Petroleum-Gas University of Ploiesti
The Centre for Studies and Legal and Socio-Administrative Research

JOURNAL OF LAW AND ADMINISTRATIVE SCIENCES

No.2/2014

ISSN 2392-8298
ISSN-L 2392-8298

The Journal is indexed in the international data bases:

SSRN
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THE PRINCIPLES OF LAW PHILOSOPHICAL APPROACH

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Abstract
Any scientific intercession that has as objective, the understanding of the significances of the "principle of law" needs to have an interdisciplinary character, the basis for the approach being the philosophy of the law. In this study we fulfill such an analysis with the purpose to underline the multiple theoretical significances due to this concept, but also the relationship between the juridical principles and norms, respectively the normative value of the principle of the law. Thus are being materialized extensive references to the philosophical and juridical doctrine in the matter. This study is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between "given" and 'constructed" we propose the distinction between the "metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law. .
Keywords: *Principles of the law/ / "given" and "constructed" in the law / Moral value / juridical value/ metaphysical principles/ constructed principles*

INTRODUCTION

In philosophy and in general, in science, the principle has a theoretical value and an explanatory one as it is meant to synthesize and express the basis and unity of human existence, of existence in general and knowledge in its diversity of manifestation. The discovery and the assertion of the principles in any science concedes the certitude of knowledge, both by the expression of the *prime element*, that's exist by itself, without having the need to be deducted or demonstrated, as throughout the achieving of cohesion within the system, without which the knowledge and scientifical creation cannot exist.

The principle has multiple significances in philosophy and science, but for our scientifical approach, one keeps in mind this one:" as element, idea, basic law on which a scientifical theory is grounded, a norm of conduct or the totality of laws and basic concepts of a discipline".[1] The common place of the meanings of the term of principle makes the essence, a common category important both for philosophy as for the law.

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The principle represents the *given as such*, that may have a double significance: a) what existed before any knowledge as aprioric factor and grounda for the science; b) theoretical and resulting element of the synthesis of the phenomenon diversity for the reality of any type. The distinction, but also the relationship between “given” and ‘constructed” are important in understanding the nature of the principles in science and mainly in law. In his work “*Science et tehnique en droit positif”* published at the beginning of XX century, François Geny [2] analyzes for the first time the relation between science and juridical tehchnique starting from two concepts” the ‘given” and the ‘constructed”. In his opinion Geny one thing is”given” when it exits as an object outside the productive realities of human. On this meaning the author distinguishes four categories: the *real given, the historical given; the rational given;* the ideal given. From our researching theme’s perspective two of these categories are of interest, namely:” the rational given” that consists of those principles that come out from the consideration that needs to be shown to the people and human relationships, and the “ideal given” throughout which is being established a dynamic element, respectively the moral and spiritual relationships of a particular civilization.

One thing is being “constructed” when being achieved by man, as a reasoning, a juridical norm, etc. The “given” is relative in the meaning that is being influenced by a ‘constructed”, by human activity. Regarding the “given”, man’s attitude consists in knowing it by the help of science. Regarding the “constructed” the man is by hypothesis the “constructor”, he can make from this respect, art or technique. The sphere of the constructed stretches out onto the social and political order.

The question that arises is if the law is “given”, object of science, in other words for a finding, recording or it is “constructed, as technical work? From historical perspective, the law is obviously “given”, object of science, such as it appears in the old law, in the international or national contemporary law. The drafting of the positive law yet assumes a “construction” and the juridical rules are the work of technique on this respect.

In the juridical literature this distinction has been retained, in compliance with which the science explores the social climate that requires a certain juridical normality, and the technique is aiming towards the modalities through which the law maker

transposes them into practice, “builds” the juridical rules. It was emphasized nevertheless upon the relativeness of this distinction, having into consideration that the juridical technique also assumes a creation, a scientifical activity.[3]

Therefore the principles represent the “given” as ideal or background for the science and the ‘constructed” in situation they are developed or transposed into a human construction, included by juridical norms.

A good systematization of the meanings which the principle notion has is done in a monography [4]: “a) the founding principle of a field of existence; b) what would have been hidden to the direct knowledge, and requires logical-epistemological processing; c) logical concept that would allow the knowledge of the particular phenomenon.”

This systematization, applied to the law means: a) the discussion referring to the substance of law; b) if and how we may know the substance; c) the efficiency of placing into the phenomality of the law, related or not with the substance.” [5]

The need of the spirit to raise up to the principles is natural and mostly persistent. Any scientifical construction or normative system must relate to the principles that will guarranty or substantiate them. This regressive motion towards unconditioned, towards what is prime in an absolute way is for exemple of the motion that Platon follows in the Book VII of the Republic[6], when he puts the essence of the “Good” as a prime and nonhypothetical principle. In the same meaning another great thinker [7] speaks about the “first principles” or the eternal principles of the “Being”, non demonstrable, a ground for any knowledge and of any existing one, beyond which is nothing else but ignorance.

The question then is to know if what seems necessary, in the virtue of logics of knowledge is necessary also in the ontological order of the existence. In the “Critic of the Pure Reason”,[8] Kant will show that such a passing, from the logic to the existing, (the ontological argument) is not legitimate. If the unconditioned, as a principle, is put in a necessary way by our reasoning, this fact cannot and must not lead us to the conclusion that this unconditioned exists outside it and independently of any reality.

In consequence, as the principles aim the existence in all its fields, they cannot and must not be immutable, but are the outcome of the becoming. They are a “given”, but only as a result of the existential dialectics or as a reflection of becoming into the phenomenal world and of the essence.

II PAPER CONTENT

Since the law is assuming a very complex relationship, between the essence and the phenomena, and also a dialectics specific to each of the two categories in the plane of theoretical, normative and also social reality, cannot be outside the principles.

The problem of the statute of the principles of law and their explaining was always a concern for the theoreticians. The natural law school argued that the source, origin, and therefore the grounds of the juridical principles are of human nature. The historical school of law, under kantianism influence. The law historical school, under kantianism's influence, opens a new view in researching of juridical principles' genesis, presenting them as products of the people's spirit (Volkgeist) which shifts the grounds of law from the universe of pure reasoning, to the junction of some historical origins scattered in a multitude of transient forms. The versions of the positivist school claim that the principles of law are generalizations induced by the social experience. When the generalization covers a series of social facts, in a sufficient number, we are in the presence of principles. There are authors such as Rudolf Stammler that deny the lastingness of any juridical principle, considering the contents of law diversified in space and time, lacking universality. In the author's concept the law could be a cultural category. [9]

Referring to the same problem, Mircea Djuvara asserted: "All law science does not consist in reality, for a very serious and methodical research, but merely in releasing out of a multitude of law dispositions, their essential, which are precisely these last principles of justice of which other dispositions derive from. In this way the entire legislation is of a large clarity and what it is called the juridical spirit comes into being. Only thus the scientifical drafting of a law is being done. " [10]

In our opinion this is the starting point for understanding the principles of law.

In the specialized literature there is no unanimous opinion regarding the definition of the principles of law [11] A series of common elements are identified, which we mention below:

- The principles of law are general ideas, guiding postulates, fundamental provisions or bases of the law system. They characterize the entire law system, constituting in the same time features specific to a certain type of law;
- The general principles of law configure the entire structure and the development of the law system, provide the unity, homogeneity, balance, coherence and its development capacity;
- The authors differentiate between fundamental principles of law, that characterize the entire law system and which reflect what is essential within the respective law type and the principles valid for certain law branches or juridical institutions.

Thus in the doctrine were identified and analyzed the following general principles of law: 1) providing the juridical bases for state's functioning; 2) the principle of liberty and equality; 3) principle of responsibility; 4) principle of justice.[12] The same author considers that the general principles of law have a theoretical and practical importance that consists in: a) the principles of law are drawing the guiding line for the juridical system and orientates the activity of the law maker; b) these principles are important for the administering of the justice as "The man of law must ascertain not only the positiveness of the law, he has to explain the reason of its social existence, the social support of law, its connection with the social values"; c) the general principles of law take the place of the regulating norms when the judge, in the silence of the law, solutions the cause based on law general principles.[13]

One of the main problems of the juridical doctrine is represented by the relation between the law principles, law norms and social values. The oppinons expressed are not unitary they differ pending on the juridical conception. The natural law school, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside their norms, positive and superior to them. The principles of law are grounded on the human reason and configure valorically the entire juridical order. Unlike this, the positivist law school, the Kelsian normativism considers that the principles are expressed by the norms of law and in consequence there are no law principles outside the juridical norms system.

Eugeniu Speranţia established a correspondence between the law and law principles:"If the law appears as a total of social norms, mandatory, the unity of this

totality is due to the conseqvence of all norms related to a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between them. ” [14]

In connection to this problem, in Romanian specialized literature was emphasized the idea that the law principles are fundamental provisions of all juridical norms.[15] In another opinion, it was considered that the law principles orientate the drafting and enacting of the juridical norms, they have the force of some superior norms, that are found in the text of normative acts, but they can be deduced from the “permanent social values” when they are not expressly formulated by the positive law norms.[16]

We consider that the general law principles are delimited by the positive norms of law, but undoubtedly there is a relationship between these two values. For instance, the equality and liberty or equity and justice are valoric foundations of social life. They need to find their juridical expression. In this way appear the juridical concepts that express these values, concepts that become foundations (principles) of law. From these principles derive the juridical norms. Unlike the norms, the general principles of law have an explanatory value because they contain the grounds for law’s existence and development. [17]

Besides other authors [18] we consider that the juridical norms relate to the law principle in two meanings: the norms contain and describe most of their principles; the functioning of the principles is achieved by putting into practice of the conduct provided by the norms. In relation to the principles the juridical norms have an explanatory, teleological narrower value, the purpose of the norms being to preserve the social values, not to explain the causal reason of their existence. The principles of law are the expression of the values promoted and defended by the law. One can say that the most general principles of law coincide with the social values promoted by the law.

For a correct understanding of the problematic of the values in law and their expressing by the principles of law some brief comments are needed in the context of our researching theme. The different currents and juridical schools, from antiquity up to the present, have tried to explain and substantiate the regulations and juridical institutions by some general concepts appreciated as being special values for the society. The law is grounded on judgements of value. Indeed by its nature the law

implies an appreciation, a value rendering of human conduct in relation to certain values, representing the finality of juridical order such as: justice, common good, liberty etc . [19]

The values are neither of a strict nature nor of an exclusively juridical nature. On the contrary, they have a larger dimension, moral, political, social, philosophical, in general. These values must be understood in their historical-social dynamics. Though some of them are to be found in all law systems, for instance the justice, nevertheless the specific and historical particularities of the society leave their print on them. The values of a society must be primordially deduced from philosophy (social, moral, political, juridical) which leads and guides the social forces in the respective society.

The law maker, in the enactment process, oriented be such values, expressed mainly in the general principles of law, transposes them into juridical norms, and on the other side, once these vales “enacted” they are defended and promoted in the form specific to the juridical regulation. The juridical norm becomes both a standard for the appreciation of the conduct pending on respective social value, or a means to ensure the achieving of the exigencies of such a value and the prediction of the future development of society. Needs to be added that the juridical norms substantiate the juridical values in a relative way because, either as a whole or individually, they don’t show totally a juridical value, they do not exhaust its richness in contents.

In regard to the identification the values promoted by the law, the oppinions of the authors do not coincide, yet they stay in closed related spheres. Thus, Paul Roubier named few such values *the justice, juridical security and social progress* [20] Michel Villey named four large finalities of the law: *justice, good conduct, serving people and serving society*. [21] François Rigaux speaks about two categories, namely: the primordial ones called by him formal, *order, peace and juridical security* and the material ones *equality and justice*. [22]

The undeniable value that defines the finality of the law, in the concept of the most distinguished thinkers, yet from the ancient times, is the *justice.* The most complex concept *justice* was approached, explained and defined by numerous thinkers – moralist, philosophers, counselors, sociologists, theologians – that start in defining it from the ideas of *just, equitable*, in the meaning to give everyone what deserves. The

general principle of law, equity and justice is the expression of justice as a social value. Many concepts about the law would be suitable, be it on a rationalist line or in a realistic one. The rationalists argue that the principle of justice is innate to men, it holds onto our reasoning in its eternity. The realists argue that the justice is an elaborate of history and human general experience.

Regardless of theoretical orientation, the justice undoubtly constitutes a complex ground of the juridical universe. Giorgio del Vecchio assterts that the justice is a conformation to the juridical law, the juridical law being the one that contains the justice. According to Lalande the justice is the owner of what is just; Faberquetes considers the law as a unique expression of the principle of justice, and the justice, as, naturally, the unique content of the expression of law. It has been said that the justice is the will to give everyone what it is his; is the balance or proportion of the relationships betwenn people, is the social love or the harmonious fulfilling of the human being essence. [23]

The justice as a value and principle of the law exists throughout the juridical norms contained in constitutions, laws etc. This does not mean that the objective law, with expressings, carries on entirely and unavoidably the “justice”: not all that is lawfully in force is just. On the other side there are juridical norms, such for instance, the technical ones that are indifferent to the idea of justice. There are circumstances when the positive law is inspiring more utility considerents than the justice ones, in order to maintain the order and stability in society.

In our opinion, the justice, as social value and also as a general principle of law, dimensions itself in the ideas of just measure, equity, lawfulness and good faith. Mainly the concepts of just measure and equitly express the proportionality.

The principle of justice has a guidance contents on the cognitive-acting line: to give eachone what deserves. A law system is unitary, homogenous, balanced and coherent if all its components “provide, protect, establish” in such a way that every physical and juridical person be what it is, to have what he deserves without injuring one another or the social system.

The equity is a dimension of the principle of justice in its consensuality with the moral good. This concept moulds the formal juridical equality, makes it human, introducing into the law systems in force the categories of the moral from the

perspective of those for which the justification is a making for good and for liberty." Thus considered, the equity disseminates till the farthest spheres of the juridical norms system, fructifying even the strictly technical or formal fields, appearantly indifferent towards the axiological concerns".[24] Understood by the idea of proportionality, the equity regards the diminishing of the inequality there where the establishing of a perfect equality (also named formal justice) is impossible due to the particularity of the situation in fact. In other words, in relation to the generality of the juridical norm, the equity suggests to take into consideration the situations in fact, personal circumstances, unicity of the cause, without falling into extreme.

The idea of justice develops under the influence of the social-political transformations. Thus, in the contemporary democratical states, in order to underline the economical, social, cultural rights, one speaks about the *social justice.* The achieving of the social justice is mentioned as a requirement of the lawfull state in the document adopted at the Conference for European Security and Cooperation, Copenhague 1990.

Another problem of the juridical doctrine is to establish the relationship between the principles of law and those of the moral. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705) [25], dinstinguished between the mission of the right to protect the external relationships of human individuals through provisions that form perfect and sanctionable obligations and the mission of the moral to protect the inner live of individuals, only throughout provisions that form imperfect and unsanctionable obligations. This difference between morals and law has become classic.

Undoubtedly, the law cannot be mistaken with the morals, for several reasons analyzed in specialized literature.[26] However, law and morals are from ancient times in a closed relationship that cannot be considered as accidental. The respective relationship is axiological. The juridical and ethical values have a common origin, respectively the conscience of the individuals living in the same community. The theory of justrationalism – the modern form of justnaturalism – tried to argument that there is a background of universal and eternal justice, because they are written within human reasoning where they connect with the principles of good and truth. Therefore, as law is rational, it is natural and because it is natural, it is also moral.

Of course, the law is eminamently governing the outer conduct of human individual. Nevertheless the law is not disinterested by the morals, “by the fact that by means of equity it seeks the good acting to harmonize the exterior with the inside of the individual, throughout the same equity".[27]

We consider that indeed the morals and law have a common valoric structure and it can be deducted only from the assertion pretty often met and according to which “the law is a morals minimum” but also from the observation that there isn’t a moral assertion to be denounced as unfair, yet sometimes are being discovered juridical assertions in disagreement with the moral principles. It is noticed the tendency of the law to make appeal to values with a moral character so that they can be introduced into juridical regulations. In this respect Ioan Muraru stated that: “the moral rules, though usually are closer to the natural rights and customary laws, they express ancient and permanent desires of mankind. The moral rules, though usually are not fulfilled, in case of need by using the coercive force of the state, they need to be juridically backed up in their fulfilling when they defend human life, freedom and happiness.Therefore in Romania’s Constitution the referrings to moral hypostasis are not missing. These constitutional referrings provides efficiency and validity to the morals. Thus, for example, item 26, item 30 protect « good habits », item 35 mentions the « public morals » also the « good faith » which is obviously first a moral concept consecrated by item 11 and item 57.[28] Therefore the general principles of law and those of the morals have a common background of values. The norms of the law can express values that at their origin are moral and are to be found in the contents of the general principles of law, such as is for example the equity or its particular form, the proportionality.

The principles of law have the same features and logical-philosophical significances as the principles in general. Their particularities are determined by the existence of two systems of dialectical relationships specific to law:

a) principles – categories – norms;
b) principles – law, as social reality.

Few of the most important features of the principles of law can be identified, useful in order to establish if the proportionality can be considered a principle of law:

A) Any principle of law must be of the order of essence. It cannot be identified with an actual case or with an individual assesment of juridical relations. The principle must represent the stability and balance of the juridical relations, regardless the variety of normative regulations or particular aspects specific to juridical reality. In consequence, the principle of law must be opposed to the aleatory and should express the necessity as essence.

However, the principle cannot be a pure creation of the reasoning. It has a rational dimension, abstract of maximum generality, but is not a creation of metaphysics. Yet of substance order, the principles of law can neither be eternal nor absolute, but they do reflect the social transformations, they express the historical, economical, geographical, political particularities of the system which they contain and at their turn, which they substantiate. [29] The principles of law develop so that the realities they reflect and explain be subject to improving. The scientifical improving of the juridical analysis could never be ended. But in law, one needs to give immediate solutions so that the practical life does not wait".[30]

Being of the substance order the principles of law have a generalizing character, both for the variety of the juridical relationships as for the norms of law. At the same time expressing the essential and the general of the juridical reality, the principles of law are grounds for all other normative regulations.

There are great principles of law that do not depend on their consecration on the juridical norms as it is the juridical norm that determines their concrete contents in relation to the historical reference time.

B) The principles of law are consecrated and acknowledged by constitutions, laws, customary, jurisprudence, international documents or formulated by the juridical doctrine.

The principles must be accepted internally and must be a part of the national law of each state. The general principles of law are consecrated in constitutions. The characters of the state's juridical system influence, and even determines, the consecration and acknowledging of the principles of law.

The work of consecration of the principles of law in the political and juridical documents is in full progress.

Thus, in the international documents such as U.N.O Charta or the Declaration of U.N.O. General Assembly in 1970, are consecrated principles [31] that characterize the democratical international law order. The regional law systems had known and acknowledged their own principles. For example, the community law consecrates the following most important principles : principle of equality, protection of the human fundamental rights, principle of juridical certitude, principle of subsidiarity, principle of authority of res judicata and principle of proportionality.[32] Most democratic constitutions consecrate principles such as: principle of sovereignty, principle of juridicality and supremacy, constitution, principle of democracy, principle of pluralism, principle of representation, principle of equality etc.

The jurisprudence has a significant role in the consecration and applying of the principles of law. There are situations when the principles of law are acknowledged by jurisprudential ways, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends to the judges to decide in the absence of some texts, in the light of the general principles of law.

There are systems of law in which not all principles have a normative consecration. We refer mainly to the great system known by the name of *common law*, consisting in essence of three normative, autonomous and parallel subsystems: common law (in a narrow meaning); equity; and statute-law. Equity represents a set of principles coming out from the practice of the instance and is a correction brought to the common-law rules.

With all variety of the consecratation manner and the recognition of the principles of law, comes out the need at least for their recognition in order to be characterized and enacted in the system of law. This consecration or acknowledging is not enough to be doctrinary, nevertheless it must be realized throughout norms or jurisprudence. However, a distinction between the consecration or acknowledging of the principles of law must be made, and on the other side, in their enacting.

C) The principles of law represent values for the law system, because they express both the juridical ideal, as the objective requirements of society, have a regulating role for the social relations. In situation in which the norm is not clear or it does not exist, the solving of the litigations can be achieved directly based on the

general or special principles of the law. As ideal, they represent a coordinating ground for the work of law making.

D) In classifying the principles of law it is started from the consideration that between them there is a hierarchy or relation from the general to particular.[33] Starting from this observation one can distinguish:

1. General principles of law which form the contents of some norms with universal application with a maximum level of generality. These are acknowledged by the doctrine and expressed by the normative acts in the internal law or internationally treaties as having a special importance. As a rule these principles are written in constitutions having thus a superior juridical force in relation to the other laws and all law branches. Referring to the theoretical and practical importance for studying the law branches, Nicolae Popa remarks:"the general principles of law are fundamental provisions that cumulate the creation of law and its enacting…. In conclusion the action of the principles of law has as a result the conceding of *certitude of law* – the guarranty granted to individuals against the unpredictibilities of the coercive norms – and the congruence of the legislative system, namely the concordance of the laws, their social character, credibility, opportunity." [34]

The general principles have a role also in the adiministering of justice, because those in charge with the law enforcing must know not only the letter of the law, but also its spirit, and the general principles' make up of this spirit. As part of them one can include: principle of lawfulness, principle of consecration, respecting and guaranteeing human rights, principle of equality, principle of justice and equity etc.

2. The specific principles that express particular values and as a rule have a limited action to one or several branches of law. They are mentioned in codes or other laws. In this category can be included the principle of lawfulness of penalties, binding of contracts, presumption of innocence, principle of compliance with international treaties etc. The special principles have their source of values in the law's fundamental principles.

For instance the proportionality is one of the oldest and classic principles of law, rediscovered in the modern age. The significance of this principle, in a general meaning,

is that of an equivalent relation, balance between phenomena, situations, persons etc, but also the idea of just measure.

Ion Deleanu specifies that: “At the origin, the concept of proportionality is outside the law; it calls up the idea of correspondence and balance, but also of harmony. Appeared as a mathematical principle, the principle of proportionality was developed also as a fundamental idea in philosophy and law receiving different forms and acceptions: “reasonable”. “balance”, “admissible”, “tolerable”, etc.[35] Therefore, the proportionality is a part of the content of principle of equity and justice, considered as being a general principle of law. At the same time by its normative consecration, explicit or implicit, and by jurisprudential applying, the proportionality has particular significances in different branches of law: constitutional law, administrative law, community law, criminal law etc. This principle definition, understanding and applying, in the above shown significances result from the doctrinary analysis and the jurisprudential interpretation. [36]

III CONCLUSIONS

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law’s philosophy, only after their construction in the sphere of law methaphysics, these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the “understandings” of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law.*The distinction which we propose has as philosophical grounds the above shown difference between ‘constructed” and “given” in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequenlty, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no preconstituted limit for them. For instance, we mention the “principle of subsidiarity”, a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a ‘given” in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental ‘given” and not a transcendent of the law, consequently, are not “beyond’ the sphere of law, but are something else in the juridical system. In other words, they represent the law’s essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical “given” of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may have also an implicit existence, discovered or valued throughout the work for law’s interpretation. As implicit “given” and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that’s why they were called “general principles of law”. We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental ‘given” and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty.* In a future study, we will explain extensively the considerents that entitle us to identify the

above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the pruinciples of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work *„Substamzbegriff und Funktionsbegriff"* (1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientifical knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that 'world of ideas" which Platon was talking about. [37]

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality. [38]

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The juristprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16th 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: "The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the Consitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawfull state and the social state".[39]

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge respects the character of being of the juridical system, not only the functions or juridical relations.

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GENERAL CONSIDERATIONS CONCERNING BUDGETARY DEBTS*

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Abstract
Theory and judicial practice represent unlimited source for the different situations that may arise in the course of the insolvency procedure.
Problems have occurred in court practice in connection with the competition between several guaranteed creditors, which have entered mortgage on the same immovable property, as a general rule one of whom shall be also the budgetary creditor.
It is clear that only if the budgetary creditor shall be entitled to one of the securities referred to in the Tax Procedures Code then we will be able to cover the existence of a budgetary receivable guaranteed in insolvency proceedings.
Keywords*: insolvency, budgetary debts, fiscal debts, creditor, debtor*

As it is natural, we have to give first a definition of budgetary debts. Law 85/2014 defines budgetary claims as those claims that include taxes, fees, contributions, fines and other budgetary revenues, as well as their accessories. Retain this nature also budgetary claims that are not covered in full by the privileges value, mortgages or pledges held for the uncovered part of the debt (Article 5, Point 14).

Tax claims represent patrimonial rights arising from material fiscal law, consisting of: main fiscal debts - the right to levying taxes, fees, contributions and other amounts which constitute revenues of general consolidated budget, and fiscal debts accessories – the right in levying of interest and penalties on late payments.

The basis of a comparison of the two definitions can lead us to the conclusion, as regards budgetary claims, as those are supplied by tax and no tax revenues while in the case of fiscal claims, they shall be subject to judicial regulations covered by Tax and Tax Procedures Codes.

* **This work has been financed from the POSDRU/159/1.5/S/141699 contract, an ID 141699 strategic project, co-financed from the European Social Fund, by means of the Sectoral Operational Program Human Resources Development 2007-2013.**

Budgetary legal relationships are covered under the legal rules related to the establishment and implementation of the state budget revenues. Legal budgetary relationship by in their structure, cover three components, namely: subject, content and object.

Subject of budgetary legal relations are, on the one hand, the state through banking or financial bodies, invested with specific powers to achieve budget revenues, and on the other hand, legal entities or natural persons liable to pay taxes, fees and other revenue of the state budget.

