15 international databases, catalogues and NGO's databases:
THE ATLANTIC COUNCIL OF CANADA, CANADA-
http://natocouncil.ca/events/international-conferences/
ELSEVIER GLOBAL EVENTS LIST-
http://www.globaleventslist.elsevier.com/events/2015/04/fifth-international-conf
GCONFERENCE.NET-
http://www.gconference.net/eng/conference_view.html?no=47485&catalog=1&cata=018&co_kind=&co_type=&pageno=1&conf_cata=01
CONFERENCE BIOXBIO-http://conference.bioxbio.com/location/romania
10 TIMES-http://10times.com/romania
CONFERENCE ALERTS-http://www.conferencealerts.com/country-listing?country=Romania
http://www.iem.ro/orizont2020/wp-content/uploads/2014/12/lista-3-conferinte-internationale.pdf
http://sdil.ac.ir/index.aspx?pid=99&articleid=62893

NATIONAL SYMPOSIUM-http://www.nationalsymposium.com/communism.php
SCIENCE DZ-http://www.sciencedz.net/conference/6443-fifth-international-conference-after-communism-east-and-west-under-scrutiny
ARCHIVE COM-http://archive-com.com/com/c/conferencealerts.com/2014-12-01_5014609_70/Rome_15th_International_Academic_Conference_The_IISES/
CONFERENCE WORLD-http://conferencesworld.com/higher-education/
KNOW A CONFERENCE KNOW A CONFERENCE-http://knowaconference.com/social-work/
International Journal on New Trends in Education and Their Implications (IJONTE) Turkey http://www.ijonte.org/?pnum=15&
Journal of Research in Education and Teaching Turkey-http://www.jret.org/?pnum=13&pt=Kongre+ve+Sempozyum
CEPOS CONFERENCE 2015 is part of a "consolidated list of all international and Canadian conferences taking place pertaining to international relations, politics, trade, energy and sustainable development". For more details see http://natocouncil.ca/events/international-conferences/

## CEPOS Conference 2014

The Fourth International Conference After Communism. East and West under Scrutiny, Craiova, 4-5 April 2014 was very well received by the national media and successfully indexed in more than 9 international databases, catalogues and NGO's databases such as: American Political Science Association, USA-http://www.apsanet.org/conferences.cfm; Journal of Church and State, Oxford-http://jcs.oxfordjournals.org/content/early/2014/01/23/jcs.cst141.full.pdf+html;
NATO Council of Canada (section events/ international conferences), Canada, http://atlantic-council.ca/events/international-conferences/
International Society of Political Psychology, Columbus, USA-http://www.ispp.org/uploads/attachments/April_2014.pdf
Academic Biographical Sketch, http://academicprofile.org/SeminarConference.aspx; Conference alerts, http://www.conferencealerts.com/show-event?id=121380; Gesis Sowiport, Koln, Germany, http://sowiport.gesis.org/; Osteuropa-Netzwerk, Universität Kassel, Germany, http://its-vm508.its.uni-kassel.de/mediawiki/index.php/After_communism_:_East_and_West_under_scrutiny_:_Fourth_International_Conference
Ilustre Colegio Nacional de Doctores y Licenciados en Ciencias Politicas y Sociologia, futuro Consejo Nacional de Colegios Profesionales, Madrid, http://colpolsocmadrid.org/agenda/.

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Reference citations within the text Please cite within the text. Use authors' last names, with the year of publication.
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On first citation of references with more than three authors, give all names in full. On the next citation of references with more than three authors give the name of the first author followed by "et al.".

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References:

The references cited in the Article are listed at the end of the paper in alphabetical order of authors' names.
References of the same author are listed chronologically.

For books

Olimid, A. P., (2009a). *Viaţa politică şi spirituală în România modernă. Un model românesc al relaţiilor dintre Stat şi Biserică*, Craiova: Aius Publishing.
Olimid, A. P., (2009b). Politica românească după 1989, Craiova: Aius Publishing.
For chapters in edited books
Goodin, R. E. (2011). The State of the Discipline, the Discipline of the State. In Goodin, R. E. (editor), *The Oxford Handbook of Political Science*, Oxford: Oxford University Press, pp. 19-39.

For journal Articles

Georgescu, C. M. (2013a). Qualitative Analysis on the Institutionalisation of the Ethics and Integrity Standard within the Romanian Public Administration. *Revista de Ştiinţe Politice. Revue des Sciences Politiques*, 37, 320-326.

Georgescu, C. M. (2013b). Patterns of Local Self-Government and Governance: A Comparative Analysis Regarding the Democratic Organization of Thirteen Central and Eastern European Administrations (I). *Revista de Ştiinţe Politice. Revue des Ştiinţe Politice*, 39, 49-58.

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