The active subject must always be a person carrying a public authority - the state, a local community, a public institution in subordination, which gives it a higher position than that of the second subject, banking or financial bodies, in his capacity as it may require other subject compliance with the obligations laid down by law that they have to the state budget. In this category we can identify: the Ministry of Public Finance, local councils, various public institutions, the Court of Auditors, inspectorates, offices, etc.

Passive subject may be any natural or legal person, which judicial law regulates his liability towards obligations or rights regarding public finances.

In the framework of the insolvency procedure, the budgetary creditor as provided by Article 5, point 20 of the Law 85/2014 *may belong also to those creditors entitled to request the opening of proceedings, when his claim against debtor's assets is quarrel, liquid and chargeable for more than 60 days.*

Holder of budgetary claim can be also the creditor entitled to participate in the proceeding, as defined in Article 5, point 19 of the law, namely *the holder of a right of claim on debtor's fortune, which has registered an application for registration of the debt, after which it acquires admission rights and obligations covered by this law for each stage of the proceedings.*

If we are to relate to the amount of debt of the budget, the holder of the **budgetary claim** it may be either a creditor entitled to apply for initiation of the procedure, or a creditor entitled to participate in insolvency proceedings.

The content of budgetary legal relations constitutes the rights and obligations of participating subjects.

Subject to budgetary legal relations it constitutes the amounts of money which represents taxes, fees and other revenue of the state budget due by natural or legal persons who make incomes or have goods taxable or chargeable.

To achieve budgetary debts it is necessary that they meet the general conditions **of the common law:** *certainly, liquid, and chargeable* character.

Certified debt is that debt instruments whose existence is arguable, on which there is no dispute. By analysing the provisions laid down by law, it is observed that the legislator do not appealed to the character definition in the new code of civil procedure, but she had kept on the one of the code of civil procedure from 1875, Article 379, paragraph 3, which contains a better coverage of situations in which a claim can be labelled as quarrel [1].

Liquid debt is that debt the quantum of which is precisely determined. Are always liquid claims those having as its object a determined amount of money or a specified quantity of generic goods.

Debt is a debt due to fall due, which can be claimed, which may be required as soon as possible the execution, even forced.

Another essential condition to be satisfied by budgetary debt is that of the *financial nature of the claim.* This must bear on taxes, fees, contributions, or other income, even no taxable ones, taxes to the local or central budget, recorded by one of the forms of individualization of the tax claims as specified by Article 83 C. Tax procedure Code., but also throughout other legal provisions, i.e. the fiscal debt purposes, having always enforceable decision, by law effect [2].

An essential requirement to be satisfied by budgetary debt is that, the amount of the claim to reach the threshold of 40,000 lei or, when there are multiple claims, the amount thereof to reach same threshold value of 40,000 lei. What is significant is the fact that it has provided for this threshold value also for the debtor, including the proceedings initiated under law 31/ 1990 specifically for applications made by liquidators appointed to administer the winding-up proceedings governed by the law 31/1990 [3].

The quality of budgetary creditor, it has been established by court practice [4], that arises at the time in which the creditor complies with the conditions laid down in the law of insolvency, that he has requested the registration of the claim, that he had proved

it with any documentary evidence admitted by law and that this has a budgetary character.

The creditor is obliged to apply for registration within the table of creditors, to prove its existence and the amount of the claim, and thus after the registration at the Commission in relation to the share capital due to him under the law, retaining fees of the securities in exchange for service provided.

These charge having budget character must be paid annually, otherwise they will have to pay penalties for delay.

Even if the creditor's budgetary debt isn't due at the date of initiation of insolvency, it must lodge an application for admission to the statement of affaires of his undue application. (Article 102, paragraph 4 of the law)

In the event that budgetary debt is accompanied by guaranties, the creditor has the obligation to attach at the application for the acceptance of the debt, supporting documents.

Article 5 PCT 15 of the Law 85/2014 defines *claims which benefit from a question of preference* as those *claims which are accompanied by a privilege and/or a right of mortgages and/or similar mortgage rights, in accordance with Article 2347* Civil *Code, and/or a right of pledge on the property of debtor's assets, regardless of whether it is main debtor or a third party guarantor of those receiving such causes of preference. In the case in which the debtor is third party guarantor, the creditor may take advantage of a question of preference will exercise the correlative rights only on the good or the right in question. These causes of preference shall have the same meanings given by the civil code, if by special law does not provide otherwise.*

Therefore, in the case in which the budgetary creditor benefits from a question of preference, we can speak of a budgetary debt guaranteed within insolvency proceedings.

Creditor's budgetary debt must have at the date of initiation of insolvency both the quality of budgetary debt instruments, as well as quality of guaranteed debt by a question of preference, so that it can be entered by the legal administrator/judiciary liquidator in the table of claims as having double qualification.

If, at the time of the opening of insolvency proceedings, budgetary debt did not have also the quality of a guaranteed debt, the creditor will participate at the insolvency procedure with only a budgetary debt, with rank of priority laid down in Article 161 (5) of the law. Participation in distributions of amounts shall be carried out in accordance with Article 161 (5) of the insolvency code.

If at the initiation of insolvency, the budgetary debt is guaranteed also by a clause of preferability this will participate at the distributions of amounts carried out in accordance with Article 159 of Law 85/2014. In the case in which there would be a uncover part of a budgetary debt, the creditor will participate in the distribution of amounts carried out in accordance with Article 161, the priority ranking provided for that by same Article, at point 5.

With regard to the quality **of participating holders of budgetary debts in insolvency proceedings**, it can be noted that, in the case in which a budgetary creditor it has been decided to participate in insolvency proceedings, even if he does or not request the initiation of the proceeding, it will be a part of the creditors' assembly, if his claim was allowed to the statement of affaires.

Whereas it will be part of the creditors' assembly, the creditor will have all the rights provided in favour of any creditor and will be kept by carrying out of all obligations set out under load of any creditor, as provided by the Article 47-49 of the law.

Article 48 (3) of Law 85/2014, afford budgetary creditor to participate through representation at the creditors' meeting, their interests, in case in which participation by representation at meetings of creditors will be supported by an employee of the fiscal office with delegation signed by the chef in charge.

Article 50 (1) [5] lays down that both budgetary creditor with the highest dept in the category of creditors, can be part of the provisory designated committee of creditors by -syndic judge, after drawing up the preliminary table of claims, to the extent that it will be approved by the creditors' assembly, having regard to the provisions of Article 50 (4) of the law.

In accordance with Article 80 paragraph 1 and 2, exception to the rule, is that (1) *no interest, increase or penalty of any kind or expense, generically called*

accessories, will not be able to be added to the claims born before the date of initiation of the procedure, except the circumstances provided for in Article 103.

Claims that are beneficiaries of a preference clause, benefits in accordance with Article 103 of a special treatment, in the sense that they are *entered in the table permanently up to the market value of the collateral guarantee established by assessment, prepared by the legal administrator or judicial liquidator , carried out by an assessor appointed in accordance with Article 61. In the event that assets in question of preference will be sold at a price which is higher than the amount indicated in the table or in the table definitively consolidated, the favourable difference will return again to the guaranteed creditor, even if a part of his claim had been discussed as an unsecured debt, to cover main claim and the accessories that will be calculated in accordance with acts from which the debt is resulting in, up to the date of recovery. This provision shall also apply in the case of failure the reorganization plan and sale property in the bankruptcy procedure [6].*

As provided by Article 5 point 15 of the law, the budgetary creditor debt should be recipient of a cause of preferences. In the case in which there isn't the beneficiary of a cause of preference, at the date of initiation, the calculation of the delay increases must be stopped, even if we are talking about a budgetary creditor.

In practice [7] have been rejected appeals declared by budgetary who have requested, the entry in the additional table drawn up by the liquidator of certain debts consisting of the amount which represents penalties for delay and legal costs which could not have been foreseen at the time when the declaration was lodged, as is reported by court the date of initiation of the insolvency procedures when declaration is lodged, the consequence being that these amounts will not be included on the additional claims table.

In accordance with Article 122 C. Tax procedure code., in the case of taxpayers who have been opened proceedings, for fiscal debts born prior to, or after initiation date of insolvency is due interest and penalties for delay in accordance with Article 80 and Article 103 of the law 85/2014.

Articles 151 (8) and Article 154 (6) of the Tax procedure code provides for certain facilities for budgetary claims, in the sense that it assimilates to such claims, if they are

covered by a legally established movable or immovable property of the debtor's debts, secured by a pledge or mortgage legal grounds.

Claims by fiscal creditors will be subject to the same legal protection regime in respect of creditors with the causes of preference, including participation in distributions of amounts carried out in accordance with Article 159 of the Code of insolvency.

The Parties not covered from recouping assets guaranteed will have same juridical regime of a budgetary debt.

Whereas there were abuses in practice of fiscal authorities, who considered that by the mere inclusion of the debt in the Electronic Archive of Real Guaranties the budgetary debt became a guaranteed one by Article 5, point 22 of Law was expressly provide that the mere inclusion of a claim in the AEGRM, is not turning this one latter into debt instruments which benefit from a clause of preference.

Conclusions

Any company has an activity which generates a complex system of relations both economic and legal with the beneficiaries of services provided, but also with the state budget regarding the payment of taxes and fees [8].

Raising effectiveness of the recovery of fiscal claims representing duties, taxes, fines and other contributions, will also be an important key in order to achieve budgetary projects, meant to ensure a balanced development in Romania. Development of the capacity for the collection of budget revenues and the fiscal discipline of the tax payers has a particular importance for the economical stimulation.

New insolvency Code is an important step in meeting debtor's desire, as a means of economic reinsertion, as well as a more efficient tool for ANAF, in order to recover budgetary debts.

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biggest amount of debts as value. If the small number of creditors is considered an useful buy the judge the creditor committee attribution will be taken by the Creditors Assembly."

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EMU – What Role for European Central Bank in the asymmetric shocks?

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Abstract:
The consequences of exogenous shocks hitting either the supply or the demand side, some of them affecting European Monetary Union (EMU) area, are labeled "common" or "symmetric", while the others - hitting only a part of countries - are labeled "idiosyncratic" or "asymmetric".EU Member States agreed to share a common single currency. EMU was achieved in three stages through coordinating economic policy, achieving economic convergence, sharing a common currency –Euro.
The first stage was achieved from 1 July 1990 to 31 December 1993 (exchange control abolished, capital movements liberalized, Maastricht Treaty convergence criteria), while the second was between 1994, January, 1 and 1998, December, 31 (establishment of European Monetary Institute, adoption SGP and ERM II), and finally, the third came into force from 1 January 1999 (ECB establishment for leading all monetary policies in the common monetary area, Euro adoption).
Keywords: *asymmetric shocks, convergence, capital movements, technocracy, expertise.*

I. Introductory Consideration.

The asymmetric shocks are better described with the OCA (Optimal Currency Area) theory which was enunciated firstly by Robert Mundell (1961) [1] proving to be an useful and very popular economic instrument.

Analyzing the potential gains and losses for Canada in joining to a monetary union with US, OCA stated a number of criteria for an optimal currency union, describing the economy as following a path - the long-run potential growth path – which is mainly determined by supply-side factors uninfluenced by macroeconomic policies. The fluctuations around this path are the consequences of exogenous shocks hitting either the supply or the demand side, some of them affecting European Monetary Union (EMU) area, being labeled "common" or "symmetric", while the others - hitting only a part of countries - are labeled "idiosyncratic" or "asymmetric".

But, what is EMU? EMU is a "core Europe" through which some EU Member States agreed to share a common single currency. EMU was achieved in three stages through coordinating economic policy, achieving economic convergence, sharing a common currency –Euro.

[*] PhD in international law

The first stage was achieved from 1 July 1990 to 31 December 1993 (exchange control abolished, capital movements liberalized, Maastricht Treaty convergence criteria), while the second was between 1994, January, 1 and 1998, December, 31 (establishment of European Monetary Institute, adoption SGP and ERM II), and finally, the third came into force from 1 January 1999 (ECB establishment for leading all monetary policies in the common monetary area, Euro adoption).

The monetary union could be better described in its dynamics using the ALIS schema applied to (neo)functionalist theory.[2]

II. (Neo)functionalist theory.

These scholars offer an explanation how to solve the individual and transnational problems through technical cooperation, which is built from bottom-up using the forms that trespass the formal sovereignty reducing the states' ability to act as sovereign entities in different sectors. Its preference towards step-by-step metod of integration (real but limited transfer of sovereignty) supported the idea of a "core Europe" in which some willing and able states could start an enforced cooperation in a certain sector being opened to gradual integration of other states at the moment when they are prepared. The Eurozone is an example of such "core Europe".

1. The (neo)functionalism' assumptions are based on the positive view concerning human nature, being in line with John Locke and or John Stuart Mill tradition, assuming the human nature as good and optimistic. Cooperation could evolve even between rational egoists in order to fulfill better their needs.

Functionalism' assumptions transferred to the European level could be translated in the next rationale: if human beings can cooperate rationally to fulfill certain common needs, the same could do the EU Member States.

According to these assumptions, EMU is a consequence of positive-sum-game, understood as being the cooperation in the mutual advantage of its members, in order to fulfill jointly their needs in monetary area.

2. The idea of "form follows function" is the central point of (neo)functionalism. As such, the logics of European monetary system mean that the most 'functional' (most efficient) institutions such as ECB could be set in order to support the best solution to

the problems in monetary sector (form follows function) because the cooperation needs to be located on the adequate level (the cooperation on an adequate level could be considered as the origin of the EU's subsidiarity principle).

According to (neo)functionalism, the successful cooperation in one sector would trigger the further cooperation in another sector (spill-over effect or sachlogik). As such, EMU is the result of spillover effect of common market achieving and the "technical" policy-making process. The ERM success and Single Market completion required imperatively the collaboration in monetary area in order to maximize their benefits. From collaboration within ERM, the significant monetary policy convergence was arising.

In this process (spill-over or sachlogik), supranational actors and institutions, such as European Central Bank (ECB) proved to be influential. They are providers of expertise in order to achieve collective outcomes through sectorial cases of functional cooperation and mutual dependence (peace in parts).

3. Functionalist institutions must reflect the logics of "technocracy" and "expertise" such as we already showed. In this regard, ECB was endowed with the both technocracy and expertise.

Actually, concerning the role of institutions, neo-functionalism considered them as being the central agents in organizing the integrated sector, and to push further the integration process shifting the loyalties, not only by elites – who are considered as being a crucial part in establishing the working peace setting – but the popular loyalties, too. Therefore, in neo-functionalist theory, institutions could also be political (elites are central parts) as well as providers of expertise (in this point, neo-functionalism is different by the classic functionalism). Following this logic, some European politicians tried to politicize ECB without success.

We will focus in this paper especially towards European Central Bank (ECB) competences to define monetary policy for Eurozone in order to implement it uniformly. Its main aim is to maintain price stability and, consequently, a low inflation. ECB takes care by foreign reserves of ESCB, is competent to conduct foreign exchange operations, etc being structured in: a body called Governing Council with decision-making attributions in monetary policies, interests' rate, etc; an executive body which implement

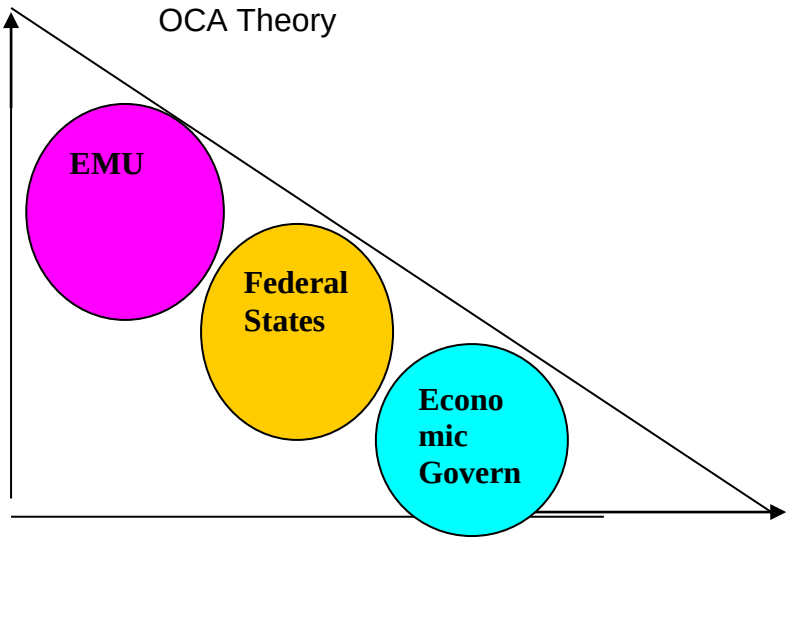
Governing Council decisions being called the Executive Board; and a plenary organ, respective, the General Council.

Because ECB coordinates entire monetary policy within EMU, the next arguments concerning the strategies available for monetary union could be realized only with ECB support.

4. The strategies in functionalist theory were displayed along the two key variables: widening and deepening. We will focus only upon the strategies and remedies to asymmetric shocks existing already for the actual EMU members because they will be available also for the new members. In the sense of, institutional deepening cooperation within a group of „willing“ and „able“ member states, such as Eurozone is, must take into account the national interests, especially, of the states affected by asymmetries within EMU.

The strategies of adjustments to asymmetric shocks were better described by OCA theory (at least, for federal states).

Concerning the asymmetric shocks, we will show, for the first, the channels of adjustments available for federations and unitary states in order to analyze in so far such instruments are available at EU level and the path following towards a European centralized economic government.



Commentary: In this picture, on the vertical axis, we set out the degree of shocks' symmetry, while on the horizontal axis we have the degree of flexibility. In this diagram, Economic Centralized Governance and federal (or unitary) states are able to use the labor market flexibility , interest rates, exchange rate more, because they have the most flexible policies in order to face the asymmetric shocks, while the EMU is the most rigid but, also, with a big degree of symmetry.

In a federal state, the first channels of adjustments to asymmetric shocks would concern the labor market mechanisms: unemployment rising, wages downwards, out-migration which will alleviate the unemployment effects. From this point of view, wage or labor flexibility is low in the EU. Therefore, ECB and European Commission asked EU Members to pay attention to the problems of flexible wages and "structural reforms" in the sense of labor markets flexibility.[3]

However, the most important channels of adjustment for a federation are financial instruments. These instruments would use the parity change. In addition, a country has to borrow from abroad in order to keep budgetary deficit under control and to smooth consumption and investment paths. Its central budget is also an important instrument used for reducing the amount of taxes collected and increasing a number of relevant and useful social expenditures for solving crisis, such as unemployment compensations.

Are these channels available for EMU? In any case, the European budget is too inelastic and too small for making adjustments in the face of asymmetric exogenous shocks.

When a country joins EMU, it loses its ability to use monetary and exchange rate policy for its economy stabilising. Therefore, some scholars defended the idea that it is the best if Governors Council allows EMU Member States some autonomy completed with some forms of co-ordination in national fiscal policies or to create an insurance fund. The same, it could allow Eurozone countries to negotiate their deficit.

These theses were rejected on the grounds that the public budgetary deficit and debt of one country from Eurozone would hit the budget of the others in the logic of spill-over effect within monetary union.

Concerning the use of financial instruments for crisis prevention, the market corrections showed the necessity of the EU surveillance and financial regulation of

national central banks and fiscal policies. The European supervisors' committee could reinforce trans-border cooperation and information exchange in order to avoid the asymmetries of information. In this process of EU financial surveillance and regulation, the Council of Governors could play an important role. It could be essential to exploit further the Lamfalussy framework in accordance with ECOFIN Council guidelines.

III. The McDougall - Delors Report.

This Report tried to solve the capacities of Eurozone to face the asymmetric shocks dealing with the problem of reducing disparities in *per capita* income through the process of equalising and stabilising using EMU mechanisms. In this regard, fiscal policies under EMU would involve a set of net fiscal transfers towards countries affected by crisis for stabilising rather than redistributing wealth. In their view, such transfers could use a certain percent of funds destined to structural adjustments.[4]

Complementing some national provisions, the EU tax system could lead to automatic transfers among regions. Giving such redistributive functions to an EU tax system would avoid the discussions concerning such transfers at the national level. These discussions will be moved, rather, towards how much redistribution should occur across countries, than to economic national policies. Though this common tax system could not be achieved easier, it is more and more probably that political pressures requiring such redistribution and the spill-over effects of the Single Market and the EMU itself, may lead to such system of European taxes in the future.

There were also some debates concerning the savings coming from the reduction in interest rates relying whether and how the ECB will use these resources.

Another option in order to face asymmetric shocks within Eurozone would be, such as we showed, to allow the Member States to increase their budgetary deficit and debts within EMU. It is well-known how many pressures and difficulties were raised in the case of Central-Eastern Member States in order to maintain the minimum level of public deficit and debt required by the Stability and Growth Pact (SGP) or Maastricht criteria in order to join Euro area. Arguing the necessity to modify or renounce to the aforementioned documents, Mundell-Fleming theory highlighted that the effectiveness of a monetary union is dependent by the efficiency of the various domestic policies which

would lead to the necessity of more autonomy for national fiscal policies. The question remained: in how far such autonomy has to be given? The same, it is still unclear the question in how far the link between EMU and the national fiscal policies is consistent with this fiscal autonomy. Whatever, the Maastricht or SGP criteria are seen more and more as being obsolete for the new European realities.

To support the aforementioned, Robson suggested in his book entitled "**The Economics of International Integration**", that the optimal level of stabilization in EMU is not necessarily tied with the concentration of stabilization of functions.[5] The weakness of Keynesian point of view concerning the autonomy of fiscal policies (only fiscal stimulus in the form of deficit spending could allow to face with unemployment rate and resources) is whether the fiscal discipline within EMU could be affected by unsustainable debts of some Member States which will be propagated by spill-over effect within EMU. Some strategies for keeping fiscal discipline called upon the imposition of certain rigid ex-ante limits of public deficits and debts or some forms of fiscal surveillance of national fiscal policies in order that they have to rely with the EU policy objectives.

From a contrary point of view, some scholars reported the federal fiscal system of US to that of EMU considering that the European economic governance more centralized would be necessary. This theory dealt with a stronger political and economic dimension of the EMU. The main focal point is the balance of competences between EU and Member States. In order to implement the centralization of national economic policies at EU level, it would be necessary an European Government with the economic powers to tax and spend. It could provide also ex-ante limits for other economic policies which are, for the moment, in the competences of national states. In some views, this European economic govern could be the ECB, while other scenarios concerned ECOFIN.

IV. Conclusions.

In few words, we will remember that there are still critics concerning the monetary union creation, so, it is still far until an European Govern endowed with economic policies to be viable.

Keynesian or post-Keynesian economists criticized EMU coordinated by ECB in the sense that only fiscal stimulus in the form of deficit spending could allow to face with unemployment rate and enforce the state ability to command resources. Even with some structural changes, these economists deemed that to share a common currency has more disadvantages in spending than the advantage of reducing the transaction costs (even, in asymmetries reducing).

On the contrary, the Mundell-Flemming model argued that it is impossible to maintain a fixed exchange rate, free movement of capitals and an independent monetary policy in the same time. Therefore, these three elements were called Mundell-Flemming trilemmas. Mundell-Flemming opted-out for exchange rate and interest rate flexibilities and, also, governmental expenditure adjustments. It seems that their opinion found real express in the actual context of Fiscal Treaty in which the disparities between North and South European countries increased.

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BRUSSELS AGREEMENT IN THE LIGHT OF INTERNATIONAL LAW AND THE CONSTITUTION OF SERBIAN

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Abstract
The paper analyzes the legal nature of the "First agreement on the principles governing the normalization of relations" (Brussels, 19 April 2013) was initialed between the Government of the Republic of Serbia and the Provisional Institutions of Self-Government in Pristina (PIS), which is known to the public as "Brussels Agreement". In addition, the authors tried to look at the development or achievements of technical and political dialogue, through the observation stage of the interview, after the unilateral declaration of independence in 2008, through the prism of international law and the legal nature of this agreement and its place in the constitutional and legal order the Republic of Serbia. In that sense, the paper special emphasis on negotiations, which were conducted with the mediation of EU High Representative for the Common Foreign and Security Policy, Baroness Catherine Ashton (Catherine Ashton), as one in a series of attempts, which sought to engineer a resolution of the current crisis in Kosovo and Metohija and thus set the basis for the creation of a permanent and stable "foundation" final status of the southern Serbian province. In conclusion are given a certain predictions concerning possible further flow of dialogue, highlighting the potential sensitive points.
Keywords: *Dialogue, the European Union, the agreement, Belgrade, Pristina, human rights, international law, the Constitution of the Republic of Serbia*

Introduction

Provisional Institutions of Self-Government in Kosovo on 17 February 2008, unilaterally declared independence[2], in this way, contrary to the ratified international conventions and rules of international law, although Kosovo since the conflict in this area in 1999, was under the protectorate of the United Nations, in accordance with Resolution 1244 [1], was followed by a sort of (quasi) completion of statehood this entity.

On the unilateral act of secession of Albanian institutions of self-government in Pristina, which has so far accepted 99 countries, public authorities in the Republic of Serbia, responded with immediate rejection of the null and void legal acts, with a

[2] Previously, during 2006 and 2007, between the authorities in Belgrade and Pristina negotiated, which is coordinated by the special envoy of UN Secretary General Martti Ahtisaari (Martti Ahtisaari) in connection with the determination of the final status of Kosovo. During March 2007, the Special Envoy of the UN Secretary General, Martti Ahtisaari presented the "Comprehensive Proposal for the Kosovo Status Settlement," which is de facto established basic guidelines for "supervised independence" of Kosovo, as well as the establishment of institutions and protecting the rights of ethnic communities, the regulation relations with the authorities in Belgrade and the formation of a security system. See: "Comprehensive Proposal for the Kosovo Status Settlement" UNOSEC, Vienna, 26 March 2007.

concurrent three-year interruption of any form of mutual dialogue with representatives of the Albanian authorities in Kosovo and Metohija.

Progress in establishing a dialogue attempt by the adoption of the UN General Assembly of the United Nations on 9 September 2010, which stipulates that the authorities in Belgrade and Pristina, in the context of continuing the dialogue, under the auspices of the European Union to regulate certain outstanding issues in order to improve the status of their citizens[2] and that the success of the deal will depend on their eventual accession to the European Union.

However, progress has been made in this sense was not until 8 March 2011, when it was at the insistence of the European Union started a dialogue on how to instruct technical issues, whose aim should be to improve the status of citizens to "Kosovo". The aforementioned dialogue supported by the United States.

In this manner, the European Union has succeeded in compliance with the Copenhagen criteria (1993), encourage the normalization of relations, but also to significantly influence the development of future cooperation between the authorities in Belgrade and Pristina, with the success of the above dialogue reliance on Europe Serbia's path, but also certain benefits for Kosovo.

In this sense, when with the relevant EU institutions is estimated that there has been significant progress in the dialogue between representatives of Belgrade and Pristina, Serbia is possible to obtain a date for the start of membership negotiations with the EU, while in Brussels for Kosovo announced that it will soon start negotiations on the conclusion of the Stabilisation and Association Agreement[3].[3]

During the dialogue, are largely eliminated problems related to the representation of Kosovo in regional boards and initiatives, the manner of functioning of the customs system in Kosovo and integrated border management / administrative line,with efforts to thereby contribute to improving regional security.[4] Then, with the assistance of the European Union, followed the introduction of institutions located liaison officers between

[3] Although not recognized Kosovo's independence in the member states of the European Union (Slovakia, Romania, Greece, Cyprus and Spain) for him in the process of European integration used identical mechanisms as well as access to the Western Balkans. It is the Stabilisation and Association Process, which was defined in 2000 and 2003. See more at: Dragan Djukanovic, "European Union policy towards the Western Balkans", in: R. Dragan Simic (ed.), The integration of the Western Balkans into the network of global security, the Association for the Study of the United States in Serbia, Čigoja press, Belgrade,2011,p . 225-236.

Belgrade and Pristina, as well as reaching agreement on the establishment of the Community majority Serbian municipalities and integration security and judicial structures northern parts of Kosovo and Metohija in the framework of Kosovo's legal system.

A particular issue, which has become the subject of dispute expert public in the Republic of Serbia is the mark of a legal character "Brussels Treaty", that is, whether the document on the normalization of relations, which are in Brussels, on 19 April 2013, signed by the representatives of Belgrade and Pristina, legal, or political act and is therefore the Constitutional Court responsible for the evaluation, which is the topic of discussion in the Constitutional Court of Serbia (USS), at the initiative submitted by political parties operating in the territory of the Republic of Serbia and the right orientation.

According to the views of representatives of the current government, which among other things publicly presented through media appearances by the Minister of Justice of the Republic of Serbia, Nikola Selakovic, "Brussels Agreement" is considered a political act, which is the only possible way to achieve the most cost effective dialogue between Belgrade and Pristina and which can normalize relations within the limits of the Constitution of Serbia.

On the other hand, the Serbian political options of the center-right, argue about the ulterior ratification "Brussels Treaty", which has no power sources, but only represents - a political act, which as such has no legal effect. It therefore follows that the representatives of the Serbian state that the "Brussels Agreement" initialed, accepted and approved, did not follow the constitutional obligation "to represent and protect state interests in Kosovo and Metohija in all internal and external political relations" (constitutional preamble), which are allegedly violated the principle of the rule of law, because in the process of concluding the Brussels agreement are not "complied with the Constitution" (Article 3, paragraph 2).

Process technical dialogue

The conversation between the representatives of public authorities in Belgrade and the Albanian provisional institutions of self-government in Pristina, began, as already stated, on March 8, 2011, under the mediation of the European Union in

Brussels. Team of Republic of Serbia, by mid-2012, in the said dialogue was led as head of the negotiating team of the Government of the Republic of Serbia for dialogue with the authorities in Pristina, Borislav Stefanovic, while the Albanian side was represented by Edita Tahiri.

By the fourth round of talks, dialogue topics were of a general nature and did not result in concrete agreements, but it is mainly guided discussion on certain principles and standards. Only at the fifth meeting, which took place on 2 July 2011, achieved concrete agreements on freedom of movement and population registers.[5] The same agreement is determined and payment security for persons and vehicles crossing the border / administrative line, that has been established between the central part of Serbia and Kosovo and Metohija, and the recognition of identity documents issued temporary Albanian authorities in Pristina in the field below control of the authorities in Belgrade.

The said part of the agreement relating to the registers,[6] contains four articles and provides that the contracting parties undertake to establish a correct and "reliable" registers. The control of the implementation of the above, performs "tripartite committee" made up of experts in the registers on both sides and a representative of the EULEX (EuropeanRule of Law Mission in Kosovo). The jurisdiction of this committee is to determine the possible existence of certain omissions and deficiencies in the population registers, which were conducted prior to the commencement of the armed conflict in Kosovo in 1999. In this sense, EULEX has got the authority to certify all copies of birth certificates, in certain municipalities and assumed responsibility from Kosovo to submit certain information on registers authorities in central Serbia, but it is said "upon request".

During the next meeting, representatives of the Government of Serbia and the holders of the Albanian political structure of the Kosovo and Metohija, which was held on 2 September 2011, achieved the two agreements, namely: on customs stamps and cadastre.

Agreement on customs stamps[4] is confirmed, previously agreed by both parties to ensure full freedom of movement of goods in accordance with the agreement CEFTA,

[4] "Customs stamp", Brussels, 2 September 2011, Integral article published in the "Report on the political and technical dialogue with the Provisional Institutions in Pristina"; op. cit.

2006.[5] Under the agreement stipulates that the Kosovo customs stamp stands this name, as well as the English translation - "Kosovo Customs".

By the end of 2011, achieved two more agreements. The first was agreed on 22 November, during the seventh round of negotiations, and concerned the recognition of university diplomas[7], during which it is agreed that the Conference of European academic experts, according to the decision of the European University Association, recognizes the diplomas and will thus be recognized by both sides.

Another agreement was reached on December 2, 2011. It is defined integrated border management / administrative lines,[8] which are intended to be in line with European standards implementation model of Integrated Border Management (Integrated Border Management - IBM), which is one of the basic requirements for the countries which want to join the EU, and in accordance with the Contract from Lisbon.

This agreement is determined to be that way, customs and police representatives to attend the border / boundary crossings, which are defined as part of the administrative boundary line of central Serbia and Kosovo and Metohija, which stipulates that the same are also engaged representatives of EULEX. In addition, it was determined the formation of "Tripartite Group" under the chairmanship of the EU, and to conclude a separate technical protocol on implementation. This protocol was signed in Pristina on 23 February 2013.[9]

Subsequently, on January 19, 2013, specifies the details relating to the excise tax and value added tax (VAT)[10], on goods intended for northern Kosovo-a. According to the Agreement, representatives of Belgrade and Pristina have agreed to the import of goods intended for northern Kosovo, is not paid customs duties, or to pay the excise tax and value added tax (VAT) .This relating to limit / administrative crossings Jarinje, Leposavic Municipality and Brnjak, Zubin Potok municipality, and the funds collected on these crossings should invest in the Fund for the Development of Northern Kosovo[6], and four municipalities with Serbian majority (North Mitrovica, Zubin Potok, Zvecan and

[5] Kosovo is in accordance with the signature of the then Head of Mission of UNMIK member of the said arrangements.

[6] The Fund maintains a special committee composed of representatives of the EU, the Albanian authorities in Pristina and representatives of Serbs in northern Kosovo and Metohija

Leposavic). This fund should keep a special committee composed of representatives of the EU, the authorities in Pristina and representatives of Serbs in northern Kosovo.

To overcome the problem, which concerned the operation of regional initiatives for cooperation in the Western Balkans and Southeastern Europe, whose intention is that the so-called. Republic of Kosovo, after the unilateral declaration of independence in 2008, it is represented in their work, and it is impossible to opposition from Serbia, and other countries in the region that have not recognized Kosovo's independence (Romania, Greece, Cyprus, Bosnia and Herzegovina and Moldova) at the insistence of the European Union, on 24 February 2012, the scheduled new talks between Belgrade and Pristina.

Specified in the agreement was reached, which stipulates that Kosovo will participate in all aspects of regional cooperation, with the active participation of Serbian and Albanian authorities in Pristina plan to improve and intensify the implementation of the above.[11] In addition, it was specified that the name of the area Kosovo and Metohija during participation in regional forums and meetings using the name of Kosovo with a footnote / asterisk, which states that "this term does not prejudice the status in accordance with UN Security Council Resolution 1244 and the opinion of the International Court of Justice on Kosovo Declaration of Independence“. At the same time it was emphasized that the organizer of some regional meetings, the presentation will highlight the quasi-state symbols of the so-called Republic of Kosovo, with the exception of their own and symbols of the European Union. In addition to the above modes of representation, it is recommended that the country hosts regional meeting and use the formula "Gymnich" [7], which implies the absence of the name of the country / entity and / or its symbols. Also, it is possible that the representatives of the Albanian structure from Kosovo and Metohija, can not initialed certain acts in the meetings.

The above contributed to temporarily unblock the participation of representatives of the provisional institutions of Kosovo in regional meetings.

[7] It is a German castle Gymnich, where in 1974 were held meetings between representatives of the State without specifying the name of the state or the use of national symbols.

Political dimension of negotiations

Continued dialogue between Belgrade and Pristina, which was temporarily interrupted due to the presidential and parliamentary elections in the Republic of Serbia began on 19 October 2012, with hitching political dimensions of the same, which moved from the technical to the political dialogue.

In accordance with the foregoing, in the continuation of talks held on 7 November 2012, arranging the appointment and the appointment of liaison officers (Arrangement devoted to issues of liaison officers).[12] According to the agreed, offices mentioned officers are provided for the formation of the Delegation of the European Union in Serbia and the EU Office in Pristina, and their task is to resolve certain outstanding issues in the implementation of agreements reached thus far between the authorities in Belgrade and Pristina.[8]

In late 2012 and early 2013, representatives of the government of the Republic of Serbia have taken an important foreign policy initiative for the establishment of the Union of Serbian municipalities in Kosovo, under which the issue has reached a high degree of consensus between the government and opposition parties in Serbia. Mentioned was the starting point for the further continuation of a conversation representatives of Belgrade and Pristina, and accordingly the National Assembly of the Republic of Serbia on 13 January 2013, starting with the proposal that the platform of the President of the Republic of Serbia, Tomislav Nikolic, adopted the "Resolution on the basic principles for political talks with representatives of the Provisional Institutions of Self-Government in Kosovo and Metohija. "[13]

The aforementioned document, Serbia has requested to provide and guarantee the full rights of members of the Serbian community in Kosovo and Metohija-in, as well as the normalization of relations with the authorities in Pristina, without recognizing the unilaterally proclaimed independence. The same document stressed that Serbia is committed to the continuation of the dialogue tends comprehensive and mutually acceptable solution for the southern Serbian province, and to create conditions for normalization of relations between the Albanian and Serbian peoples, which would contribute to a rapid integration of the Western Balkans into the EU.

[8] Government of Serbia on 4 February 2013, appointed Dejan M. Pavićevića to this post.

In continuation of political negotiations, on 20 February 2013, representatives of the dialogue between Belgrade and Pristina, was related to the position of Serbs in northern Kosovo, where the Serbian dominated most of its population.

Then followed a very difficult round of negotiations, in which the preliminary principles for an agreement, which was presented by EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, 20 March 2013, Serbian officials have not accepted on the grounds that there is no sufficiently strong guarantees for the protection of the Serbian community. On the other side, the Albanian side, there have been significant efforts to enter into an agreement and the provision of so-called Republic of Kosovo's membership in international organizations (in particular the United Nations).

Because of the following issues, at the insistence of the representatives of Serbia, in the negotiations in April 2013, included the North Atlantic Treaty Organization, as a kind of guarantor of the agreement between Belgrade and Pristina, and to prevent potentially endangering the safety of the north.

As a result, when the dialogue was held on 19 April 2013 in Brussels, there has been "the first agreement on the principles governing the normalization of relations,"[14] which, among other things, provided for the establishment of the Community majority Serbian municipalities (eng. Association / Community of Serb majority municipalities in Kosovo), which in addition to the four municipalities in the north, and included some municipalities inhabited by Serbian population in the central parts of Kosovo and Metohija.[9] The same agreement also envisages that during 2013, held local elections in northern Kosovo, with the support of the Organization for Security and Cooperation in Europe (OSCE) and taking into account the provisions of the applicable legislation of Kosovo.

[9] It is envisaged that the said Board operates in accordance with its Statute and has the President, the Parliament and the Council. At the same time, it was emphasized that it will act in accordance with Kosovo's constitutional order, as well as the applicable legislation. Municipalities will also cooperate within their competence, in accordance with the European Charter of Local Self-Government of the Council of Europe, and will also have the right to control "areas of education, economic development, health, urban and rural development." The community will have a representative role in the Community Consultative Council, which works with the institution of the President of Kosovo and brings together representatives of Roma, Egyptians, Ashkali, Montenegrins, Bosnians and Serbs. Central Albanian authorities in Kosovo and Metohija , in accordance with this Agreement may transfer additional powers specified community.

In addition, the " Brussels Agreement", it was agreed that the Kosovo police only act on the territory of Kosovo and that the forces of the Ministry of Internal Affairs of the Republic of Serbia, which is currently operating in the north, will be integrated into its composition.[15] For the four municipalities of northern Kosovo is determined to set a special regional police commander from among the Serbian community, and after the appointment of the Ministry of Internal Affairs of the so-called Republic of Kosovo. The agreement also provides that the Kosovo police in this part of Kosovo Serbs constitute the dominant, in accordance with the current ethnic structure.

The inclusion of the existing judicial structures in northern Kosovo, Kosovo's judicial system is provided through the establishment of a special higher in the Appellate Court in Pristina, which will do the majority judges Serbian nationality and will be responsible for the municipalities with their ethnic majority. Thus one department of the Appellate Court in Pristina to be established in North Kosovska Mitrovica and it will constitute the dominant Serbian judges.

To avoid the efforts of the Albanian side to be in agreement on the normalization of relations admit the necessity consent Serbia's Kosovo in all international organizations, in article 14 of the agreement emphasizes the fact that both sides will not block each other on the "road to the European Union", nor affect on others to do so.

"The first agreement on the principles of normalization of relations" and predicts that up to 16 June 2013, to reach agreements and representatives of Belgrade and Pristina on energy and telecommunications. In this dialog appeared the problem of international telephone dialing code for Kosovo and work mobile phone operators from central Serbia, in the field of energy, too, appeared several important issues related to the functioning of the Electric Power Industry of Serbia and electrical network in the north of the province. All of the above is stopped due to the current crisis over the formation of the authorities in Pristina.

Meanwhile, the European Commission on 10 October 2012, published a report on Kosovo's progress in European integration ,[16] in which we stress the need to protect the rights of all ethnic communities and the need to protect their religious and cultural heritage.

In this sense, it is specifically stated that the Kosovo authorities must further engage in the protection of buildings and property of the Serbian Orthodox Church, and in the context of continuing European integration.[10]

Given the foregoing, as well as the "Comprehensive Plan for the Kosovo Status Settlement" special attention was paid to the protection of religious and cultural heritage. Thus its Annex V fully dedicated to the status of the Serbian Orthodox Church in Kosovo.[17] Accordingly, the Kosovo Assembly on 20 February 2008, adopted the "Law on Special Protected Zones",[18] which states the manner of implementation and monitoring of a number of solutions that are expressed in the so-called Ahtisaari's plan. Under this law defines as special protection zones around monasteries and religious complexes in which construction is prohibited industrial units, deforestation and environmental pollution.

Implementation of Brussels Agreement

In the period that followed the initialling of the "Brussels Agreement," continued the dialogue, whose topics were devoted to the implementation of the agreement. In this regard, it was particularly significant harmonization of the Plan of Implementation of the Brussels agreement, which was reached in mid-June 2013.[19]

This plan provided for a phased and gradual implementation of the "Brussels agreement" and the active participation of the Parties in the implementation of specific measures and legislative procedures, within the deadline set for it.

However, when implementing agreed, there have been numerous problems, which are mainly concerned precisely the area of Kosovo and Metohija status issues and the different attitudes of officials from Belgrade and Pristina. Belgrade authorities in the implementation of the Brussels agreement insisted on his "status neutrality" while, on the other side, Pristina authorities saw in it the possibility of establishing full authority and sovereignty in the north.

[10] This caused the initiative and Kosovo Prime Minister Hashim Thaci, who is 22 November 2012 in Brussels suggested that in the Kosovo Police formed a special investigation unit for the protection of religious and cultural heritage. It would be composed of members of the Serbian community in Kosovo. Thus, it was suggested to form a special committee formed by the two ministers from the Government (Minister of Interior and Minister of Culture), representatives of the Serbian Orthodox Church and representatives appointed EULEX.However, this proposal are still not supported by the representatives of the Serbian Orthodox Church.

In addition, certain activities of the security structures Pivremenih Albanian institutions of self-government in Kosovo and Metohija[11], they additionally contribute to raising tensions and hindering the implementation of agreed, as such a negative impact had a delay in the process of adopting an amnesty law in Kosovo, which has pledged Pristina side, and due to the insufficient number of votes in the Assembly of Kosovo and the willingness of local political parties that this process is successful.

As a response to the above, the representatives of the local Serbs in northern Kosovo have formed the Provisional Assembly of the Autonomous Province of Kosovo and Metohija, which was established against the recommendations of the official Belgrade. It was mid-August rejected Serb participation in local elections in Kosovo.[20] In response, the holders of political office in the Republic of Serbia are announced and conducted shifts local officials in northern Kosovo due to the rejection exiting the November local elections, conducted in 2013.

In this manner the obstruction removed the president of the northern municipalities of Kosovo to participate in local elections, with the successful seizure of power in Belgrade obligations related to the implementation of the "Brussels agreement" and thus opening the foreign policy leeway Serbia to present itself as a reliable partner of the European Union, to overcome the status quo in the north.

Continued implementation of the said agreement, as well as the final agreements on telecommunications and energy sector in Kosovo, too, have not yet been achieved, although the deadline for signature was attached to half of June of the current year. Moreover, Belgrade has offered few concrete proposals, but they are idle because, as already noted, the current parliamentary crisis in the bodies of the so-called Republic of Kosovo.

Assessment of the legal character of Brussels Agreement

In its assessment of the legal nature of the "First Agreement on Principles governing the normalization of relations" and determining its role in the constitutional and legal order of the Republic of Serbia, as well as estimates from the standpoint of international law can be approached from two perspectives.

[11] Kosovo police are continuous commitment to the arrest of members of the Serbian community's administrative crossings with Serbia.

First look respects the arguments of the part of the professional public and the international community, which considers Kosovo an independent and sovereign state, and as such capable of herself and conclude international agreements and thus assume the rights and obligations arising from these contracts. This view interprets the Brussels Agreement as an ordinary international agreement concluded between two sovereign states, Serbia and Kosovo, the contents of which are actually the rights and obligations of both parties (the Serbian and Albanian) in terms of the final status of Kosovo and Metohija.

Significantly for this approach is that the Serbian signature on a document called the Brussels Agreement (which the government of the Republic of Serbia gave their consent and accepted as binding the contents of this Agreement), as interpreted by the Serbian indirectly (implicitly, by implication) de jure recognition of Kosovo's statehood. They claim that the Serbian acceptance of this agreement recognize Kosovo as a sovereign state, able to conclude international agreements alone, and thus irrevocably acknowledged her status and subject of international law, which means that such recognition Serbia can never undo it (just because it is a formal, de jure recognition).

In support of its argument, the statements and the provision of Section 14 of the Brussels agreement in which both parties "Parties" pledged not to block each other on the path of European integration. If we take into account the fact that candidates for European integration exclusively state as international legal entities (which emerges from the observation of current practice of joining the European Union and from the constituent acts of the EU, among which the most important "Contract of European Union"), then the quite clear that Serbia allow Kosovo to advance in their relations with the EU acts as a sovereign state, which is a prerequisite for Kosovo's membership in the United Nations as an umbrella organization of the state. This is for the representatives of this view the status of Kosovo and Metohija is finally resolved, because the Serbian recognition of Kosovo's borders, passports and PIS as the official central government, recognized Kosovo as an independent state.

Another view of the answer to this question is given in strict compliance with the relevant norms of customary international law, Resolution 1244 United Nations Security

Council (which is by its legal nature legally binding on all UN member states) and the applicable norms of the Constitution of the Republic of Serbia.

According to the Serbian Constitution, which, in its preamble, as well as its normative work (point 182), declares Kosovo and Metohija for integral and inalienable part of Serbia), international agreements may be entered into only the central government on behalf of the Republic of Serbia as an internationally recognized state and subject public international law, which shows Serbia's membership in the United Nations.

As such, the Republic of Serbia may enter into a treaty with only one side which also has the status of a subject of international law (not important to be a member of the UN but due to the fact that membership in the UN today a universal character, that entity that is not a member of the UN, can be very difficult called state). Kosovo, although it declared independence in 2008, is not and can not be a subject of international law, because it does not meet the criteria of statehood, as defined by international customary law.

Namely, Kosovo has no effective authority throughout its territory. Carriers executives are still bodies of certain international organizations KFOR, UNMIK and EULEX[12] , the very limits of "state of Kosovo" has not been defined, and also the right to self-determination of peoples, to which urges the Albanian community in Kosovo, in this case is not applicable, because the Kosovo Albanians are not really people but only one of the minorities in the Republic of Serbia[13]). In addition to the fact that Kosovo has no right to own statehood, speaks Resolution 1244 UN Security Council , which clearly guarantees the preservation of the territorial integrity and sovereignty of the Republic of Serbia on the territory of its southern provinces. The resolution requires a compromise solution of the final status of Kosovo that would be in the mutual benefit of both Serbs and Albanians, prohibits any unilateral action PIS in Pristina and insist on a solution that

[12] It should be noted that the legal justification for the existence of the EULEX mission, although currently operating in Kosovo and Metohija, and despite the fact that the official Serbian authorities accepted, put into question because the very mention of Resolution 1244 only UNMIK and KFOR as the international monitoring bodies in Kosovo.

[13] Kosovo Albanians can not be treated as a separate nation (Kosovars), because according to objective-subjective definition of the concept of the people to actually part of the Albanian people as a minority who live outside their existing and internationally recognized state of Albania.

would "allow a very high degree of autonomy of the Albanian population within the internationally recognized borders of the Republic of Serbia".

A similar interpretation of Resolution 1244 were submitted and judges of the International Court of Justice in The Hague in 2010, during the advisory opinion on Kosovo's declaration of independence.[14]

Thus, in his concurring opinion of Judge Koroma, Tomka and Sima clearly turned out to need after the final status of Kosovo and Metohija solely with respect to the meaning and provisions of Resolution 1244, because the act is the main authoritative and binding document on the Kosovo issue, issued by the UN Security Council as the sole authority responsible for the maintenance of peace and stability in the international community. It is precisely the meaning of the resolution (its so-called. Ratio legis) requires a compromise solution which would preserve both the fundamental rights of the Albanian minority, and the existing state border of the Republic of Serbia.

Starting from the above it is clear that Kosovo is not eligible for the status of a subject of international law, and consequently no ability to enter into agreements of international nature. Kosovo by Resolution 1244, and the Constitution of Serbia, as an entity with a certain measure of autonomy and still undefined status, may enter into agreements with the central government in Belgrade only in the capacity of local authorities, not as a sovereign central authority, as can a sovereign state.

Regarding a possible relationship between the 1244 and the Brussels Treaty is quite clear that the agreement can not have any effect on the legality of the existence of the resolution itself. Resolutions are acts issued by the United Nations as the highest judicial body in the international community and as such always take precedence over other bilateral agreements Member States. Plain political act as the Brussels Agreement, and even that would have the character of a bilateral contract, must be in accordance with the said resolution. To Brussels Agreement had a legally binding character of the state bodies of the Republic of Serbia, Serbian National Assembly should adopt constitutional law, that the content of the Brussels agreement turned into a

[14] It is important to note that mentioned the advisory opinion of the court in all its work is not legitimized Kosovo's right to secede from Serbia. The Court actually ruled only on the "bare declaration of" independence and said that as such it is not in contravention of international law, but did not rule on the effects of these declarations, ie. the existence of the right to secession of Kosovo.

binding constitutional and legal norms Serbian legal system. Until that happens (and while the people in a referendum that the law does not confirm), the Republic of Serbia has not been internationally responsible for violations of the Brussels agreement, because that document as an international contract does not exist.[15]

Regarding the issue of relations between Serbia and Kosovo after the Brussels negotiations, it should be noted that Serbia is not (yet) de jure recognized Kosovo's statehood, which, looking at relevant international law does not exist. Only if the Republic of Serbia publicly and formally renounced its territorial integrity of Kosovo and Metohija, it would thus fully recognized Kosovo's statehood. Brussels Agreement official Serbian authorities have not yet done this step, but are to some extent (at least as far as agreeing to negotiate at a high political level with Pristina PIS and to the mediation of foreign officials) granted Kosovo "special status with certain elements of statehood."
Such behavior Serbian authorities can be characterized as de facto recognition of the special situation in Kosovo and Metohija; recognition that, in contrast to de jure recognition, can always cancel, everything depends on the behavior of the official authorities conducting state policy.[16]

Although perhaps even unconscious, the Serbian authorities are least so far timely statements about it, that is for them only Brussels Agreement "means the agreement that defines the principles of political dialogue with the southern Serbian province", carried out in a way a kind of "protest" in the international community.

Thus, although indirectly and transparent, explained that they have no intention of formally recognized Kosovo's statehood. It is important to note the fact that a possible formal adherence Serbia on Kosovo's statehood meant a serious violation of the State Constitution, which would ultimately lead to the degree of criminal responsibility of the senior officials of the Constitutional Court of Serbia and where possible international agreement between Kosovo and Serbia, which would the two sides entered into with the

[15] Mention should those views, which are interpreted Brussels Agreement as a document that Serbs in Kosovo and Metohija provides some measure of autonomy within the "Kosovo institutions". Such a view is, to put it mildly, incomprehensible; If the Albanian community guaranteed autonomy within Serbia as a national state of Serbs, then why Serbs guarantee autonomy in their own country? Such unrealistic views in favor of the interpretation of the Brussels Treaty as an international treaty for Serbia are not eligible.
[16] It should be noted in a similar practice among some Arab countries and the state of Israel. Among them there are a multitude of agreements and contracts on an international level, but that does not mean that these Arab states recognize Israel as a state; are only recognized "the existence of certain specific circumstances in the area of the state of Israel", but not de jure statehood itself and the entities.

intention to recognize Kosovo's statehood, under Article 46 of the Vienna Convention on the Law of Treaties, was absolutely null and void.

Conclusion

Starting a dialogue between Belgrade and Pristina, and particularly the achievement of the "First Agreement on Principles governing the normalization of relations" on 19 April 2013, is credited as one of the most important success of the instrument of the Common Foreign and Security Policy of the European Union and High Representative Catherine Ashton, after the adoption of the Contract of Lisbon (2007).

In this regard, it is not quite clear whether such agreement is a legal or political act, or what its legal force under applicable legal regulations of the Republic of Serbia and the generally accepted rules of international law.

Government of Serbia "Brussels Agreement" as a political act, which is the only possible way to achieve the most rational dialogue between Belgrade and Pristina, and that can normalize relations within the limits of the Constitution of Serbia, and that such agreement is only one stage in the definition of substantial autonomy in Kosovo and Metohija. In this sense, starting from the political context of the interpretation of the Constitution, Serbia's policy is "existential dialectic."

In this manner, a representative of the government of the Republic of Serbia, trying to refute the thesis about the ulterior ratification of the Brussels Treaty, referring to the resolution of the Assembly of Serbia, which is unambiguously determine the limit negotiators.

Contrary to the view represented by certain experts in constitutional and public law in the territory of the Republic of Serbia, as well as some international officials, including leading political representatives from the Russian Federation, who mentioned agreement into the category of legal acts, or in a category of international agreements, which is contrary to the Constitution of the Republic of Serbia and international legal norms.

However, despite the results shown by the dispute over the legal effects agreement, much more importantly, the political reality, the implementation of agreements reached thus far between representatives of Belgrade and Pristina, whether they are the product of a technical or political dialogue, as well as the continuation of the

same, has a very fragile basis, which is why the European perspective of the dynamics of the accession of all entities in the Western Balkans, very uncertain.

Because of the above, it can be expected that the capacity of the European Union in the framework of the policy of conditionality further growth, which may contribute to the reduction of latent tension in the Western Balkans region and prevent any form of discrimination against non-dominant ethnic groups in certain areas.

An aggravating factor is the challenges of the global economic crisis, which may result in the emergence of new forms of national, and religious extremism, particularly in the area of Kosovo and Metohija.

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Contribution of culture and Christian civilization to the creation and affirmation of the principle of non-discrimination and equal opportunities for men and women

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Abstract
In the present context it is interesting content analysis of national legal norm unprecedented dynamics under Romanian law; Dynamic geared towards harmonization of Romanian law with EU law, national law remains a right incidental to the European construction right in line with the priority application of European law. It is perfectly logical that the equality of all citizens of the Union and national institutions of state members of the union to be established and regulated on the basis of rules and laws unique to uniform criteria. Under these conditions in the near future we will witness a symbiosis of national laws and finally to a single resultant union laws valid throughout space. Likewise, the case and the legal protection of human rights where it occurs discrimination and equal opportunities for men and women.
Keywords*: non-discrimination, equality between men and women, European Union law, international law of human rights, culture and Christian civilization*

1.Argumentum

Francis Pope's recent speech in Parliament was, without the slightest doubt, the decisive moment in this action research approach. The speech was a historical one. Why? I base my conclusion on several grounds. First is the first visit of a Pope in the last 25 years. Previous Pope spoke in the European Parliament plenary in Strasbourg was John Paul II in 1989. Then, in the collapse of the Iron Curtain, the Berlin Wall, who played a key role in the liberation of Europe from Communism wanted to mark the victory of liberal democracy with such a speech. Then, is the second foreign visit of Pope Francis in Europe after the one in Albania. Finally, Pope coming in plenary in Strasbourg took place in a time when anti-religious sentiment has grown in the European Union and the European Parliament became the place where leftist ideologies often conflict with conservative approaches.

In this regard, the speech touches obvious conservative Pope Francis was a surprise, knowing that His Holiness previously announced that it will review approaches Catholic Church in delicate matters such as, for example, gay rights. "We see a Europe

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grandmother, not a fertile", said Pope. He then criticized the fact that the European Union "bureaucratic and technocratic apparatus are too strong." Then launched a frontal critical to the European Parliament. "The rules set out here are far removed from people's sensibilities. You. must protect fragile nations and people. Holy See's willingness to renew dialogue with the institutions. "His Holiness noted" opulent lifestyles ", a" culture of littering, an excessive consumerism, a culture of sole uses. "He then addressed the question of religious intolerance "A Europe of religion is a way to fight extremism, which have escalated in recent years (...) Forgetting God, not His worship is the one that creates violence (...) to have dignity, people should have freedom of religion, jobs, not to be discriminated against. After speaking about tackling immigration, "that does not turn the Mediterranean into a graveyard" about protecting the environment, loneliness, that affect both the young and the old, the Pontiff invited European parliament members to abandon economic approaches, mercantile and focus on "the sacredness of the person" sacredness of women and men, equal opportunities between the two parts of a whole - man - God's creation.

In the present context it is interesting content analysis of national legal norm unprecedented dynamics under Romanian law; Dynamic geared towards harmonization of Romanian law with EU law, national law remains a right incidental to the European construction right in line with the priority application of European law. It is perfectly logical that the equality of all citizens of the Union and national institutions of state members of the union to be established and regulated on the basis of rules and laws unique to uniform criteria. Under these conditions in the near future we will witness a symbiosis of national laws and finally to a single resultant union laws valid throughout space. But until when we can speak of a single union law - primarily the EU Constitution, that is a law of laws - national law tends by origin and by the influence of culture and Christian civilization, primarily as a spirit . Likewise, the case and the legal protection of human rights where it occurs discrimination and equal opportunities for men and women.

2. European contribution to the emergence and codification of discrimination

Although there are some ways that the right of non-discrimination should be a recent creation, some domain-specific rules have the same length as the company from that of non-discrimination law in its current form was born under the impulse sense of humanity, he had people's consciousness and practical way of action of states. Paradoxically, although international practice registered legal masterpieces, since antiquity, systematization and theorization tests are relatively late. There is basically a historical period or an exact date to mark the beginning of non-discrimination law in general.

Relevant to our approach to identify the contribution that Christian culture and civilization brought to the development of international law in general, especially non-discrimination law. From the perspective circumscribed area of influence of Christian culture and civilization are some issues to be mentioned in historical terms. In ancient classical Greece Orient spread two basic tools of international law: the treaty and diplomacy who added his own creation: international arbitration. Imperialism Roman Republic, then imperial dream (reflected by the edict of Caracalla in 212) to absorb all the peoples of the empire into a universal whole was not compatible with international practice which supplied the Greeks.

Everywhere but Rome has contributed to the development process. Before replacing something, Rome treaty peer (faedus Aequum) with the Latin cities and Carthage. Then during the occupation and organized relations with foreign nations based on two legal concepts: jus jus gentium and fetuses. Ius fetuses essentially religious idea of the inviolability of ambassadors and resume rise to the distinction between just war and unjust war. Ius Gentium or the law of nations, the work required lawyers need to allow the Romans to establish legal relationships with people who were not Roman origin. Genuine international relations occurred during the Middle Ages, specifically in the eleventh century. West resume diplomatic practices of antiquity which it enriches and improves them, and natural law school contribution to the development of international human rights law is substantial as we try to show in what follows.

3. Contribution to the development of the school of natural law of human rights international law

School or school of natural law and natural law of nations as it is called, was born in the seventeenth century with the great jurisconsults reformed headed by Hugo Grotius which was published in Paris in 1654, the law of war and peace. With him, Samuel Pufendorf is considered to be a true founder of this school in 1672 after the appearance of the work of nature and of nations right. This term is one of the first attempts to introduce international law in European legal thinking. It can be considered that highlighting the existence of a right of nations separated by natural law, these authors have sought to show that it is necessary to create a law that would apply to the states, along with addressing individual rights. Hugo Grotius and his followers. Hugo Grotius, whose contribution in this area is undeniable did not seek to theorize classical international law. Europe of his time was torn by religious and territorial conflicts of the sixteenth century and the Thirty Years' War was beginning.

This is the context in which Dutch jurist has developed his main work. Driven by a deep sense of humanity, he wanted to develop a rational law that require assembly of sovereign powers and limit the use of violence. But Grotius's law of nations if it was designed in a natural law that people should be prosecuted conduct only in civil or regulatory issues that escaped when they were insufficient. This right can cover and international issues such as for example the right funeral [For details, see H. Grotius, On the Law of War and Peace, Scientific Publishing House, Bucharest, 1968, pp.464-474.]. This was a common law, common assembly of sovereign powers, founded with the consent of civilized nations. However, identifying the law of war, such rules differentiated natural law, Grotius introduced mutations in the law of nations which were formulated in the work of Suarez. Other authors from the German Samuel Rachel (1628-1681), Englishman Richard Zanche (1590-1660) and the Dutchman Cornelius von Bynkershoek (1673-1743), spell out the idea that the agreement states can be created by legal rules of gentes, they admitting the existence of customary law of Grotius. It also crystallize a more pronounced internationalist outlook and full right of nations, compared to that of Grotius which refers only to a right of war.

This success saw the law of war as a distinct field from other rights of nations as a whole. Among other things, Grotius and his followers were to depend on an individual vision right of nations: the State was not subject to its right of nations, Prince be confused with the state. Law of nations saw them was so right interstate but a right that refers to the conduct of individuals and sovereign princes (rulers representatives of the Member). The emergence of classical international law was accompanied in the eighteenth century by emphasizing the just war theory, entailing only action sovereign powers whose case was considered fair. In the classical conception, the legitimacy of recourse to war was once the situation where there is a violation of fundamental rights of the state. But for reasons of sovereignty, states decide for themselves so subjective, resort to war in order to regain a right, or at least to obtain redress for injustice caused by a third party.

The development of international law in the last hundred years has focused on the "peaceful settlement of disputes" with the pact limiting League of Nations, then banning the UN Charter ["Members shall refrain in their international relations from the threat or use of use of force against the territorial integrity or so political independence of any state, and in another manner inconsistent with the Purposes of the United Nations ".

Use of force to resolve disputes between states. Over the centuries, the war could be considered a "normal" dispute settlement, whether it was seen as a kind of "divine judgment" being the winner will be done, whether they act as a more rational conception of "balance of power" being an adjustment of forces. A fortiori, a "social Darwinism" can be found in the "law of the strong" rational justification for conquest winner, enshrining European imperialism during the "gun policy". We conclude from the foregoing that since the second half of the nineteenth century, a strong ideological trend starts to substantiate peace law, ie to protect the peace by putting the war as "outlaws", but to do justice on the basis of a lasting peace.

By the mid-nineteenth century to act exclusively as customary rules are respected because there since time immemorial and that respond to demands of the civilized world. All civilizations have formulated rules aimed at limiting violence, even if a form of institutionalized violence as war, since limiting violence is the very essence of civilization. Not this way we are interested in doing legal research, but the influence and

contribution of culture and Christian civilization to the creation and affirmation of the principle of non-discrimination and equal opportunities for men and women.

4. The influence of culture and Christian civilization on the formation of international human rights

Among the factors that influenced the development of international law of human rights Christianity certainly has an important place. Judeo-Christian religion proclaimed the creation of man as the image of God, all children with the same father and shot at eternal life. The consequences of this new doctrine are manifold and incalculable, because status of the person departs from cosmic structure. Contains a dignified human being still unknown, men are brothers, murder is a crime and not slavery. This concept was revolutionary but oscillating on the basis of ancient society. Jesus preached love of neighbor and raised a universal level. Human love must be the divine image, absolute and without reason. It refers to all, including the enemy. We must love our neighbor as it is, without measuring its merits and without expecting anything in return.

Unfortunately, people have distorted this doctrine, seeing above all in altruism means to be paying their homage that person, or to gain heaven without applying the precepts brothers in faith. In the Middle Ages try life as a simple presentation about the world beyond. Focus concern to save the soul separated from the body seen. Earth Life seemed a good price and therefore unnecessary or prolonged efforts to preserve it. Suffering is given a mystical value by virtue of education. Jesus did not comment on human rights or non-discrimination, but it is important to know if the urge Decalogue "no kill" or the Gospel "love thy neighbor" only applies to the entire company or individual privacy. The issue has always been controversial. The year 313 is memorable moment Edict of Milan in which Emperor Constantine converted to the new faith will make the Church a great power over time.

Later, St. Augustine - a great personality of Christianity - followed later by Thomas d, Anguino, early fifth century promoted a way that suggested a compromise between the ideal of moral and political necessity. The reasoning was based on the fact that the natural order is reflected in the objective order. Legitimate sovereign may establish and maintain this order, aiming at any cost to assert justice, seeking justification in faith, morality, justice and honor.

It should be also mentioned another institutional influence, it is about Knights, institution of Germanic origin that characterizes the feudal period. Order elite knights gathered a body of people who have the right to bear arms and fight on horseback, that is noble. This right is honor which implies certain obligations. Among others undertake to supervise as they serve God or their sovereign. Failure to follow this belief is the ultimate offense. Order values are honor, faith and love, and his virtues are loyalty, faithfulness, sacrifice, moderation and compassion. The principles of chivalry have contributed to the development of international human rights law. What is unfortunate, however, these rules were valid only for Christians and closed world of nobility. Note that noble status was applied and enemies of the same rank. Moreover, these rules only concerns knights. So better understand the curious mixture of compassion and cruelty, tenderness and severity, faith and betrayal, and decay that is proper ideal of chivalry.

An overwhelming influence on human rights was Sinti in the modern era of humanism which in the sixteenth century, with the formation of modern states and the pontifical authority decline led to a new conception of the law of nations, jus inter gentes became, in which political entities taking place individuals as subjects of law. In this era scholastic philosophy had an influence on the war. Thus the Spanish Dominican Francisco de Vitorio repeating ideas of St. Augustine and Thomas Aquinas, develops and builds view a distinct body of doctrine. Through its humanitarian ideas Vitorio placed ahead of his time. Relying on natural law he condemns the massacre of innocent suffering excessive. A few years later Reformation Christians divided in two. In international relations unit was needed that was required by the law of nations.

Artisans were Grotius and his followers, Protestant this time. For Grotius law was not divine but fairness expression of human reason. The right not precede action states whatsoever. The law of nations was the work of nations that created the fullness of their sovereignty. In this view, national legislation is inspired by the natural law and proclaims certain rights of the human person which it exercises by public authorities, especially since science has witnessed a remarkable development. Man discovered the laws of physics that governs the universe and yourself. Life has become an end in itself. From the beginning, the company has taken into his own hands the destiny, with the intention of correcting errors generating hatred and cruelty.

The period was called "Enlightenment" humanitarianism recognizes that evolved and rational form of charity and justice. People are equal in rights and duties, which states have the obligation to guarantee and humanization national law, made important steps. In this respect, the most outstanding is undoubtedly the "Treaty of Friendship and Peace" ended in 1785 Frederick the Great and Benjamin Franklin whose provisions amounted in principle. For the first time expressed the belief that parties "undertake mutually and in the universe" and that an agreement between the state aims to protect the individual and the enforcement of such clauses create a genuine common law. Must clearly indicate that these achievements materially as its legal and were not available in some countries than in Western Europe.

Some of age thinkers have tried to develop social rules that are applied by states in their relations with citizens. These ideas were taken up by the French Revolution in its Constitution solemnly proclaimed natural rights, inviolable and sacred human rights and adopt the famous Declaration of Human Rights. In this HOLZENDORFF wrote that "the great principles which he proclaimed French Revolution and became common heritage of civilized nations, give this revolution paramount importance in the history of the law of nations". In a concluding statement, although the limits imposed by the state of development of international law and the obvious differences between optimistic and visionary desires of concrete realities, attempts to regulate human rights is an important step in the overall process of codification of law and a decisive role in this regard had the influence of culture and Christian civilization. After this brief excursus in history to investigate discrimination between man and woman, in actuality, through EU law

5. The principle of non-discrimination in the equation scientific research. From exegetical comments, explanations of EU non-discrimination law

5.1. Explanatory issues on European non-discrimination

With preliminary to note that the concept of discrimination, called "equal treatment", plays an important role in European Union law, and in many cases decided by the Court of Justice of the European Union (hereinafter CJEU) has been understood as a general constitutional principle. There are two broad conceptual approaches equality, which are evident in the provisions on equality and non-discrimination both in law and the EU:

a) formal equality or "legal" refers to the basic idea that people in similar situations should be treated alike. Formal equality focuses on equal treatment based on the appearance of similarity, without taking into account the broader context in which such treatment occurs. Under this approach, laws or practices that are aimed at treating differently persons who are in similar situations can lead to direct discrimination. Formal equality ignores the structural factors that result in certain marginalized groups. Therefore, when applying the concept of formal equality and individual differences are not considered, consistency treatment often fails to provide broader objectives of equality.

b) "substantive equality" refers to the idea that people in different situations should be treated differently. This approach comprises two distinct ideas - equality and equal opportunities results. Specifically:

- "Equality of results", requires that the outcome measure following the review should be equal. Recognize that seemingly identical treatment may, in practice, reinforce inequality because of past or present discrimination, or differences of access to power and resources. According to this approach, the effects, and the order of steps has to be taken into account.

- "Equality" suggests that all people should have equal opportunities to access the desired benefits, taking into account their different starting positions. Equality aims to provide equal opportunities, but not equal.

As regards EU law, EU citizens should be treated as equals if they are in a similar situation or, conversely, the right should not impose equal treatment if they are in different situations, unless that difference is objectively justified. Over time, EU law of non-discrimination, along with market-oriented approach distinct, took a social dimension, including in its fight against discrimination on grounds of sex, race, ethnic origin, age, disability or sexual orientation. This development is part of a more general trend in the EU fundamental rights. Thus, art. 21 on "non-discrimination" of the Charter provides: "(1) prohibits any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual

orientation. (2) The scope of the Treaties and without prejudice to specific provisions thereof, any discrimination on grounds of nationality. "

Likewise, art. 23 of the Charter contains a specific provision on "equality between women and men", which include, without limitation, labor relations: "Equality between women and men must be ensured in all areas, including in terms of employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex. "Also, Article 8 (ex Article 3 (2) TEC) (1) of the Treaty on the Functioning of the European Union (TFEU) states that "in all its activities, the Union shall aim to eliminate inequalities and promote equality between men and women." in the same vein are Articles 18 and 19 of Part Two of the TFEU, marginal titled "discrimination and citizenship of the Union" which states: "Within the scope of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality. European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules to prohibit such discrimination. [Article 18 (ex Article 12 TEC)].

"(1) Notwithstanding the other provisions of the Treaties and the limits of the powers conferred by it upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and with the approval of Parliament, may take appropriate action to combat any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

(2) Notwithstanding paragraph (1), the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws, regulations and administrative provisions of the Member States, to support action taken by Member States to achieve the objectives referred to in paragraph (1). "[Article 19 (ex Article 13 TEC)].

They are manifestly too broad formulations and, to some extent, is a mixture of rights and principles without direct effect; they must be converted into individual rights in EU legislation and case law of the ECJ. They are addressed to the Union, according to the general clause of Art. 51 of the Charter, Member States' only when they are implementing EU law. "Understanding the wider scope of the Charter corresponds to

existing case law of the ECJ on the application of general principles and fundamental rights. As can be seen in both the previous case the ECJ concerning discrimination and the manifestation of the Charter, the rights that are generated by this principle are primarily a vertical direction - in relations with citizens of the Union or its Member States, the including any body or institution ultimately governed by public law. We will look further another aspect of the principle of non-discrimination in EU law, the civil law relations on which the right of Member States and Union law are subject to the principle of "self employed". What mean this autonomy? Autonomy is a fundamental principle of EU law, but is limited by rules of law that protects the primary and secondary objectives are considered to have a higher or at least equal status. The most important are imposed by competition law, EU labor and consumers and anti-discrimination legislation in civil law relations.

In a concluding formula, the fundamental principle of autonomy can not be conceived of theoretically and practically free of restrictions contrary to the principles of its existence under the public interest criteria that try to avoid abuse by unilateral exercise of these freedoms by the May strong in a contract or at the expense of competition and open markets. Legal order mission will be to find the right balance between these two principles and will be a constant concern for both EU law and to national, under the guidance of the ECJ case law.

5.2. Introductory Issues on European non-discrimination

The term "European non-discrimination law 'suggests a unique European rules on non-discrimination; in fact, it consists of a variety of contexts. This study is mainly based on European Union law (Art. 18 TFEU and Art. 21 of the EU Charter of Fundamental Rights) and the ECJ case law and will not develop below a particular theory of European law on discrimination, distinct EU public law, but we remark only that European law of discrimination seems to be lagging behind the EU constitutional and administrative law, but will certainly acquire a role increasingly important, as EU law will govern horizontal relations between individuals and their right to make their own ways, both substantive and procedural.

References to European law on discrimination, will consider the two Directives adopted in 2000, as amended and supplemented, namely: Directive establishing a

general framework for equal treatment in terms of employment and employment, prohibiting discrimination based on sexual orientation, religious belief, age and disability in employment; Directive on equal treatment between persons irrespective of racial or ethnic origin, prohibiting discrimination based on race or ethnic origin in the context of employment, but also on access to social assistance and social security and access to goods and services. This represented a significant expansion of the scope of EU non-discrimination law, which recognized that, for individuals to be able to achieve its full potential in the labor market was essential for them to ensure equal access in areas such as health , education and housing. In 2004, Directive implementing the principle of equal treatment between men and women in access to goods and services and the supply of goods and services expanded the scope of sex discrimination to the goods and services. However, the protective measures on grounds of sex does not fully correspond to the scope of protection afforded by the Directive on equal treatment between persons irrespective of racial or ethnic origin, as the Directive on equal treatment between men and women in social security guarantees equal treatment in relation to social security only and not with the broader system of social assistance, such as social protection and access to healthcare and education. Finally, rich jurisprudence of the court in Luxembourg, will be mentioned and analyzed for each type of discrimination, in the section entitled typology of discrimination in European Union law. As regards private law of the EU, from the beginning, we stated that there can be no contradiction in terminis when we talk about the principle of non-discrimination in private law relations of the EU, but we find that there is a clash inevitable between justification underlying principle private law and logic discrimination fueled by concern for economic efficiency and the free choice of trade partners. This right of free choice is protected by the essential elements of civil law relations, namely freedom of contract and party autonomy, which precludes discrimination, as Jürgen Basedow concise in his opinion, "the principles of equality or prohibition of discrimination are currently part of the traditional principles of civil law. The concluding a contract to do so in their own interest and not to do justice to others. Who must choose a contractor from among several candidates has, according to a German proverb, suffering choice, since there are

usually several selection criteria, the relative value of which can be assessed only by reference to the subjective preferences. "

At this stage of our study it is necessary to clarify this apparent conflict between self and non-discrimination principles by means of conciliation reference to two factors. First, the balance will tilt depending on the area of law in which relied on the principle of law as there will be different rules in labor law, consumer law and in respect of services of general economic interest, on the one hand, and genuine commercial relationships , subject only to the rules of competition. Secondly, EU law can be considered as a rule under which certain features produce discrimination (discrimination grounds legally punishable "). EU prohibition of discrimination is usually based on personal characteristics such as gender, ethnic origin, citizenship, age and sexual orientation are part of a person's identity, but not so much for economic reasons such as income, family and social status or similar features.

The novelty of EU law on equal treatment requires a value judgment based on a limited list of features that are considered to be so delicate that determines that each differentiation is based on a gender characteristics is considered discriminatory, novelty, and others taken in law Romania, as we approach further in a special section of the study.

6. Research gender barriers in the European Union

The problem of differentiating between women and men in terms of income, promotion and career is one of the major problems of Romania and the European Union which is given increasing importance in view, on the one hand, the complex role of women in contemporary society and on the other, segregation and disadvantaged position compared with men, often even when providing equal work quantitatively and qualitatively.

Addressing such complex issues regarding women's role can be achieved by knowing the true causes that generate imbalances, discrepancies, gender gaps in virtually all fields. In our research, we try to analyze the European comparative context, quantitative and qualitative dimensions on gender differentiation in a multi-criteria approach to sex cleavage, and adding the significant vectors that are age, occupation, level of training, the characteristics of the economic sectors and geographic regions, etc.

Although EU regulations and the national, one of labor remuneration principles relate to equal pay for equal work and equal value in practically all EU countries, gross income differences remain at the work performed by men, against women. Typically, such differences are justified in cases where, in terms of value and the complexity of the work, the men pursuing an activity generating goods and services more complex and difficult. There are also cases when equal work for both men and women are highly different to the detriment of women, contrary to obvious fairness and social justice enshrined as a priority objective and the instruments of incorporation and place of union and national laws. Thus, in 2013, the average gross income differences, the time worked by men against women, expressed as a percentage of gross earnings for men were:

- Below the EU-28 by 17.1%, in ascending order: Slovenia (3.2%); Italy (5.5%); Malta (6.9%); Romania (8.1%); Belgium (9%); Poland (9.8%); Portugal (10%); Luxembourg (12.5%); Latvia (14.9%); Bulgaria (15.3%); Lithuania (15.3%); Ireland (15.7%); Sweden (16%); France (16.5%); Spain (16.7%); Denmark (16.8%);

- Above the EU-28: Hungary (17.1%); Croatia (18%), the Netherlands (19.2); Finland (20.4%); UK (20.4%); Cyprus (21.0%); Slovakia (21.9%); Greece (22%); Germany (23.2%); Austria (25.4%); Czech Republic (25.9%); Estonia 30.9.

The pay gap between women and men is pay gap between men and women's salaries, calculated based on the difference between the average gross hourly employee remuneration female and male. On average in the EU, women earn per hour with about 16% less than men, and the gender pay gap varies across Europe. This is below 10% in Slovenia, Malta, Poland, Italy, Luxembourg and Romania, but exceeding 18 /% in Croatia, 20% in Hungary, Slovakia, Czech Republic, Germany, Austria and Estonia. Although, in general, the pay gap between women and men has decreased in the last decade, it has increased in some countries (Hungary, Portugal). Pay gap exists despite the fact that, in general, girls do better than boys school. On average, in 2013, 83% of young women in the EU had at least a high school education, compared to 77.6% of men. Also, women represent 60% of university graduates in the EU. The impact of the pay gap is that women earn lifelong less than men, which means that they

have lower pensions and are at greater risk of poverty in old age. In 2013, 21.7% of women over 65 were at risk of poverty, compared with 16.3% of men.

In Europe, the total employment rate of women is 63% compared with 75% among men aged between 20 and 64 years, and women represent the majority of part-time workers in the EU, 34.9% of they worked part-time, compared to only 8.6% of men. This has a negative impact on career development, training opportunities, pension rights and unemployment benefits, all of which influence the pay gap between women and men. But how to measure the pay gap between women and men in the EU? The pay gap between women and men is shown as a percentage of income is the difference between men and gross wages, salaries, hourly, obtained from male and female workers. The remunerations are gross salaries paid directly to an employee before deducting income taxes and social contributions.

In the EU, data on the pay gap between women and men is based on the methodology of the Structure of Earnings Survey and the pay gap between women and men is called officially "unadjusted pay gap between women and men", it does not take into account all factors involved, such as, for example, differences in education, labor market experience, hours worked, type of work performed, etc. Using as a basis, the compensation per hour can also mask some salary differences are not shown, for example those resulting from bonuses, from compensation payments or seasonal performance. As is clear from the above data, differences in earnings between men and women seem to be higher in countries with high levels of EU development compared to the least developed, although exceptions are recorded both in the group of countries below the EU average and those above the EU average.

The undervaluation of women's work is due to the way their competences are valued compared to men. Jobs requiring similar qualifications or experience tend to be poorly paid and undervalued when they are dominated by women rather than men. For example, cashiers are women, mostly in supermarkets and usually earn less than male employees mainly involved in arranging shelves or other activities that require physical labor. In addition, performance assessment and therefore, salaries and career advancement that can also be in favor of men. For example, where women and men

have the same qualifications, is given responsibility for capital higher than responsibility for people.

In most EU countries, women continue to be underrepresented in decision-making and important social positions, especially at the highest fora and institutions, despite the fact that they represent nearly half the workforce and more than half of graduates higher education in the EU. Although there has been some progress in terms of reducing the imbalance of men and women in political decisions, there is still much to recover as, on average, one in four members of national parliaments and ministers of national governments are women.

Regarding economic decision making, the proportion of women is lower than that of men at all levels of management and decision-making, this being 1 to 10 board members, of the largest companies in the EU, only 3% of the total are women on the boards of the respective companies. Research shows that there is a gender diversity in terms of wages and a positive correlation between women in leadership and business performance, and despite the EU target to have 25% proportion of women in leadership positions in the sector public research, this proportion in 2013 was only 19% of the total number of women teachers in universities EU countries. The predominance of men in this field is a major obstacle to the European objective of increasing competitiveness and maximizing innovation potential.

Romania occupies a position close to the EU average (11%) in 2013, the share of women among board members (12%), the largest discrepancies did women registered in Cyprus, Luxembourg , Italy, Portugal and Greece (5%) and the share of women was recorded by Bulgaria (17%), Denmark (18%), Slovenia (19%), Finland (24%), Sweden (27%), Norway (42%).

Regarding the representation of women in national parliaments (combined upper and lower chambers) in Romania, women account for 11%, compared to 23% EU-28 and Norway, Belgium, Finland, Netherlands, Sweden weight range between 39% and 45%. After all these elements of comparative analysis of discrimination in the European Union and our approach consistent with the objective of scientific research, we address the legal sequence of equal opportunities and gender barriers in the legal order of the European Union and Romania in order to establish the extent to which European and

national legislative framework provides legal protection of non-fundamental principle of EU law. Beyond these European approach of principle nedicriminării women we find that similar concerns were made in the very depth studies in the Asian region, specifically in China, where human rights issues in general and women in particular, is extremely sensitive and delicate, as we will analyze below.

7. Similar approaches in researching gender barriers in Asia

Asia, continent huge, heavily populated, with strong vocation globalizing, but also massive nationalist influences of east Asian countries in recent decades have become recognized worldwide as economic powers and major tourist destinations, although ago a century and a half, when they opened their doors to competitive Western world after a long period of isolation, these countries were unable to cope with economic and technological Western powers. Today, unlike the late nineteenth century, these countries are recognized by the West as development models, real economic and diplomatic jungle tigers. Although Japan, South Korea and China are now successful prototypes Western world XXI century century, when investigating how women in these countries enjoy equal rights, we see that, in fact, they continue to be discriminated against and marginalized, often preferring not to receive their rights and do not advocate a practical equality of rights.

Going through the study of Su-Hao Pei-Shan Liao You and based on a survey conducted between 1996-1997 in mainland China and Taiwan, we see that 69.5% of women who participated in the survey in mainland China believe that men should have to work and women take care of the home, while only 52.3% in Taiwan think so. In addition, 90.7% of women surveyed in China and 90.8% of those surveyed in Taiwan considers that they become successful women with husbands in career achievements. Finally, 74.4% of women surveyed in China and 78.4% of those from Taiwan argued that women can have much better care of the family than men. Thus, based on such a mentality, it is no wonder that Chinese society tends toward inequality in rights, with all that this company offers all possible means that women receive equal rights. Given the above it is shocking that in both systems leading Chinese area, both the Taiwanese democratic and authoritarian Chinese mainland region ideologies of gender equality principles provide yet women are unable or unwilling to take them. Mao Zedong, the

founder father of China and Maoist ideology of Marxist-Leninist, was the main promoter of gender equality in rights. But he began the equalization of rights based on both the Marxist analysis on women as the main social group discriminated against economic and observe its own analysis subordination of women by applying Confucian ethics. It came to promote the principle that helps women and Chinese state-building "taking half the sky" 3 "that is [also] be shared equally by China's reconstruction work, which means that wearing the same clothes and doing the same jobs for the same money. "Thus they reached the Maoist period to have the right to choose her husband to divorce, to have a job, to have access to education, etc5 and legislative reforms regulating the equal rights of both postmaoistă between sexes continues on a "women hold up half the sky and". Also, the various laws that have been approved by the Chinese state governing bodies, she currently benefit from maternity leave, a salary equal to that of man, and acts like rape, kidnapping and selling women or inciting them to become a prostitute is punishable by the death penalty.

Unfortunately, since 1979 in mainland China women's right to give birth to more children is banned by law enforcement one-child policy. This law states that every family is entitled to one child, and ethnic minorities are allowed to have a second child, while the other families that give rise to more than one child to pay huge fines. Regarding Taiwan, the principle of equality occurs only after the country's transition from a one-party democracy guardianship, Kuomintang, to a multi-party democratic system. By 1986 Taiwan leadership was more occupied with the creation of economic reforms, agricultural and security, aimed at strengthening economic area. But with the advent of multi-party authoritarian rule disappears Kuomintang, he was forced to compete with other parties for votes by promoting solutions to social problems. It comes as a result of these proposed reforms of the elect, they succeed not only keep its promises to the voters, who have confirmed that representatives but also contribute to improving the living standards of citizens.

Since 1996 there were numerous laws governing Taiwan certain rights and freedoms for women and the law of 1996 which provides a framework for determining child custody right. Another law is the work of Equal Rights adopted in 2002 governing that female employees salary must be equal to that of male employees and women

have two years of maternity leave and have days off during menses. Given the above context we can expect both Mainland China and Taiwan to exist and rich apliceun code of laws which aims to regulate equal rights. Unfortunately, although women are nearly equal rights with men, there seems to be a patriarchal spirit governing, and women tend to ignore their rights, preferring to be subordinate to men and even abused. This is confirmed by a recent study according to which half of mainland Chinese women who were interviewed had some quarrels with spouses and 39% of them were assaulted by them.

Although females in both areas of China have the right to education, we find that the families of blankets socialeinferioare conservative or negative influence on the education of girls opinion prompted them to give up this right. In addition, many Taiwanese families still strongly influenced by Confucian ethics tend to discourage young in attending an educational trail. These things can be observed in recent studies showing that 80% of girls and 88.8% of China continentală2 Taiwan3finalizează the primary school, but only 74.8% of Taiwanese high school graduates go to become and only 40% of Chinese women past graduated middle school. As a result, this lack of education of women from mainland China leads to an imbalance in the labor market. Thus, it appears that urban women employed in skilled positions is below 50%, and those working in research, engineering, law, public administration is even less than 30%.

Unfortunately, various Chinese employers profit from women and lack of real reforms in terms of equal rights, preferring to engage the a shorter period of time, knowing that after the age of 35-40 years will retire labor market, because after they marry and remain însărcinateacestea prefer to take care of the family. This is confirmed by polls showing a sharp drop in the number of Chinese women willing to job around the age of 40 years 8 and can be graphically represented by "\" and differing from Japanese women whose schedule employment could be graphically represented by the letter "M".

In Japan, women "undertake, immediately after school, between 20 and 30 years, until marriage [...] which is a maximum of young age. After marriage and children grow up until women are leaving jobs consecrating family after starting to take a job again. This period, representing women aged 30 to, say, 40 years, jumping << V >> plot by joining the two bars << M >>'s. << V >> peak point minimum employment would be

determined by the withdrawal of women from work to raise children, and the line perpendicular to the right or the top right corner [,] are maximum employment of women returners service when they believe that children do not need their presence permanent home. "

Although today there is, in both systems management of Chinese territory, in theory, principles and laws governing gender equality, however millennial Confucian legacy still dictates a patriarchal family system in which a young woman listening father after marriage husband and son in his old age. This regime dominates both patriarchal society menţinătoare traditional Taiwanese and mainland Chinese society in which Mao tried unsuccessfully to eradicate this medieval system. And this is because this cultural influence Chinese society over thousands of years and therefore can not be wiped out in a few decades by the compulsion of socialist ethics or imposing Western norms of peaceful equal rights.

We believe that gender equality is not a universal rule, because there was only with the industrialization of Western society by the emergence of Western feminist movements who campaigned for equal rights and freedoms. Also, Chinese contemporary feminist groups should not be limited to campaigning for equal rights, but also to promote the rights and freedoms enjoyed by women, because gender equality, not a universal rule, many women do not know and is likely to resist patriarchal system in the Far East and due to ignorance of the benefits that can bring women's rights.

If, however, we believe that gender equality is a universal norm and discussing China's situation, we can say that despite the universality of gender equality, in some societies women prefer to give up the rights of the spouses and be entertained by adopting depiction housewives which takes care of the family. Accordingly, any efforts and social policies will fail. We conclude that both the Chinese Communist system and the democratic Taiwanese gives equal rights to women, but millennial Confucian heritage, which remains present in our time, prevent the development of Chinese companies egalitarian. This leads to a situation where women in Taiwan and mainland China to prefer life under male domination, which is often an aggressive, than to challenge the patriarchal regime and to seek economic independence based on their own rights. Beyond these assertions Sino-European geographic, to examine the

phenomenon of discrimination of women in Romania, from its myth paradigm in our country.

8. Myth of Women in Romania

In Romanian mythology, she was not too desired. Mythology is not in this respect than to align a bias current and almost universal. Even today, at a time when even some Muslim countries had women prime ministers, successive governments of Romania impresses with almost all of them male. It was noted in the world without irony, as even the Romanian delegation at the international conference of women was led by a man. She can get course in mythology, but its place in a marginal position, subordinate, the witness and moral supporter of big business men. Elena gentle lady, who supports both Cuza Voda is a significant example for women accepted typology. In a heroic version, but equally dependent women appear great men of old, raised in Bolintineanu lyrics: "Mother of Stephen the Great" who sent his son to victory or death ("go to war, the country die ") or the mother of Michael the Brave, with its unusual reaction to his son's death" very sad news is your / my son not died / but that's just the death / the Romanian did disrobed ". It remains for psychologists to decide!

Some second-class historical characters appear in the modern era: Ana Ipătescu 1848, Ecaterina World War. But - prove documents - Ana Ipătescu courage was far courage. She allowed to issue Revolutionary Government gun, pistol that belonged by her husband, whom he deceived the world's highest 1848 world eventually decided Romanian Land Policy. But hardly accept femininity upper hierarchy. Women who want to impose "top" are seen evil as well, to refer to two historical figures amplified through literature, Mrs. Clara and Mrs. Chiajna. Triad "făcătoarelor bad" in the last half century: Elena Lupescu, Ana Pauker and Elena Ceausescu merely to confirm the apparent accuracy of the Romanian distrust towards women in power.

Establishment dynasty was likely to change somewhat feminine domestic typology. A queen is not an ordinary woman but a character on which, regardless of sex sacredness tool flows. Is that allowed large queen listened to the ruling of countries otherwise governed exclusively by men. In Romania, only two names acquires the question: Queen Elizabeth - Carmen Silva and Queen Mary. Mythologizing of the first process has not gone too far, limited too strong personality of Charles I. Queen

remained the area for works of charity and especially of culture and enhancing the creative and protective traits. Are completely different things with Queen Mary. The only woman he met in Romania climbing the highest peaks of the myth, but like any woman, was in turn: adored and despised, mistress and slave. But who is the main coordinator of the family, nation and human species? When we have no rational solutions perfect relationship between people solve problems by decision. At this thought Frenchman who spoke of "arbitrary benefactor!" Not to be confused with caprice. It will be seen later in that mirror mythology battle of the sexes and its biological and social results, which were the effects of male domination and female.

These were just a few opinions about the woman. It is strange and profound cosmological vision based on the principle of the father. I do not remember who the artist made based on the principle of creation milk. It was thought that the father is the reason bearing notes, anxiety creation, conception and thirst for freedom will be sought in the area as possible. It has been said that freedom was born from the need to exit the perfect father's loneliness were made findings regarding: the superiority or inferiority of women. European family was and still is ruled by pater familias ennobled by Christianity. A master tamed, protective called to restore order to the chaos of human biological species.

Democratic movements tend to overthrow by establishing the principle of gender equality. The absence of climate egalitarian feminism has made it necessary. She is Axus mundi, everything revolves around it. Depends on how resist to do this, do not go especially dizziness and consistency of how much and how much you want this. She remains vortex and form essential to carry forward all we live here now. We as hunters, we must be clear that there is a strong form of matriarchy which was placed in the foreground, the woman ruled the world and it is the future of humanity. Is it a state of continuity.

Finally, it is worth noting that men are tolerant to women when they have to cede power and control action and decision, and today the revolutionary movement, promoting purity of indigenous values and moral-religious regeneration of the nation, the current Romanian feminism moves emphasis from the right and power to the assertion from the domination of politics to civil society. In this sense, continuing our study, we will

briefly present some similar approaches in researching gender barriers in the European Union.

9. The legal regime of barriers and gender equality in Romania

9.1. introductory issues

Romanian society at the beginning of sec. XXI, remains and must remain a civilized society, that is, in legal terms, a company belonging to the High Civilizations Legal Onusiene, one in which human rights are considered and inalienabilele inherent rights of each person. The concept of "human rights" defines a number of subjective rights of individuals, that it may oppose in relation to public authorities, naturally inclined towards a position of abuse of power, and thus to human rights violations. As stated doctrine, only in civilized societies, ie, some with high levels of social and cultural maturation in those societies organized force of law and not brute force, human rights find their fullest expression fulfillment. Such companies are some model based on the principle of the rule of law and respect for human rights. They are companies in which public authorities in all their actions relate to human rights, a permanent exercise of self-limitation of power through which human rights are consolidated and become an effective legal guarantee against abuse and the dangers of any kind.

9.2. The legal regime of gender barriers and equal opportunities in Romania

Forms of application of this principle enshrined in the Constitution meet: eg., We could cite art. 38, paragraph 4 (which requires, on the right to work, women have equal pay with men for equal work); art. 44, paragraph 1 (family foundation is, according to Romanian constitutional law, marriage between spouses freely consented and is based on their gender). Also have to mention art. 20, para. 1 and 2 which operates a general reference and priority international documents on human rights to which Romania is a party (Universal Declaration of Human Rights, Covenants and other relevant international documents).

So, the above-quoted article send public authorities interpretation and application of the mandatory provisions of the Romanian Constitution concerning the rights and freedoms of citizens, in terms of a set of international documents on human rights ratified by Romania. It operates as an implied reference to the interpretation and

application of the Constitution of Romania in this field in terms of legal content of the principle of equality between women and men, as indicated by the set of legal documents enshrined in international and European level, ratified by Romania). Moreover, according to art. 20, paragraph 2 of the Constitution establishes the priority of international legal documents on human rights to the internal laws of the Romanian state, if the top and the latter disagreements. The exception to this principle of interpretation and application forms where, human rights, the Constitution and laws of the Romanian state contain provisions more favorable than the set of international and regional legal documents to which Romania is a party. Also in the Constitution there are references to a legal regime of positive discrimination of women in Romania, as compared to men: art. 38, para. 2 (right of employees to social protection measures, including those relating to working conditions for women) or art. 43, paragraph 2 (right of citizens to have paid maternity leave, other forms of social insurance, public or private, under the law, and measures of social welfare law).

Finally, it should be noted that the jurisprudence of the Constitutional Court of Romania concerning non-discrimination and equal opportunities is constant, according to the norms of the European Union and the European Court of Human Rights, no matter in which legislates, consider that "the violation of the principle of equality and non-discrimination exists when applying differential treatment of equal cases, without any objective and reasonable motivation, or if there is a disproportion between the aims and the means used by unequal treatment.

Uses, differentiated legal treatment applied to those who consider themselves entitled to compensation for non-pecuniary damage suffered by political conviction, depending on when the court judgment becomes final on the right to compensation affects the rights of people who did not have a final judgment entry into force of Government Emergency Ordinance no. 62/2010. Accordingly, the provisions of art. I pt. 1 and art. II of the Government Emergency Ordinance no. 62/2010 amending and supplementing Law no. 221/2009 concerning political convictions and administrative measures assimilated pronounced between 6 March 1945-22 December 1989 and to suspend the application of provisions in Title VII of Law no. 247/2005 regarding the

reform in property and justice, as well as some additional measures violate Art. 16 para. (1) of the Constitution on equal rights. "

This solution is consistent with the case law of the European Court of Human Rights in the case relating to the application of Art. 14 and Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms. European Court of Human Rights has emphasized that, based on Art. 14 of the Convention, a distinction is discriminatory if it "has no objective and reasonable justification", that is, if not pursue a "legitimate aim" or there is a "reasonable relationship of proportionality between the means employed and the aim sought" (see, in particularly Marckx judgment against Belgium on 13 June 1979, Series A no. 31, p. 16, para 33). At the same time, the European Court of Human Rights noted that the list includes Article 14 becomes indicative and not restrictive one (see Engel and Others v the Netherlands, judgment of 8 June 1976, Series a no. 22, p. 30, § 72, and Rasmussen against Denmark, judgment of 28 November 1984, Series a no. 87, page 13, paragraph 34). European Court of Human Rights went on to explain these principles in its judgment in Case Abdulaziz, Cabales and Balkandali v United Kingdom: "a difference of treatment is discriminatory if it has an" objective and reasonable justification ", that is, if not pursue a "legitimate aim" or if there is "a reasonable relationship of proportionality between the means employed and the aim sought '" (judgment of 28 May 1985, Series a no. 94, paragraph 72). At the same time, the European Court of Human Rights, referring to the measure of discretion, left to the Member, stated that it varies depending on the specific circumstances of each case, the fields and the context in question (judgment of 28 November 1984 in Case Rasmussen against Denmark, series A no. 87, § 40).

The principle of equality and prohibition of discrimination was taken by the European Court of Human Rights Protocol. 12 to the Convention, adopted in 2000. Art. 1 of this Protocol provides that "The enjoyment of any right set forth by law shall be secured without discrimination, in particular on sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. "In particular, the additional scope of protection established by Article 1 refers to cases where a person is discriminated against:

- The exercise of a specific right granted to a person under national law;

- The exercise of a right which may be inferred from a clear obligation of a public authority under national law, that where a public authority under national law, has an obligation to behave in a certain manner. These principles have been repeated in subsequent case law of the European Court of Human Rights judgment in the Case Thorne vs. the United Kingdom, adopted in 2009.

The property, *exempli gratia*, Decision no. 179/2014 relating to dismiss the objection of unconstitutionality of art. 1 para. (3), art. 4 relative to the second sentence of art. 33 and art. 24, art. 31, art. 32, art. 33, art. 34 and art. 35 of Law no. 165/2013 on measures to complete restitution in kind or compensation, real estates abusively taken during the communist regime in Romania. Analyzing this criticism, first, the Court observes that the sale, whether or not obtained compensation, are in the same situation, and their treatment, relative to the amount of compensation that you can get is different. It follows, therefore, that in the case before constitutional review criticized provisions establish a different treatment for people in the same situation. However, both the Constitutional Court and the European Court of Human Rights has held that not every difference in treatment means, automatically, violation of constitutional provisions relating to the prohibition of discrimination or conventional (by way of example, mention Constitutional Court Decision no. 164 of 12 March 2013 published in the Official Gazette of Romania, Part I, no. 296 of 23 May 2013, the European Court of Human Rights decision of 20 March 2012 in Case Panfile against Romania, paragraph 27). Also, on the same occasion, the European Court held that art. 14 does not prohibit a Member State to treat certain groups differently to correct "factual inequalities" between them, since the Contracting State has a broad discretion in assessing whether and to what extent differences in similar situations justify a different treatment. Typically, state convention leaves a broad discretion in the area of economic and social strategy.

The principle of equality of citizens before the law and public authorities show that, by Decision no. 70 of 15 December 1993, by Decision No. 74 of 13 July 1994 and Decision no. 85 of 27 July 1994, the Constitutional Court stated that "it is not contrary to the constitutional principle of equality of citizens before the law and public authorities << establishment of special rules, as long as they provide legal equality of citizens in their use >>. the principle of equality does not mean uniformity, so if equal situations must

correspond to equal treatment to different situations treatment can only be different. "Examining the legal regulation deducted control, the Court held as follows: Equality before the law and public authorities, established as a principle of art. 16 para. (1) of the Constitution, finds application only when the parties are in the same or equal requiring and justifying same treatment in law and therefore the same legal establishment. Per a contrario, when they are in different situations, the legal regime applicable to each can only be different, which is not contrary to legislative solution, but rather a logical consequence of the very principle enunciated. That is, what is noticed in support of the objection, by way of fine unconstitutionality of the contested regulation, that, according to its parts have two or only one remedy, depending on how you proceeded First Instance to solving the case, with or without examination of the merits, even if such set two different legal regimes, makes of the existence of two different situations, which, as such, could not be regulated identically. However, since the criterion according to which legal regime is applicable or that is objective and reasonable, and not subjective and arbitrary, consisting of a certain hypothesis ţsituatie stipulated norm and no affiliation or quality of the person, regarding which finds application intuitu personae therefore, no grounds for qualification deducted control regulation as discriminatory, so contrary to the constitutional norm of reference.

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The current relevance of the Ombudsman institution at the states level

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Abstract
The paper addresses certain aspects of the activity of the Ombudsman institution, an institution of Swedish origin with a significant development in recent decades. The emergence of this institution was prompted by the need to provide protection for citizens against possible abuses of public authorities. Practice has shown that the efficiency of the Ombudsman institution has depended on the qualities of the person designated to occupy the position of Ombudsman, on their authority and way of working, and also on the applied procedure and the legal instruments at their disposal. In Romania, the Ombudsman institution is represented by the People's Advocate, a form of the classic Ombudsman whose effectiveness depends on its constitutional state, but also on the manner it understands to concretely meet its specific mission.
Keywords: *Ombudsman, institutional effectiveness, authorities, protection, status, petitions*

Introduction

The special magnitude of the tasks assigned to the legislative and public administration sphere, as a result of the development of economic life and of the complexity of social life, both nationally and internationally, has determined the occurrence of certain disfunctionalities in the relations between state citizens and various public authorities and administrative structures, which resulted in conflicts. In this context, many countries have acknowledged that the institutions which traditionally have in view the legal protection of citizens and the control of public authorities were no longer able to resolve these disagreements or conflicts.

The materialization and rapid development of the Ombudsman institution has been determined, therefore, by the need to provide protection to citizens against possible abuses of public authorities. The immediate solution was to create this control system to provide greater speed, simplicity, efficiency, flexibility.

Etymologically, the word "Ombudsman" comes from the Swedish language, meaning "one who pleads for another". Later, the term was adopted in universal language, designating an institution recognized by the Constitution or by a law of a competent legislative body, managed by an independent person, responsible for their

acts before the Parliament, receiving complaints from citizens and acting on their own initiative to defend the legality of legal or administrative acts, making recommendations or suggestions and publishing annual information.[1] This definition admits different variants related to the appointment of the Ombudsman, to the limits of powers, method of presenting complaints, tenure, etc.

Historically, two models of ombudsman have been outlined [2]: *the parliamentary ombudsman*, occurring in the early nineteenth century and *the administrative mediator*, occurring in 1970.

The parliamentary Ombudsman can be considered a sort of permanent parliamentary representative, who is in charge, in the interval between sessions, with the supervision of the manner in which the administration accomplishes its mission and obeys the laws. In particular, it may have the mission to supervise the way in which the protection of freedoms and fundamental rights is ensured (corresponding to the Swedish model, although when it was created, in 1809, there was no parliamentary regime in the current sense of the term).

Created after the British and French model, *the administrative mediator* appeared in countries where the Parliament exercises a real political control over the Government and the jurisdictions control the actions of the administration. The establishment of this institution is done by law, its holder is appointed by the Executive, and its activity aims at improving daily relations between the administration and citizens.

The institution of the Ombudsman, an institution with a special character

The institution of Ombudsman was established in Sweden for the first time by the Constitution of 1809, the Parliament being competent to appoint a Parliamentary Ombudsman, someone “recognized for their legal competence and for their exemplary probity”. The Ombudsman was a tool allowing the Parliament to exert some control over the exercise of power by the executive, by monitoring the way in which public authorities abide laws.[3] The parliamentary Ombudsman carried out its activity mainly in the form of inspections and investigations, some of its tasks being to encourage the uniform application of laws and to clarify legislative imperfections.

The state which set up the following Parliamentary Ombudsman was Finland, by the Constitution of 1919, and then Denmark, in 1954, by regulating the Ombudsman Office. In recent years, this institution has spread throughout the world; there are currently about 120 ombudsman institutions.

If in some countries the name “ombudsman” was kept, in others it has changed: in Austria – *Volksanwaltschaft*; in Belgium, Bosnia-Herzegovina, Croatia, Cyprus and France - *Mediator of the Republic*; in Greece and Hungary - *Commissioner for Human Rights*; in Ireland and Lithuania - *Parliamentary Ombudsman*; in Malta and the Netherlands - *National Ombudsman*; in Poland and Portugal - *Defender of Justice*; in the Russian Federation - *High Commissioner for Human Rights*; in Slovenia - *the Ombudsman for Human Rights*; in Spain - *Defensor del Pueblo*; in Great Britain - *Parliamentary Commissioner for Administration*.

In countries such as Austria, Belgium and Spain the regions have their own Ombudsman, while in others there are only regional ombudsmen: in Italy - *Defensore Civico*, in certain Swiss cantons and some German Länder. There are, however, ombudsmen for local administration, such as those in large cities in the Netherlands (Amsterdam, Rotterdam, The Hague and Utrecht), Belgium (Antwerp, Leuven and Mechelen), and Switzerland (Basel, Winterthur and Zurich).

An analysis of the Ombudsman typology in various countries shows that the institution itself has imposed in countries with the most diverse forms of state and government and with different administrative structures. In any of these states, the basic structure of the institution with Swedish origin is standardized, the detailed organization being different, in accordance with the national system. Consequently, the ombudsman institution has developed in two forms[4]:

- *Ombudsman with general competence* - addressing all the issues that arise from failures in administration;

- *Ombudsman with special competence* - specialized in a particular field (e.g. ombudsman for child protection, ombudsman for consumer protection, ombudsman for financial services, ombudsman for equality and anti-discrimination, ombudsman for persons with disabilities, ombudsman against ethnic discrimination, ombudsman for defense etc).

Given its special character, the Ombudsman, which was established to protect the rights and freedoms of citizens in all countries where it exists, carries out an activity that seeks to supervise the compliance with laws[5] and counter attitudes of public authorities that are bureaucratic, abusive, especially those with executive character. The Ombudsman is not a body that replaces others, but, along with other public authorities, such as those of executive nature, supports the rights and freedoms of citizens, being a protector of all.[6]

In most countries in which it operates, practice has shown that the effectiveness of the institution has depended on the qualities of the person appointed to the position of Ombudsman, on the authority and manner of their work, on the appreciation and support of public opinion, but also on the degree of responsiveness and support of public authorities.

The Ombudsman can be considered a special institution, since analyzed in comparison with the other three public authorities exercising the attributes of sovereignty - legislative, executive, judicial, has no power of decision. The real powers of the Ombudsmen are based on their moral authority and prestige. Moral authority is related to the absence of partisan ties with any political party or trade union; this is the reason why, as a rule, the ones elected for this position are magistrates, judges, academics, eminent lawyers and persons of high social prestige and politically uninvolved.

As such, the means employed by the Ombudsmen in their work consist of persuasion and influence, a degree of superiority based on impartial knowledge of the facts or situations, in the right use of law science to demonstrate the legality or illegality of acts or deeds, in the diplomatic prudence to reconcile litigants, and, respectively, in a special sense of balance and fairness regarding the identification of the incoherent acts of administration.

According to Donald C. Rowat there are *three main features* of the Ombudsman institution, common to most European systems of law:

a) The ombudsmen receive individuals' complaints against the administration, for which they are trying to find a solution, in the event they are found to be substantiated;

b) The ombudsmen are not authorized to give instructions or cancel a decision because they do not have direct power over the administration;

c) A fundamental aspect that distinguishes ombudsmen from administrative courts is their independence from the executive power.[7]

Seen as such, the ombudsman has the following functions: to monitor the respect for fundamental rights and the legality of the administration activity; to investigate and control public administration; to mediate or recommend new legal measures; to sanction or penalize acts of authority that encumber their activity.

In essence, the mission of Ombudsmen is to protect the rights and freedoms of citizens in their permanent interaction with the public administration, so that, by the legal consecration of an additional form of administrative appeal which citizens can address, a supplementary way to control the public administration system takes contour, indirectly.

The institution of Ombudsman in Romania

The option of the constituent in Romania was for the name “People’s Advocate”, an Ombudsman institution with general jurisdiction, which aims to protect the rights and freedoms of individuals in their relations with public authorities.[8] The preference for this name is explained by the specific legal and political Romanian language and by the fact that it most clearly expresses and explains the role and significance of this institution.[9]

In terms of its appearance, the People’s Advocate represented, along with the Constitutional Court, one of the new institutional structures created by the Constitution of 1991, seeking to protect the rights and freedoms of individuals in their relations with public administration authorities. The institution was established by Law no. 35/1997 [10] on the organization and functioning of the People’s Advocate institution.

The People’s Advocate Office is organized and operates in accordance with *the Paris Principles*, taking into consideration the immediate accreditation in the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, and the integration in organizations regarding human rights from the United Nations system.

In accordance with Article 13 of Law no.37/1997, the duties of the person holding the office of People’s Advocate can be summarized as follows:

- the settlement of petitions;
- the activity regarding constitutional litigation:

- formulate opinions at the request of the Constitutional Court;

- may notify the Constitutional Court on the unconstitutionality of laws before their promulgation;

- may notify the Constitutional Court directly with the exception of unconstitutionality of laws and ordinances.

- Activity regarding the administrative court (may notify the administrative court, according to Law no.554/2004);
- Promotion of appeal on points of law before the High Court of Cassation and Justice, on legal issues that have been addressed differently by the courts, by irrevocable court decision;
- Presents reports to the two Chambers of Parliament, annually or upon request (the reports may contain recommendations for amendments to legislation or other measures to protect the rights and freedoms of citizens);
- Presents reports to the presidents of the two Chambers of Parliament or, where appropriate, to the Prime Minister, when taking note, during investigation, of gaps in legislation or serious cases of corruption or failure to comply with national laws;
- May be consulted by the initiators of draft laws and ordinances, which, by the content of the regulations, refer to the rights and freedoms of citizens provided by the Constitution, the covenants and other international treaties on fundamental human rights to which Romania is a party.

The People's Advocate exercises his powers ex officio or at the request of persons aggrieved by the violation of the rights or civil liberties by the public administration authorities.

In Romania, the status under which the classic Western European Ombudsman is organized and operates ensures its independence and impartiality. Today, the People's Advocate, as a form of the classic Ombudsman, can already be considered an institution and an efficient, viable one, due to the achievement of its mission to protect the person and her fundamental rights.

Typically, the Ombudsman deals with complaints from citizens regarding certain administrative injustice, inadequate management, human rights, or issues of various

forms of corruption. The Ombudsman is vested with the authority to investigate, to report and make recommendations regarding individual cases, and also administrative procedures applied.

Analyzed as an individual, the portrait of the Ombudsman is that of a person with a high level of confidence, with prestige and influence, acting with objectivity, competence, efficiency and fairness. Moreover, the Ombudsman has no executive powers and does not have the power to make the orders, the main area of activity being to find solutions to problems through the process of investigation and conciliation.

Highlights of the Ombudsman activity

Starting from the assumption that the enhancement of the role of public administration sometimes leads to the increase in the number of abuses committed by it, a relegalisation of the administrative activity was required.[11] This has become especially prominent in the context of insufficient effective control mechanisms - there was the risk of us facing a growing state interventionism. It is considered that the legislative gaps and incomplete or inadequate drafting of normative acts have contributed to the development and strengthening of the role of the Ombudsman, resulting from an inefficient public administration control exercised by the public authorities of the state. To this was added the absence of rapid procedures and the inaccessibility of the administration. In order to reach harmony between freedom and authority, the control of state activity was necessary, and especially that of the administrative activity. Currently, the interest in this institution has increased due to its close link with the protection of human rights.[12]

Therefore, the issue of identifying additional means of control was raised, namely the establishment of administrative authorities empowered to do so.[13] Relevant for this new category of authorities are the institutions of ombudsman or mediator, which have developed in recent years, exceeding the borders of Europe, based on the Swedish model of justice, Ombudsman.

Internationally, in the last decades there has been a growing interest in national institutions promoting and protecting human rights.[14] This has generated a series of meetings of various bodies of the Council of Europe, competent in the promotion and

protection of human rights, as well as meetings of ombudsmen from various European countries, with the same mission, regardless of the level where they operate their activity - national, local or specialist. An example in this respect is Resolution 85 (8) of the Committee of Ministers, which includes the organization, within the Council of Europe, of regular conferences of Ombudsmen of the Member States, to examine and exchange views and experience regarding the protection of human rights before the acts of administrative authorities. This was followed by a considerable increase in the number Ombudsmen in Europe and in other continents; still, there are certain differences in terms of states administrative and legal practice.

As a result of the growing impact of administration activity on people's lives, a counterweight was necessary, one that traditional judicial means could not provide. Relevant here is the first international technical meeting held in Paris in 1991. The conclusions of the reunion are found in Resolution no. 54/1992 of the UN Commission on Human Rights, entitled "Principles relating to the Status of National Institutions" and known as the "Paris Principles".[15] Subsequently, the United Nations General Assembly has approved them by Resolution no. 48/134 of 20 December 1993, according to which the Member States are encouraged to establish or strengthen national institutions which should be granted a mandate as extensive as possible in promoting and protecting human rights.

Although, currently, the institution of Ombudsman takes many forms, their common mission is to help achieve a balance in the exercise of the state or public administration power in relation to citizens or the private sphere. Although this view is unanimously accepted, the nature and role of the Ombudsman institution remains unclear. This arises from the following considerations: the institution does not integrate well into the classical doctrine of separation of powers, and the limits of Ombudsman intervention are at the border between political and legal; also, the efficiency of the institution, in terms of citizens and of co-existence with other institutions, is not considered at all.[16] Therefore, the question is: can the institution of Ombudsman be understood as a mechanism complementary to the system of *checks and balances* specific to the rule of law? It remains to be seen to what extent this is possible.

Conclusions

In scientific terminology, the name of the "ombudsman" institution is quite widespread. In all systems of law, the institution of Ombudsman exists in parallel with other means of control at state level, such as hierarchical appeal, administrative courts, ordinary courts etc.

It can be appreciated that the Ombudsman is an independent and apolitical form of control of public authorities or at least of their administrative operations. It can be considered as an option for correcting errors of public administration; for citizens, it represents an expert and impartial agent whose activity does not incur any expense for complaints, without delays, without the tension to discuss with the opponent.[17] Seen from this perspective, the Ombudsman is an extraordinary body of public administration control, outside the normal procedures of challenging it.

In the Romanian legal system, by the fact that the institution of Ombudsman was assimilated under the form of People's Advocate, Romania joined the category of countries endowed with increased responsibilities in protecting the rights and freedoms of citizens, as an additional guarantee of compliance with the requirements that derive from the democratic character of the rule of law. Another conclusion that emerges from the analysis is that, both in terms of image and of effectiveness, in Romania, People's Advocate is a single-member institution, the three successive Ombudsmen fully leaving their personal touch on the function of the institution.

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The Disciplinary Responsibility – A Form of Judicial Responsibility

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Abstract
Disciplinary responsibility represents a form of judicial responsibility specific to the labor law, containing the ensemble of the legal norms that define disciplinary deviations, establish the sanctions and regulate the background and procedural conditions for their application.
Being specific to the work relation, the disciplinary responsibility occurs whenever an employed person violates the obligation to respect labor discipline. This tipe of responsibility has a contractual nature, a strictly personal character, exercising sanctioning, preventive and educational functions.
Keywords*: disciplinary responsibility, labor discipline, disciplinary deviation, the objective side, the subjective side*

Labor Discipline – Characteristic Notions And Features

The labor discipline exclusively regards the social work relations being an objective, necessary and indispensable condition of activity developement in every institution. It can be defined as „the necessary order within the execution of the social labor relation and within a determined collective, resulted from the respecting of some rules or norms of conduct by the ones that compose the collective that ensure the efficient developement of the labor process" [1, 559].

In virtue of the subordination relation, the employee must respect both the general labor obligations provided by the normative acts in the collective labor agreement, the regulation of organisation and functioning or the regulation of internal order and the measures and/or the dispositions given by the employer, through written or verbal orders, during the exercise of his coordination, guidance and control attributions [3, 463]. In this respect, within the collective labor agreement on a national level of the years 2007 – 2010 there is provided that: „the signatory union confedereations acknowledge the right of the empployers to establish, within law conditions, the disciplinary or patrimonial responsibility of the employees who are guilty of violating the norms of labor discipline or who prejudice the indtitution" (art. 95).

Emphasizing the importance of the obligation to respect labor discipline, The Labor Code stated it in art. 39 align. 2. Letter b as a distinct obligation of the employees. From a judicial point of view the labor discipline can be characterised as one of the general

principles of the labor relations regulation, being a system of norms that regulate the employees' behaviour during the developement of their activity.

From a subjective point of view (of the employee) it is appreciated that the labor discipline is a syntesis judicial obligation that summarizes the totality of obligations assumed by closing the individual labor agreement, since it is a general obligation that does not accept any exception thus being mandatory for every employee [4, 661]. Likewise, since it is an obligation that occurs after closing a labor agreement it can be said that it is an obligation of contractual nature.

a. Disciplinary Responsibility. Notions and Characterization

Being specific to the labor relation the disciplinary responsibility occurs whenever the employed person violates, by guiltly committed actions, the obligation to respect labor discipline.

Disciplinary responsibility requires the cumulative meeting of the following conditions:

- the existence of some deviations from the labor obligations of the employee, including the violation of the conduct norms;
- the employee's action is guiltly committed;
- Through his action the employee has prejudiced the order necessary for a good activity developement within the institution.

According to art. 263, align. 1 of the Labor Code, „ the employer disposes of the disciplinary prerogative, having the right to apply, according to law, disciplinary sanctions to his employees whenever he pbserves that they have commited a disciplinary deviation". Thus, the disciplinary deviation constitutes the necessary sufficient condition of triggering the discplinary responsibility of the employees.

In conclusion, disciplinary responsibility is a form of judicial responsibility [2, 81] specific to the labor law containing the ensemble of the legal norms that define the disciplinary deviations, establish sanctions and regulate the background and procedural conditions for their application [4, 466].

Essentially, the disciplinary responsibility is characterized by the following features:

- it is of contractual nature since the closure of the labor agreement has as effect the hierarchical subordination [4, 663] as an objective condition of the labor organisation and efficiency representing at the same time the hierachical ground of authorising the employer to apply disciplinary sanctions; from the closure of the labor agreement alone there is issued the obligation of the employee to respect every rule that sets the labor discipline;
- it exercises a triple function : sanctioniong, preventive and educational, as it protects and reestablishes the internal order of the institution when it has been violated;
- it has a strictly personal character, responsibility for the actions of other or giving it to the heirs not being possible [1, 562];
- it is transposed in a material or moral restraint, according to the gravity of the committed deviation, in order to prevent the sanctioned person to committ other deviations in the future; by this it is distinguished from the patrimonial responsibility that mainly has a reparatory function;
- it protects the internal order of the certain institution; from here there is also issued the more reduced social danger of the disciplinary deviation as against other actions that affect larger social relations, general interests, such as contraventions and offenses;
- It is a form of responsibility independent from all the other forms of the judicial responsibility.

b. The Disciplinary Deviation

In the labor law the ground of disciplinary responsibility is constituted by the disciplinary deviation. According to the Labor Code (art. 263, align. 2) „the disciplinary deviation is a fact related to labor and consists of an action or inaction guiltly committed by the employee, through which he has violated the legal norms, the internal regulation, the applicable individual or collective labor agreement, the legal orders and dispositions of the hierachical leaders".

The definition of the disciplinary deviation provided in the Status of the public servants (Law 188/1999, art.77, align.1) is similar: " the guiltly violation by the public

servants of the duties of their public function and of the norms of professional and civic conduct provided by law, is a disciplinary deviation and triggers their disciplinary responsibility".

It is a prerogative of the employer to implicitly determine the committing of a disciplinary deviation by establishing the job duties of the employees. Also, the employer will establish if the constitutive elements of the disciplinary deviation are met, namely:

- the object of the deviation
- the objective side
- the subject of the deviation
- the subjective side

The object of the disciplinary deviation, in fact the social values violated by committing a deviation, is constituted by the labor relations, the order and discipline necessary at the workplace. Essentially, they imply the execution of the job duties as well as respecting the conduct norms. By job duties it is understood the totality of duties of every employee,based on the labor agreement, on the law provisions and on all the decisions taken at the level of the institution [5, 153].

The objective side represents the action that is not in accordance with the job duties assumed by the employee, committed by him, through which he affects the labor relation. Besides, the employer has the obligation to draw up the Internal Regulation that wil contain several cathegories of dispositions amongst which there are „concrete rules regarding the labor discipline within the institution", „disciplinary deviations and applicable sanctions", rules regarding the respecting of the principle of not discriminating and of eliminating any form of dignity violation", „the rights and obligations of the employer and the employees" [6, Art. 258, lit. b,c,d,e,f].

The subject of the disciplinary deviation is always an individual, as a qualified subject, respectively an employee of an employer. The discipline being unique the obligation to respect it is both of the dettached or delegated personnel and of the pupils and students that practice at that work place [4, 666].

The subjective side is represented by the guilt as a conscious and deliberate attitude of the guilty person towards his action and its consequences. According to the forms and the degrees of guilt stated in the Penal Code the deviations can be

intentionally committed (directly or indirectly) or committed due to fault (out of carelessness or recklessness) [7, 92-97]. Within the disciplinary responsibility the guilt degree is one of the criteria used to establish, to individualize the sanction.

The disciplinary responsibility does not operate in some situations that exclude the illicit character of the action, such as : self – defense, necessity status, physical restraint, moral restraint, accidental case, major force, error of fact, execution of a job order legally issued. These are causes of relief of the disciplinary responsibility (non – responsibility) [1, 567].

c. Disciplinary Sanctions

The Labor Code provides expressly and limitatively the sanctions that the employer can apply to the employee whocommitts a diusciplinary deviation. These sanctions can be applied only in the quantum andf period established by law. According to art. 264, align.1 of the Labor Code they are the following:

- the written warning;
- suspending the individual labor agreement on a period that cannot exceed 10 work days;
- demoting in function, while giving the proper salary of the function to which the employee has been demoted for a period that cannot exceed 60 days;
- reduction of the basic salary on a period of 1-3 months by 5-10%;
- reduction of the basic salary and/or, as appropriate, of the leadership indemnity on a period of 1-3 months by 5-10%;
- Disciplinary termination of the individual labor agreement.

The disciplinary sanctions are ways of restraint provided by law having the purpose to protect the disciplinary order, the developement of the responsibility spirit for conscientiously executing the job duties and respecting the conduct norms as well as preventing the production of indisciplinary acts.

The sanctions provided by the Labor Code in art. 264 are general disciplinary sanctions, there also are special sanctions provided in the Disciplinary Statuses applicable to certain labor sectors or professions, such as: The Status of the public servants (Law 188/1999), The Status of the educational personnel (Law 128/1997), The Status of magistrates (Law 92/1992), The Status of doctors (Law 74/1995), The Status

of pharmaceutists (Law 81/1997), The Status of lawyers (Law 51/1995) and others, with the ulterior modifications and completions.

Likewise, the Labor Code provides on art. 265 that disciplinary fines are forbidden (align. 1) as well as the fact that for the same disciplinary deviation there can be applied only one sanction (align 2).

Taking into account their effects, the disciplinary sanctions can have a preponderantly moral and/or patrimonial effect, the most severe sanction being the termination of the individual labor agreement,this meaning the removal of the guilty employee from the labor colective by the unilateral will of the employer.

d. The Procedure of Applying the Disciplinary Sanctions

The disciplinary action does not have a jurisdictional sense (of contradictory judging the employee's deviation) [3, 471]. The establishment of the disciplinary deviation is the result of an analysis made by the employer, frequently named in practice disciplinary investigation. The employer establishes the applicable disciplinary sanction in relation to the gravity of the disciplinary deviation committed by the employee, taking into account the following elements [6, Art. 266]:

- thecircumstances in which the act was committed;
- the degree of guilt of the employee;
- the consequences of the disciplinary deviation;
- the general conduct at work of the employee;
- the possible disciplinary sanctions previously suffered by the employee.

There are distinguished the following stages of the disciplinary actions [4, 156]:

- informing the competent organ about committing a deviation;
- the investigation of the action and the establishment of the committing of the deviation;
- the application of the disciplinary sanction;
- the communication of the sanctioning decision.

The New Labor Code has included in art. 267 explicit provisions refering to the procedure of the preliminary disciplinary investigation. Thus, the employee will be summoned in a written form by the person authorized by the employer to make the investigation,stating the object, date, time andplace of the meeting. „During the

investigation the employee has the right to formulate and sustain all the defense in his favour and togive to the person authorized to make the investigation all theevidence and reasons he thinks necessary as well as theright to be assisted, at his request, by a representative of the union he is a part of" (art. 267 align 4 of the Labor Code).

If the provisions of the Labor Code regarding the preliminary disciplinary investigation are not respected the sanctioning decision is stricken by absolute nulity. Only if the employee does not come to the meeting, without any objective reason, the employer willhave the right to sanction him without the preliminary investigation (art. 267, align 3 of the Labor Code). Certainly, if the concerned does not come for an objective reason - such as temporary incapacity to work – he will not be sanctioned. In this situation, the individual labor agreement is suspended and the terms of sanction application are also suspended. [4, 680]

The disciplinary sanctions must be objectified in writing (decision), a unilateral act of the employer. According to art. 268 align 2 of the Labor Code under the sanction of absolute nullity, the decision must contain:

- the description of the action that constitutes a disciplinary deviation;
- the statement of the provisions of the personal status, internal regulation or the applicable collective labor agreement that were violated by the employee;
- the reasons why the defenses formulated by the employee have been eliminated or, as appropriate, the reasons why the investigation has not been made;
- the lawful ground based on which the disciplinary sanction is applied;
- the term when the sanction can be contested;
- the authorised instance where the sanction can be contested.

The employer disposes of the application of the disciplinary sanction on a term of 30 days from the moment when he aknowledged the committing of the disciplinary deviation but not later than 6 months from the moment when the action has been committed. The 30 day term is a prescription term that can be interrupted or suspended and the 6 month term is a cancellation term after which the employee can no longer be

disciplinary sanctioned. All the procedural stages regarding the application of the sanction must be integrally consumed within the 6 month term. [5, 157]

For producin effects, the sanctioning decision must be communicated to the employee in maximum 5 days from the date of its emission (art. 268, align 3 of the Labor Code), personally, with reception signature or, in case of refusal of the reception, by registered letter to the residence communicated by the employer.

Due to the fact that it is not a jurisdictional act, the sanctioning decision is revocable [1, 584].

According to the Labor Code the sanctioning decision can be contested by the employee at the competent courts within 30 days from the date of communication (art. 268, align 5).

Against the application of any disciplinary sanction the law provides the possibility to exercise an appeal by complaint with a guarantee of the defence right of the employee. But the exercise of the appeal by the sanctioned person does not suspend the execution of the disciplinary sanction [3, 475].

A controversial problem regards the possibility of the labor jurisdiction organ to replace the applied sanction with a lighter one when he observes that the one concerned has committed a disciplinary deviation but with a lighter gravity that did not justify the maximum sanction. This controverse is generated by a gap in the labor legislation that does not state the possible solutions in judging appeals. Thus, the practice is not unitary: while some instances consider that replacing a severe situation with a lighter one is possible, others appreciate that there is no such possibility, motivated by the fact that the application of the disciplinary sanctions is the exclusive attribute of the employer. [4, 685, 688]

Therefore, the labor legislation obligates the employees to respect the order and discipline at the place where they develop their activity. By closing the labor agreement the employee is to subject himself to the discipline imposed at the workplace thus being established a specific subordination between employee and his employer. Ensuring the labor disciplin represents an indispensable condition for accomplishing any activities developed by an economic agent or any other judicial person of other nature.

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The ("Economic") Crisis And Human Rights

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Abstract:
The paper' s aim is to identify the possible effects of the financial crisis that influenced the human rights area in Europe and in the whole world.
The main purpose of the paper is to show the financial crisis could act both as a catalyst and a disruptive for human rights. We try to focus on the fact that most of the governemnts of the Member States of the European Union usually use the crisis as an apanage in order to breach fundamental rights as the right to education, the right to health. In order to stop the possible abuses, we must identify what is realy a crisis on an objective and case by case matter, taking into account boths the past and future of the State in question.
Keywords: *Economic crisis, social and economical rights, (protection of) human rights, national policy on taxation.*

1. Introduction

Human rights are one of the most sensitive subject for any developing or formed society. When it comes to how human rights or the protection of human rights was born, we can easily state that they were born in time of crisis. For instance, one of the first interests on human rights came to light soon after the World Wars, especially during the second one, when human rights were ignored and the human rase suffered from abusses and violences. Those violences and the opression of the human rights were one of the main reasons for the European Convention of Human Rights.[1]

The Universal Declaration of Human Rights[2] Preamble's invocation of 'barbarous acts' operates in concert with the immediacy of the following clause that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.

We can clearly see that at the origin of the international human rights protection was a crisis, the response to the violations acting like an "aspirational reaction" [3]. This is how human rights became the lingua franca of international law [4], the only language that every state should understand and the only one that truly unifies.

1. The definition of the word crisis

As for the understanding of the term we used to define the situation of the 1950-crisis, we begin by saying that there is not an accurate definition of the notion. Firstly, we state that by defining a term, you obtain the opposite of clarifying [5] Secondly, the definition depend on how we see the crisis. Either we consider that the crisis is a constructive event or a distructive one. The word crisis had specific connotations in ancient greek law, tehnology and medicine, deriving from the greek verb krino, meaning to decide, to judge and to separate.[6] In the legal language it meant arriving to a decision, in medical language it meant the determination of the progression of illness or wheatear it is possible to relapse. Just like any legal or juridical concept, the "crisis" evolved with time and ended up being considered to be "an inescapable pressure for action"[7], a critical time requiring a decisive intervention.[8] Even if there are some intempts of defining the crisis itself, we consider that is very difficult to pin down it's meaning because it was considered to be both "a moment of objective contradiction, yet subjective intervention".[9] Crisis can also be seen as a catalyst or as distraction[10], those two being in fact the positive results of the crisis and the side effects.

2.1 Crisis As A Catalyst.

We can refer to crisis as a catalyst when we consider that both the apparition and the evolution of human rights are a consequence of those many moment when one or other type of crisis was a menace for the human being. For instance, we had the Second World War when the human dignity and integrity suffered and we have the current economic crisis that has an important effect on the social and economic rights. But, what we must take into account is that the current situation has not fully developed and we cannot know at the moment whether the economic crisis will be a catalyst or a disruption for human rights in general and for economical and social right in particular.

2.2 Crisis As A Disruption.

In this paragraph we refer especially at the economic crisis that already had a huge impact on human rights both at a national or international level. For instance, due to the crisi, the national budgets for two of the most important Ministers: the education and the health are lower than ever and this situation could have serious side effects on a long term analyze. And those are only some random examples.

We will truly know the kind of crisis was the economic crisis only after we will be able to identify the long term effects that were produced in the human rights protection. Just like any judicial concept, the economical crisis is an evolutive concept and only with the passing of time we will be able to conclude that the economical crisis was a catalyst and helped to provide a better protection for human rights-and we refer especially to the social and economical rights, or it was a disruption and his main effect was the infringement of this category of rights.

3. The impact of the economic crisis on national policy on taxation

Recently, the European Court of Human Rights, gave its ruling in the Grande Stevens c. Italy case.

The matter of the case was the following: the Court was asked to verify if the principle ne bis in idem was infringed by the state of Italy. In fact, the applicants were accused of spreading unreal information to the press by the bias of a press release that caused the collapse of the price of some private society's shares. This is why the applicants were subject of both some administrative penalties and a criminal procedure. We won't insist on the particular aspects of the case, but we will stress out that that the main plot here is that, according to the 7th Protocol of the European Convention of human rights no one can be subject of two penal sanctions. The Italian government argued that the administrative procedure and penalties had not had a criminal character, but only an administrative one, due to the specific category they were put in by the national law. The ruling of the Court was in accordance with its previous jurisprudence: it ruled that it doesn't matter the name stated by the national law for the punishment, but it's nature and effects, the administrative proceeding applied by the Italian government

being in this regard a penal one. Concluding, the Court found an alleged violation of the applicant's right to not be subject of two criminal procedures.

In my opinion, in this ruling we can find another primary subject as already stated in a comment of the case.[11] As an effect of the financial crisis, the Member State of the European Union were forced to change their financial legislation in order to improve and to increase their budgets. This is way so many of the European Union Member States augmented the sanctions applied by the administrative institutions and organs. For instance, in France, the Agence Monetaire Francais has the power to give sanctions with a 100 000 000 euros limit.

This is how the State eludes its role of human rights protector and starts to infringe human rights causing to see the financial crisis as a disruption, but not a catalyst.

What does matter is that we must clearly identify what is a crisis in order to impeach the State to use a special policy for collecting more income for the budget using the excuse of the financial crisis. In the end, what we really need to do is to answer the following questions on a case by case matter: who has the power to identify the crisis and what are the main characteristic of a financial crisis?

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The Conceptual Analysis of the Professional Ethics

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Abstract:
Professional ethics is the practice of a profession morally analysed having as main purpose overcoming the dilemmatic situations making the developed activity more efficient. Their official recognition of a professional ethics, respectively the elaboration and adoption of a moral and professional conduct code imposes respecting the ethical rules, being provided sanctions in the case of their violation.
The present essay is based on the professional ethics concept. Within it there have been treated the relation between ethics and morality and the notions of profession and conceptual professionalism of professional ethics as well as the ethics in public administration.
Keywords: *professional ethics, the relation between ethics and morality, profession, professionalism, professional codes*

Ethics is indispensable to any profession, offering solutions where the judicial norms are not precise or do not expressly provide the moral-conflict situations in which a profession's in a certain domain is found. Thus, professional ethics is of great importance.

Nowadays the public function and the public servant are more and more discussed as the concepts became the premises of integrating in the European Union. For this purpose the National Agency of the Public Servants has been founded, a professional, stable and politically neutral corpus and organ of the central public administration under the Ministry of Administration and Interior that has elaborated the Deontological Code of the Public Servants.

MORALITY AND ETHICS

Morality is an ensemble of judgements regarding the distinction between right and wrong that has the purpose to guide the human conduct [1, 10]. Morality has a double meaning:

- as a universal social fact, as it is shown by the latin etymology (mores – moravuri); every society knows an ensemble of conduct and value rules [2, 4];
- as a result of a general experience that aims to institute justice, the punishment of the criminals and repairing the caused damages [1, 5].

A moral judgement consists in comparing what exists (the imperfect reality) with what it should be (the ideal of goodness) [1, 45]. Therefore, morality implies the renunciation to satisfying our own needs in favour of the ideal exigences of virtue. Ethics (Greek ethos – manners) is the theory of morality. If morality pleads absolute truth, ethics pleads different positions related to the issues of moral choice. Narrowly, ethics means knowing what is worth desiring. Broadly, ethics studies the general standards applicable to most people during most of their lives [3, 11].

The purpose of ethics is to help people decide what is best for each of them, on what criteria to choose and what the moral reasons of their activities are. In other words, ethics implies the rational definition of the rules of moral evaluation of the collective choices, of laws, institutions, professional and civic conduct (especially the conduct of governors, politicians and public managers including the public servants) as well as emphasizing the ways in which institutions and organisations can facilitate the liberty and accomplishment of people.

In the civic, professional and politic life ethics occurs whenever there are conflicts of roles (conflict between private life and career, between the professional status and the desires of the close people), when there are social changes (they determine the change of norms and values), in the situation of social pluralism (when people chose what is best for them).

PROFESSION AND PROFESSIONALISM

The profession represents an occupation with permanent character of a person exercised based on a practical and theoretical training in a domain. A profession implies the knowledge of the theory in a certain domain and a long term and thorough training. Every profession has the purpose to satisfy certain social needs.

The standards on initiation, maintaining and promotion of a person in the professional competence are established by the professional corpus. The members of a professional group are in collegial relations regulated by an ethic code. In the case of professional offence the roughest measure is the withdrawal of the practice license (elimination from the professional group).

Professionalism combines the common beliefs of a profession helping the growth of identity and self esteem (the profession becomes an element of the personal identity and of the identity with the other members of the professional group).

Professionalism means trusting the autonomy of professional decisions and the capacity of self – regulation and collegial maintenance of professional standards. An essential characteristic of professionalism is the one according to which to work for the benefit of the client is a moral obligation but it is not about an exagerate moral implication. Empathy is allowed but arbitrary and preferential treatments are not.

PROFESSIONAL ETHICS

For professionals there are specific laws and regulations. Part from the legal norms, ethic norms are necessary as well. These mainly target professional authority, paternalist practices and the rights of the clients.

Professional ethics represents an ensemble of rules regarding the rights and obligations of the members of a professional group, the professional practices, criticising and sanctioning the professional malpractice [4, 32].

Professional ethics is an intermediate between the philosophy of morality and particular ethics of different profession categories [3, 11] and is characterized by reflexivity. If the law usually acts after it has been violated, professional ethics acts preventively and this is the fundamental reason why it has been introduced. There are authors who deny the existence of professional ethics sustaining that there are only ethics applicable to different professions.

Several types of ethics are known:

— For complicated situations (it is not based on codes that are considered to have a strong idealist character, it is focused on the negative cases: in politics on cynism and compromise, in journalism on misinformation, in administration on corruption etc. ; the pozitive aspect of focusing on negative cases is the virtues that the criticising of malpractice in a domain offers : this type of ethics is prefered by mass-media when journalists have the conviction that everything that is not scandalous is not news).

— The standard approach (is focused on the features of professional practice analised from the poiunt of view of the rights and obligations – for example doctors and social workers have a greater duty to help others, theparliamentary have the duty to establish cohabitation laws, governors have the duty to divide the public resources – it is necessary to the strategic developement of a profession.

CENTRAL CONCEPTS OF THE PROFESSIONAL ETHICS

In professional ethics the following concepts are used:

— Autonomy by whic there is understood the possibility of chosing the course of our actions in virtue of having discernment and to know our interests.

— Benevolence (in almost all professions it is required to honour not only the duty of the job description but also you have to care about the collective you are working in, to defend the reputation of the institution).

— paternalism (according to this concept there are people who are vulnerable, that donot have the strenght or the resources to follow their purposes or people that do not have enough discernment; it reffers to the recognition of the professional authority).

— Rights and rightful actions (it reffers to professions that contain the rights of those affected by them : the rights of pacients, clients, contributors, pupils or the ones engaged in professions – the union rights) [5, 24].

ETHICAL FORMALIZATION AND PROFESSIONAL CODES

By ethic formalization we understand the elaboration of the ethic codes for different professions. The elaboration of the ethic codes is realised for covering the gaps between the frame values of a community, namely professional groups and law.

An ethic code is an example of conduct, protecting the organization from opportunist and dishonest conduct. Simultaneously an ethic code is a moral agreement between the members of an institution as well as between them and the beneficiaries of the institution’s activities and is regarded as a frame of reference in decision orientation [4, 56].

The creation of the ethic climate means the creation of a climate where actions are perceived as being just or the correlation of purely contractual actions with responsibility and trust [3, 96]. Thus, the respect for the institution grows along with its reputation and the devotion of the collaborators. To have authority, an ethic code must be tacitly or explicitly accepted by all members of the professional group. There are professions where this consent is expressed when entering the profession otherwise the certain person is not accepted.

ETHICS IN PUBLIC ADMINISTRATION

Ethics in public administration is of great importance. To sustain that public administration only deals with the technical problems of governance or to ignore the fact that public servants are people with their own values, with different educations and that professional identity becomes a component of the personal identity is a serious error. The predominant role of ethics in public administration results from the fact that if a bureaucracy is no longer ethical meaning that people no longer perceive it as being just, rightful and fair, the beneficiaries of its services no longer trust the governance and the political system. Maintaining the public trust is an essential condition of democracy.

By ethics in public administration whose main idea is what is best or better for public, there must be promoted the greatest integrity, liberty, equality and political trust. If political people assume leadership of the society on a determined period, the public administration assumes the aspect of lasting developement of the society.

Ethics and law

The state of law implies the rule of law. In a democracy the law represent the public will and the administration must ensure the legal rights and responsibilities. The public servants are not only mere law executors but they also participate to the process of law projection and in the stage of law projection public servants do not show only what it is allowed. The law targets the future and the future is not certain, there can occur social movements for civil rights that the legislator did not foresee. In the stage of law application the public servants can be considered public managers in a bureaucracy whose activity is limited by law [3, 91]. The law is the one that protects the public servants against arbitrary and the pressure of the political parties.

The Deontological Code of Public Servants

Elaborated by the National Agency of the Public Servants, specialized organ of the central public administration, the Deontological Code of the Public Servants regulates the general norms of moral and professional conduct of the public servants also having an obligatory character for people that temporary have a public function. It is amed the growth of the public service quality, a better administration in accomplishing the public interest, the elimination of bureaucracy and corruption.

The basic principles of the professional and moral conduct of a person that has a public function are:

- law supremacy (public servants must respect the Constitution and the laws of the country);
- the priority of the public interest (the public interest must be above all);
- the equality of treatment of the citizens in front of the authority or the public institution (the application of the same treatment in identical situation);
- professionalsim (public servants have the duty to execute the job duties with responsibility, competence, efficiency, correctness and conscientiousness);
- impartiality and independence (in exercising their function all public servants have the obligation to have an objective attitude, neutral towards any political,economic or any other nature interest);
- integrity (according to this principle the public servants must not solicit or accept, directly or indirectly, for them or for others, an advantage or benefit considering the public function they have or to abuse of their function);
- Freedom of thought and expression (public servants can express and substantiate their opinions respecting the lawful order).

This code of conduct also consecrates the principle of loyalty of the public servants towards the law (applying the legal provisions respecting their attributions and the professional ethics rules) and their loyalty towards the public institutions and authorities (defending the prestige of the public authority or institution where the public

servant develops his activity and refraining from any action that could prejudice the image or legal interests of the public authority or institution).

The public servants have the duty to have a conduct based on respect, good – faith, correctness and courtesy both in their relations with the personnel of the public institution or authority and with judicial persons or individuals.

The National Agency of the Public Servants coordinates and controls the application of the norms provided by this code of conduct. Other attributions of the agency refer to receiving petitions and notifications regarding the violation of the code provisions (while respecting confidentiality regarding the identity of the person who made the notification), recommending solutions for the notified causes, collaboration with the nongovernmental organisations that promote and defend the legitimate interests of the citizens in relation with the public servants, elaborating studies and research regarding the respecting of the code norms.

The Importance of Ethics in Public Administration

In the ethic for public life, trust is a central concept. The administrative decisions that must be executed by the public servants are taken by the people invested with public trust. The public institutions develop their activity in a political environment where the values and purposes are conflictual and ethics becomes a guide of values for overcoming conflicts. This are founded on values such as authority, rationality, efficiency, and the public servants must practice and maintain values like individual liberty, equality, justice, respect for the person's dignity [4, 54].

Public servants search for strategies and ways to practice public politics. They can be in dramatic situations (when the resources are poor and choosing a strategy can lead to the extinction of another strategy) or in tragic situations (when the distribution of resources is a life or death situation). There can also be critical situations when more groups of interests are involved that have very different requests. In these situations ethics is the only way to break the deadlock.

The foundation of the National Agency of the Public Servants as well as elaborating and adopting the Deontological Code of the Public Servants have constituted the first steps in the growth of the quality of the Romanian administrative

system [6, 93], the improvement of the relationship between administration and civil society, in the implementation of the communitary acquis and in the integration in the European Union.

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Protecting European Patients Againsta the Entry Falsified Medicinal Products into the Legal Supply Chain[*]

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Abstract
Examining the compatibility with the Community law of the conditions for the retail of medicinal products, the Court of Justice of the European Union recognized the particular nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods.The Court of Justice also said that the people's health and life rank foremost among the values and interests protected by the TFEU and that Member States are responsible for deciding on the level of public health protection they wish to provide and the measures to be implemented in order to achieve this level.In this context, this article examines the evolution of the legislative process regulating the internal market for medicinal products in order to ensure a high level of protection of public health against falsified medicines and to present the legislative initiatives that have been taken at EU level taking account of new risk profiles, measures meant to ensure, at the same time, the functioning of the internal market of medicinal products.
This article aims to address consumers' right to have access to safe, effective, quality and innovative medicinal products as a right of the European patient.Ensuring the free movement of medicinal products on the EU market must not violate or restrict this fundamental right of thepatient.
The falsification of medicines is a global problem and requires increased and effective international coordination and cooperation to ensure the effectiveness of the strategies to combat counterfeiting, especially in relation to the sale of such products on the Internet.In this respect, the European Commission and the Member States have to cooperate closely and to support the ongoing work of international fora on this subject, such as the Council of Europe, Europol and the UN.In addition, in close cooperation with the Member States, the Commission cooperates with the competent authorities of third countries to effectively combat the trade in counterfeit drugs globally.
Keywords: *patient rights, European legislation, the European Union, counterfeit medicinal products, public health, legislative initiatives, internal market, legal supply chain*

Introduction

Before establishing a Community code on medicinal products for human use [1], the trade with medicinal products within the European Union was hindered by the disparities between certain national provisions, which directly affected the functioning of the internal market.To reduce the disparities in the field of medicinal products for human use was necessary to draw near the relevant laws, establishing rules for monitoring medicinal products and specifying the obligations of the competent authorities of the Member States to ensure compliance with the legal requirements.

[*] **This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.**

Although the main objective of rules governing the production, distribution and use of medicinal products must be to safeguard public health, however, the means by which this goal is achieved, should not prevent the development of the pharmaceutical industry or of the trade in medicinal products in the European Union.

Considering its importance for health services, the pharmaceutical sector is subject to strict regulations.The existing regulatory framework in this sector should not include unnecessary regulatory constraints that restrict and limit competition.

The complex mechanisms of the pharmaceutical sector are subject to constant and careful analysis both at the level of the European Commission and of the Competition Council. Overseeing the rules regulating and governing the freedom of competition on the pharmaceutical market and the direct and clear intervention if violations of the regulatory framework are found guarantees the existence of a competitive environment in the pharmaceutical sector in the European Union.As mentioned above, the regulatory framework in which the business operation in the pharmaceutical sector functions must not contain constraints.

The pharmaceutical sector is vital to the health of European citizens, who must have access to innovative, safe and affordable medicinal products. The functioning of the pharmaceutical sector at Community level is based on four dimensions: regulation, integration, competition and innovation.

In terms of regulation, the EU level concerns in terms of competition in the pharmaceutical market pay particular attention to the rules on authorization and marketing, on pricing and reimbursement of medicinal products and to those relating to patents.

The patient's right to have access to innovative medicinal products

At EU level there are legislative initiatives designed to create a business environment that promotes research, innovation and the competitiveness of the pharmaceutical sector.

The pharmaceutical industry is currently experiencing an important phase of consolidation.This includes, on the one hand, an increasing concentration among (large) innovative firms and the acquisition of biotech companies.

On the other hand, the generic landscape is undergoing substantial changes in the form of the acquisitions of generic companies by originator companies and through mergers and the acquisition activities within the generic industry.

On average, consumers do not have access to generic medicines earlier than seven months after the date on which innovative medicines have lost exclusivity. This is due, in part, to pharmaceutical companies that use various techniques to extend the commercial life cycle of their products.

When the original products compete with generic medicines, prices go down and become accessible to a larger number of patients. In some cases, prices may decrease considerably.

The European Commission aims to provide safe, effective and affordable medicinal products for patients in Europe and to create, at the same time, a business environment that stimulates research, encourages significant innovation and supports the competitiveness of the industry.

Directive 2001/83/EC has been an important step in achieving the objective of free movement of medicines.Since the adoption of the Community code relating to medicinal products for human use, given the experience, especially by the Committee for Proprietary Medicinal Products additional measures have been necessary in order to cancel any remaining barriers to the free movement of patented drugs.

In 2005 came into force significant changes in the pharmaceutical regulatory framework, which had the objective of facilitating the market entry of generic medicines [2], for example, the introduction of so-called Bolar provisions [3].Some new rules (namely the new harmonized rules on data and market exclusivity) basically entered into force only in 2013 because the new protection periods were applied for the innovative product for which authorization was applied for and approved after these rules became effective in 2005.

Any action by public authorities in the pharmaceutical sector should aim at creating a competitive environment to ensure the access to medicinal products for European citizens to innovative, safe and affordable medicinal products, without unnecessary delay.In this respect, both competition law enforcement and regulatory

measures can improve market performance for the benefit of consumers and should be considered in this regard.

To facilitate the movement of medicinal products and to prevent the duplication of controls from one Member State to another, the minimum requirements for the manufacture and imports from third countries were established, as well as the conditions for granting their authorization.

Since many operations involving the wholesale distribution of medicinal products for human use may be carried out simultaneously in several Member States, it is necessary to exercise control over the entire chain of distribution of medicinal products, from their manufacture or import into the Community to their supply to the public.This ensures that the storage, transport and handling of these products is carried out appropriately.The measures taken in this respect facilitated the withdrawal of inadequate products from the market and allowed to take more effective measures against counterfeit products.

Although all persons involved in the wholesale distribution of medicinal products must have a special permit, pharmacists and persons authorized to supply medicinal products to the public and which limit themselves to this activity are exempt from obtaining this authorization.However, controlling the whole medicinal products distribution chain and avoiding the entry into the legal supply chain of counterfeit medicines requires that pharmacists and persons authorized to supply medicinal products to the public keep records showing transactions in the received products.

The parallel trade in products is a legal form of trade on the internal market.It is „parallel” as it involves products that are essentially similar to products marketed through the sales networks of original producers or suppliers, but which takes place outside and often parallel to those networks.

Parallel trade is a result of differences in prices between pharmaceutical products [4], for example, when Member States establish or otherwise control the price of products sold on their markets.In principle, parallel trade creates healthy competition and price decreases for consumers and is a direct consequence of the development of the internal market which guarantees the free movement of goods.

Although the safety and the first marketing of medicines are regulated by EU law, the principles of legality of parallel trade in these products have been established as a result of decisions of the Court under the provisions of the Treaty on the free movement of goods [5].

Regarding medication, when necessary information to protect public health is already available to the competent authorities of the Member State of destination as a result of first placing on the market of a product in that Member State, a parallel imported product is subject to licenses granted on the basis of a proportionally „simplified"procedure (as opposed to a procedure for granting marketing authorization), if the imported product has been granted a marketing authorization in the Member State of origin and whether the imported product is essentially similar to a product which has received marketing authorization in the Member State of destination.

In an attempt to balance the rights of parallel traders and the need to maintain public interest objectives such as public health, the Commission has introduced guidelines on parallel imports in the *Commission Communication on parallel imports of proprietary medicinal products for which marketing authorizations have already been granted* (2003) [6].

In addition, we must distinguish between parallel trade and reimport.For example, in the case of pharmaceutical products, re-importation designates transactions through which are imported medicinal products from a Member State in which they are authorized, after having been previously obtained by a pharmacy in another Member State from a wholesaler in the Member State of import.

In this regard, the Court held that a product manufactured in a Member State which is exported and then reimported into the concerned Member State is an imported product in the same way as a product manufactured in another Member State [7]. The Court noted, however, that these findings do not apply if it is found that such products were exported solely for the purpose of re-importation in order to avoid legislation such as that at issue [8].

The risks of the entering of counterfeit medicinal products in the legal supply chain

The field of medicinal products is one of the most regulated areas of activity within the European Union, with about 80 000 pages of EU regulations applicable to medicinal products for human use.

When examining the compatibility with Community law of the conditions for the retail supply of medicinal products, the the Court of Justice recognized the specific nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods.The Court also stated that the health and life of humans rank foremost among the values and interests protected by the TFEU and that Member States are responsible for deciding on the level of public health protection they wish to provide and the measures to be implemented to achieve this level.

Taking account of new risk profiles, legislative initiatives which have been taken at EU level include measures to ensure, at the same time, the internal market of medicines.

The counterfeiting of medicines is a global problem and requires increased and effective international coordination and cooperation to ensure the effectiveness of strategies to combat counterfeiting, especially in relation to the sale of such products on the Internet.In this respect, the European Commission and Member States have to cooperate closely and support ongoing work in international fora on this subject, such as the Council of Europe, Europol and the UN.In addition, in close cooperation with the Member States, the Commission cooperates with the competent authorities of third countries to effectively combat trade in counterfeit drugs globally.

The threat that falsified medicines pose to public health is also recognized by the World Health Organization (WHO), which has established the International Medical Products Anti-Counterfeiting Taskforce ("IMPACT").IMPACT has developed the Principles and Elements for National Legislation against Counterfeit Medical Products, which were endorsed by the IMPACT General Meeting in Lisbon on 12 December 2007. The European Union participated actively in IMPACT.

An impact assessment conducted in 2008 by the European Commission brought before the authorities alarming elements regarding falsified medicinal products entering the legal supply chain.

The European Commission held between 11 March 2008 - 9 May 2008 a public consultation on*"Key ideas for better protection of patients against the risk of counterfeit medicines".*In response to this consultation, the Commission received 128 contributions from stakeholders.Of these, 103 were from industry (pharmaceutical industry, distributors, suppliers of active ingredients, consultants), 15 from citizens, patients (patient groups), and academics, and 10 from health professionals, pharmacists and health insurers.

In terms of regions, of the 128 stakeholder contributions, 20 contributions were received from EU-wide associations, 30 from Italy, 14 from the UK, 9 from Germany, 4 each from France and Switzerland, 3 each from Poland, Ireland and the Netherlands, 2 each from Malta and Denmark, 1 each from Austria, Sweden and Spain and 18 from third countries.

13 stakeholder contributions were from global associations or could not be attributed to the regions.Thirty national and regional authorities profited from this stakeholder consultation to inform the Commission about their views on the matter.The respondents unanimously welcomed the initiative, stressing the need for urgent and decisive measures and the fact that the issue of counterfeit medicines is in exponential growth.

The "multilayered" approach the Commission, based on an identification of the various possible points of entry for falsified medicines, has also been well received.A summary of the responses was published on the Commission's website [9].

The above analysis [10] has highlighted the increasing number of falsified medicines seized in customs (2.7 million in 2006 to 2.5 million in 2007, representing an increase of 384% compared to 2005), the counterfeiting with fatal effects of medicines for serious diseases (heart, cancer) and the introduction to the legal supply chain of fake drugs, including online purchase.

The European Commission estimated that annually are sold to Europe, through legal distribution circuit, 1.5 million boxes of counterfeit medicinal products.

The fact that their volume increases on average by 10-20% per year is even more worrying.With a growth rate of 10%, the number of boxes of falsified medicines in the legal distribution circuit could reach 42 million by 2020. According to other, more pessimistic estimates, the growth rate is 30%, which would bring this number to 192 million.

The standardization of European law in the field of counterfeit medicinal products

The existing provisions of Directive 2001/83/EC on the Community code relating to medicinal products for human use [11]were in some respects insufficient to address these concrete causes.Given the length of time between the proposed amendments to Directive 2001/83/EC and their effective implementation, the need for action from European Commission at the time was clear.

Considering all these alarming aspects, the European Parliament and the Council adopted Directive 2011/62 /EU on the prevention of the entry into the legal supply chain of falsified medicinal products [12].

As the stated aim of the Directive is to protect public health, it provides the legal basis for which the *counterfeiting of medicinal products is a criminal act* which deprives patients of safe and quality medical treatment.

To this end, Directive 2011/62/EU on falsified medicinal products decided upon the clear definition of some terms, the clarification of certain responsibilities and the elimination of any confusion, for the simplification of implementation. The legal document proposes relevant enforcement measures, safety aspects for medicinal products and harsh penalties, differentiated according to the degree of the crime and its effects.

Directive 2001/83/EC of the European Parliament and of the Council provides, inter alia, the rules for the manufacture, importation, marketing and wholesale distribution of medicinal products in the European Union and the rules relating to active substances.

The measures of the Directive to include the mandatory application on the packaging of medicinal products of safety features, the increased controls and inspections of factories producing active pharmaceutical substances, increasing the

strictness of distributor records, the obligation of producers and distributors to report medicinal products presumed fake, and the centralized regulation of online pharmacies.

Past experience shows that no falsified medicines reach patients only through illegal means, but also via the legal supply chain.This poses a particular threat to public health and can lead tothe distrust of patients, including in the legal supply chain.To respond to this increasing threat, Directive 2001/83/EC had to be changed.

Persons procuring, holding, storing, supplying or exporting medicinal products are allowed to operate only if they meet the requirements for obtaining a wholesale distribution authorization in accordance with Directive 2001/83/EC.

However, the distribution network of medicinal products is increasingly complex and involves many players which are not necessarily wholesale distributors as referred to in that Directive.

To ensure the reliability of the supply chain, medicines legislation should address all actors in the supply chain.This includes not only wholesale distributors, whether or not they physically handle drugs but also intermediaries who are involved in the sale or purchase of medicinal products without selling or purchasing those products themselves, and without owning and physically handling the medication.

Any actor in the supply chain who packages medicinal products must hold a manufacturing authorization.For the safety features to be effective, the manufacturing authorization holder who is not the original manufacturer of the medicinal product must be permitted to remove, replace or cover those safety features under strict conditions.

The strict conditions stated in the Directive provide appropriate mechanisms to prevent falsified medicinal productsfrom entering the supply chain, in order to protect both patients and the interests of marketing authorization holders and producers.

Manufacturing authorization holders who repackage medicinal products are liable for damages in the cases and under the conditions laid down in Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

To increase reliability in the supply chain, wholesale distributors should verify that their supplying wholesale distributors are holders of a wholesale distribution authorization.To ensure transparency, the list of wholesalers that have been established

after inspection by a competent authority of a Member State to comply with applicable Union legislation will be published in a database created at the level of the Union.

The provisions on inspections and controls of all actors involved in the manufacture and supply of medicinal products and their ingredients have been clarified and specific provisions apply to different categories of actors.These provisions do not prevent Member States from performing additional inspections, where considered appropriate.

To help ensure the functioning of existing mutual recognition agreements with third countries whose application depends on efficient and comparable inspection and enforcement throughout the Union and, also, to provide a similar level of protection of human health throughout the Union and to avoid distortions in the internal market, harmonized principles and guidelines for inspections of manufacturers and wholesale distributors of medicinal products and active substances must be strengthened.

Medicinal products can be introduced into the EU with no intention of be imported, that is with no intention of being released for free circulation.If these drugs are falsified, they pose a risk to public health in the Union.

In addition, those falsified medicinal products may reach patients in third countries.Member States should take measures to prevent the circulation of such counterfeit drugs entering the Union.

When adopting provisions supplementing this obligation on Member States to adopt the measures mentioned above, the Commission must take into account the available administrative resources and the practical implications and the need to maintain swift trade flows for legitimate medicinal products.Those provisions should be without prejudice to customs legislation, the division of powers between the Union and the Member States or to the distribution of responsibilities within Member States.

The risk assessment should consider aspects such as the price of medicines;reported previous cases of falsified medicinal products in the EU and in third countries;the implications of falsification on public health, given the specific characteristics of the products concerned;and the severity of the conditions intended to be treated.

The supply of medicinal products to the population via the internet

The illegal sale of medicinal products to the public via the Internet constitutes a serious threat to public health because in this way counterfeit drugs may reach the public.It was therefore necessary to address this threat in Directive 2011/62/EU.

In this regard, account was taken of the fact that specific conditions for the supply of medicinal products to the public have not been harmonized at EU level and, therefore, Member States may impose conditions for supplying medicinal products to the public within the Treaty on European Union (TFEU).

The Court of Justice of the European Union, analyzing the compatibility with Community law of the conditions for the supply of retail drugs, held that the Member States are responsible for deciding on the level of public health protection they wish to provide and means to be implemented to achieve this level.

The Court also stated that Member States should have discretion as regards the supply of medicinal products to the public on their territory.Given the particular risks to public health and the power given to Member States to determine the level of protection of public health, the Court has recognized that Member States may, in principle, restrict the retail sale of medicinal al products to pharmacies only.

In view of the foregoing and the provisions of the Court, Member States may impose conditions justified by the protection of public health for the retail supply of drugs sold remotely through information society services. However, those conditions should not unduly restrict the functioning of the internal market.

Without prejudice to national legislation prohibiting the remote offer for sale to the public of medicinal products subject to medical prescription via the Internet, the Member States must ensure that products are offered for sale remotely to the public by means of information society services as defined in Directive 98/34/EC [13].

For online sales of medicinal products, natural or legal person who offers the medicinal product must be authorized or have the right to provide medicinal products to the population remotely as well, in accordance with the national law of the Member State where the person concerned is established.

The Internet site offering the medicinal product should contain at least the contact details of the competent authority or the notified authority, a hyperlink to the Internet site

of the Member State of establishment andthe common logo clearly displayed on every page of the Internet site related to the remote offer for sale of medicinal products to the public.

So that the functioning of the internal market not be unduly restricted, but also for public health protection, for the retail supply of medicinal products sold online, the Directive proposes the creation of a common logo that can be recognized throughout the Union and allowing the identification oft he Member State of establishment of the person offering the medicinal products for remote sale to the public. The logo shall be clearly displayed on the Internet site offering the medicinal products for remote sale to the public.

To harmonize the functioning of the common logo, the Commission adopts implementing acts concerning the technical, electronic and cryptographic requirements for the verification of the authenticity of the common logo and the Community logo design.If necessary, these acts shall be adjusted to take account of technical and scientific progress.

Each Member State must create a website that provides information on national legislation applicable to the remote offering for sale of medicinal products to the public by means of information society services, including information that there might be differences between Member States with respect to theclassification of medicinal products and the conditions of their supply. Also, Internet sites of the Member States should provide information on the purpose of the common logo, the list of persons offering medicinal products for sale at a distance to the public by means of information society services and their website address.

This site should also provide general information on the risks related to medicinal products supplied illegally to the public via information society services, and a hyperlink to the internet site of the competent authority in that Member State.

The European Medicines Agency (EMA) created a website that provides information on the purpose of the common logo, general information on the risks related to medicinal products supplied illegally to the public via information society services, information on the European Union legislation applicable to falsified medicinal products, as well as hyperlinks to the Internet sites of the Member States. EMA website explicitly

states that websites contain information on persons authorized or entitled to remotely supply medicinal products by means of information society services in the Member States.

The population should be assisted to identify sites which are legally offering medicinal products for sale to the public remotely. To provide comprehensive information to the public, all these sites must be interconnected.

In addition, in cooperation with the European Medicines Agency and the Member States, the Commission must organize awareness campaigns to warn consumers about the risks of purchasing medicinal products from illegal sources via the Internet.

Without prejudice to Directive 2000/31/EC and the requirements of Title VII of Directive 2011/62/EU, Member States must ensure that unauthorized persons offering medicinal products for sale to the public remotely, by means of information society services, and operating on their territory, are subject to effective, proportionate and dissuasive sanctions.

The right of patients to be protected against counterfeit medicines

To prevent drugs that are suspected to present a danger to health from reaching the patient, Member States use a system that includes the receipt and handling of notifications of suspected falsified medicinal products, as well as suspected quality defects of medicinal products.The system includes also recalls of drugs made by holders of marketing authorizationsor withdrawals of drugs from the market ordered by the competent national authorities from all relevant actors in the supply chain, both during normal working hours and beyond.

The system also allows, if necessary, with the assistance of healthcare professionals, medicinal product recalls from patients who received such products.

If it is suspected that the product in question poses a serious risk to public health, the competent authority of the Member State where the product was initially identified transmits without delay a rapid alert notification to all Member States and all actors in the supply chain of the Member State in question.

If it is suspected that falsified medicinal products have reached patients, urgent public announcements are made within 24 hours to recover these products from the

patients.Such notices shall contain sufficient information on the suspected quality defect or falsification and the risks involved.

Enlightening in this respect is the case of Pegasys, which we will present in the following. In November 2013, the Police and the National Agency for Medicines and Medical Devices (MAMD) started an investigation after three pharmacies in the country were found counterfeit syringes with serum hepatitis B and C.

The Syringes with counterfeit hepatitis serum, on which the investigation was initiated, were found in two pharmacies in Pitesti and in one of Ialomita County.The investigation was initiated as a result of complaints received from patients.

Roche Romania SRL, the drug manufacturer, informed the National Agency for Medicines and Medical Devices (NAMMD) in September 2013 on the identification in Germany by the quality department of F. Hoffmann-La Roche, Basel Ltd. of a box of counterfeit Pegasys 180 mg / 0.5 ml.After this information, constant communication with NAMMD continued related to occurrence of suspected counterfeit boxes in Romania.

The producing company Roche Romania SRL has shown that by November there were no reported cases of counterfeit suspicions of possible penetration in Romania.

The company informed, also in the context of counterfeit Pegasys syringes, that the counterfeit medicinal product presents easily observable differences from the original, asking the patients suspecting that the product they hold could be counterfeit to immediately address the doctor, the pharmacist or directly the NAMMD.

"Patient safety is a priority for Roche. (...) We note that Pegasys (peginterferon alfa-2a) isreleased in pharmacies only on prescription issued by thegastroenterologist or infectious disease specialist and is intended solely for the treatment of viral hepatitis B and C, not some cancers," said Roche Romania.

Regarding the product found in Germany, on the site of Bucharest Medical College[14]was posted at the end of October a notice to health professionals, which stated that the countries where were distributed counterfeit syringes are unknown.

The same notice stated that the chemical analysis of the counterfeit product confirms that it does not contain peginterferon alfa-2a (Pegasys active substance), that

the counterfeit product has no efficacy and safety and counterfeit pre-filled syringe should not be used.

The Medical College also recommend those holding any product which they suspect is counterfeit ore whose authenticity theycannot confirm or if they suspect that a patient could have been given a counterfeit product to immediately contact NAMMD.

After dozens of boxes of counterfeit Pegasys were released in November on prescription in pharmacies in several counties and irregularities were noticed by several people with hepatitis, the forgery came to the attention of the national authorities.

In the context of the investigation started,the Ministry of Health recommended that patients using the product Pegasys 180 µg/0.5 ml solution for injection in pre-filled syringe, when buying it in the last two weeks, to immediately contact the treating physician to determine the appropriate therapeutic management.

In the same context, the Ministry of Health asked NAMMD to take "*all legal steps required to manage the situation, so that patients do not suffer”*.

The medicinal product that came to the attention of the Romanian authorities is Pegasys - indicated for the treatment of chronic hepatitis B.Following the analysis proved that the product sold in Romania does not contain peginterferon alfa - 2a (Pegasys active substance), but glucose, water and cellulose fibers solution, therefore it has no efficacy and safety when administered.Moreover, doctors say that subcutaneous glucose administration can lead to tissue necrosis.

The press release issued by NAMMD in this case shows that*"due to information received from the National Agency for Medicines and Medical Devices (NAMD) on the possibility of the presence on the pharmaceutical market in Romania of counterfeit boxes with the label Pegasys 180 µg/0.5 ml solution for injection in pre-filled syringe (peginterferon alfa-2a), we draw your attention to the need of visual inspection of the product before administration, as the counterfeit medicinal productpresents easily identifiabledifferences to the original medicinal product Pegasys.”*[15].

In this case, the counterfeiting of a drug for a serious chronic disease, we can speak of a criminal act because for patients with hepatitis B and C, interferon vials mean life expectancy.

Counterfeit drugs could endanger patient response to treatment and even his/her life.

The interest in counterfeiting this medicinal product is obviously economic because one vial has an average price of 750 RON, the entire sum being paid by the state through national health programs.Therefore, theinvestigation of the national health authority was doubled by that of the Organized Crime.

Conclusions

The legal analysis conducted in this paper results, unequivocally, that the European Union is strongly committed to ensuring a high level of protection, competitiveness and innovation in public health.

With regard to medicines and treatment, the main Community objectives are to ensure the quality, safety and efficacy of medicinal products, the authorization and monitoring of medicinal products available on the market and the free movement of medicinal products on the EU market.

Fighting the penetration of falsified medicinal products in the legal supply chain without hampering the functioning of the internal market of medicinal products is a goal that can not be sufficiently achieved by the Member States and can therefore be better achieved by the Community.

All these goals are achieved by the European bodiesby improving and updating the legislation on medicinal products, stimulating the development of innovative medicinal products that offer therapeutic benefits and respond to health needs left uncovered.

When referring to the implications of a falsification of on public health, we must consider both the specific characteristics of the products in question, and the severity of the conditions intended to be treated with such medicinal products. Another aspect to be taken into consideration when introducing counterfeit medicines into the legal distribution chain is the price of counterfeit medicines.Counterfeiting of medicines for serious chronic diseases, for example, lead to reimbursement by the state of the full price of the medicinal product in question and, in addition, to tax evasion produced by the people introducing the forgeries to the legal distribution network, which endangers the lives of patients, by the lack of the necessary treatment.

Counterfeit drugs are illegal in terms of EU pharmaceutical legislation as they do not comply with EU rules on medicinal products.They pose a major threat to European patients and European industry and the public and stakeholders are deeply concerned about the steady increase of these products detected in the European Union in recent years.

Another concern is the fact that the risk profile has changed.The number of falsifications of innovative and life-saving medicines is increasing.In addition, to increase volume, these products are channeled through the legal supply chain to patients.Thus, in 2007, thousands of packets of counterfeit life-saving drugs have reached patients in the EU.

Even if you the exact number of existing or future cases is unknown, there is a noticeable trend clearly threatening the high level of public health protection in the European Union.*We believe that this trend can have disastrous consequences for consumer patient confidence in the pharmaceutical industry and the policy makers.*

The assessment of policy options, starting from a baseline of "non-action" on falsified medicinal products entering the legal distribution chain and estimates based on existing data, which are limited, were revealed the direct and indirect costs to society of non action, which could reach, depending on the scenario, between 9.5 billion and 116 billion by 2020.

Given the objective pursued, namely the elimination, by all means, of the risk of falsified medicines entering the legal supply chain, the European Commission compared the costs of non-action costs for achieving the chosen policy options and estimated the costs which will be incurred by 2020 by all actors involved in the distribution of medicines on the internal market.

Thus, manufacturers and importers of drugs will bear between EUR 6.8 billion and 11 billion, depending on the safety technique chosen.The costs for distributors who remove or modify the safety features are based on the volume of their business.Moreover, depending on the chosen approach, pharmacies are going to bear costs of about 157 million.The estimated costs for wholesale distributors of drugs are about 280 million, and for wholesale distributors who engage only in export activity of approximately EUR 403 million.It has been estimated, too, that other traders in the

distribution chain will have to bear costs amounting to approximately EUR 5 million.Manufacturers of active pharmaceutical ingredients will face costs of about 320 million, the bulk of these costs will be borne by producers in third countries.

Unfortunately, the costs the patients consumers of these counterfeit medicinal products have to bear can not be estimated, the danger that they have on human health and life can not be quantified.

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The influence of European regulations on the Constitution and of certain infraconstitutional regulations regarding local public administration*

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Abstract:
Choosing the European path allowed Romania to modernize its legislation by adapting to the European requirements. These requirements, which take the form of standards contained in various European regulations, are the result of the experience of EU bodies or the Council of Europe, as well as other international bodies. Taking into consideration all these regulations and driven by the desire to become part of the European family as soon as possible, national policy makers have modernized the legislation, thereby bringing substantial improvements to regulations regarding local public administration. The article presents the main legal and political instruments at European and international level that have positively influenced the legislation on local public administration in Romania and the internal normative acts resulting from this influence.
Keywords: *European regulations, local public administration, norms, jurisprudence, European standards.*

Preamble

The evolution of post-revolutionary legislation was decisively influenced by European or international regulations coming from entities within or outside the European Union, as well as from international bodies whose role is to promote peace, solidarity, strengthening of democracy and protection of human rights, and promotion of the idea of closeness between nations.

The way in which the national legislation on public administration was developed and adopted has been influenced by primary norms, derived norms, by reports or standards reflected by the jurisprudence of the European Court of Human Rights or the European Court of Justice, by regulations or opinions which take the form of resolutions and recommendations from the Council of Europe, by opinions and advice from the Venice Commission (the Commission for Democracy through Law) or of other consultative bodies within the Council of Europe or the European Union.

Even if the state is the only legal subject competent to generate legal standards mandatory for the public administration domain, the organization and functioning of public administration is an area reserved for the national legislator; legislative

* **This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.**

developments in this area and the national administrative practice have known the positive influence of European regulations.

As a subsystem of public administration, local public administration, established to meet the interests of local collectivities within the administrative-territorial units, is currently regarded as an important pillar of the European construction and has undergone many changes initially determined by the national desire of European integration[17], leading to harmonization of the legislation with the standards set by European regulations and to the adaptation of administrative practice to the requirements of modern public service, which is centered on the rights and interests of citizens. Moreover, the commitment to respect human rights is fully stated in the preamble to the Treaty on the European Union, the consolidated version, and also in Article 2 of the Treaty, which states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

It is common knowledge that one of the criteria for the accession to the European Union was the political one. Next to it was the criterion of administrative capacity and the economic one. An analysis can show that the political criterion envisages: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of national minorities. This criterion is doubled by the administrative capacity criterion, expressed through the existence of an optimal and efficient administrative system, which includes a flexible and specialized institutional architecture that enables the taking over of the European Acquis and continual implementation of European regulations. But to achieve these demands requires professionalism, competence, neutrality, a certain degree of functional autonomy familiar to some of the administration structures, and also the improvement of public management.[1]

Romania has made notable progress with the modernization of legislation regarding public administration in general, local public administration in particular, by signing and ratifying the most important international legal instruments, most of them

[17] Integration implies both Romania's accession to the European Union and, subsequently, the country's participation in the supranational organization as a full member state – Elena Simina Tănăsescu in Ioan Muraru et al., The Constitution of Romania. Comment on articles, C.H.Beck Publishing, Bucharest, 2008, p. 1430

coming from the Council of Europe, and also as a result of the takeover of European standards contained in other legal, political or jurisprudential instruments from the European Union, as well as by accepting the suggestions contained in the country reports of the European Commission. Moreover, both the EU institutions and the Council of Europe are pillars of the European construction.[2]

Thus there occurred significant changes both in the formal-organizational and the material-functional areas for the local public administration in Romania.

The main legal and political instruments at European level with an impact on legislation regarding local public administration

The international legal instrument that had a decisive influence[3] on the legislation on local public administration, even the fundamental act, was the European Charter of Local Autonomy.[4] The European Charter of Local Autonomy is the first and most important legal instrument for the protection and assertion of local autonomy, being a product of the Congress of Local and Regional Authorities of the Council of Europe.[5]

Another international legal instrument whose norms have influenced national regulations on local public administration is the European Framework Convention on the cross-border cooperation of collectivities or territorial authorities, adopted in Madrid on 21 May 1980, which entered the internal legal order by its ratification by Romania in 1998, through Government Ordinance no. 120/1998, published in the Official Gazette of Romania, Part I, issue 329 of 31 August 1998.

To respond to the European imperatives regarding the protection of the rights of national minorities, Romania ratified, by Law no. 33/1995, published in the Official Gazette of Romania, Part I, issue 82 of 4 May 1995, the Framework Convention on the protection of national minorities, adopted on 1 February 1995 at Strasbourg. To this we add the European Charter for regional or minority languages, adopted at Strasbourg in 1992, signed by Romania in 1995 and ratified by Law no. 282/2007, published in the Official Gazette of Romania, Part I, issue 752/2007. The Charter entered into force in 2008.

Other documents from the Council of Europe that have influenced the legislation on local public administration are: the Convention on the Participation of Foreigners in

Public Life at Local Level (1992), the Charter on youth participation in municipal and regional life (1992), the European Code of Conduct on the political integrity of locally elected officials (1999), the monitoring reports of the Congress of Local and Regional Authorities of Europe. However, Recommendation no. 201 (1993) of the Parliamentary Assembly of the Council of Europe represents a source of national and international law, being included in the basic treaties [6] of Romania with Hungary and Ukraine.

An extremely important document is the United Nations Convention against Corruption, which entered into force in 2005. Romania signed the Convention on 9 December 2003 and ratified it by Law no. 365/2004, a law adopted in New York on 31 October 2003, published in the Official Gazette of Romania, Part I, issue 903 of 5 October 2004.

The national desideratum of integration in the European Union and the effects on the legislation regarding local public administration

The real reform of local public administration in Romania has begun with the start of the negotiations for accession to the European Union in 1999. With its regular reports, the European Commission has boosted the Romanian public administration reform, prompting national deciders to develop and promote normative acts enabling the Romanian administration to adapt to an ever changing social environment and to European demands claiming the decentralization of decision, the opening of the administration towards the needs and interests of citizens, the fight against corruption and other disturbing factors, the protection of persons' rights and interests violated by acts of administration. The documents from the European Commission had the merit of a radiograph of the Romanian administrative reality, thus allowing the detection of deficiencies and their correction by the empowered political actors. The views expressed by the European Commission through its representatives, who constantly monitored Romania on its path to the Union, have oriented public deciders towards the adoption of measures and normative acts which included norms compatible with the European vision in managing local affairs.

Starting from the need of highlighting the principles of local autonomy, subsidiarity, proportionality, the national legislator adopted a series of regulations that

covered the field of civil service, the fight against corruption, the status of local elected officials, decentralization, local public finance, public services of local interest, local elections, administrative courts etc.

Among the first normative acts adopted after the submission of the European Commission report in 1999 was the Law on the status of civil servants, a normative act required by the Romanian administrative reality, and the European officials, who emphasized through their positions the need to cover the legislative gap on the matter of civil service and civil servants, calling for the adoption of regulations that allow the depoliticization of the civil service by guaranteeing a status of the official that ensures the professional independence of civil servants. The initiative for adopting this normative act belonged to the Government who assumed responsibility before the Parliament, and the bill promoted by this exceptional way of passing legislation became Law no. 188/1999 regarding the status of civil servants.

Also, to respond to the European imperatives on decentralization, there was adopted the Local Public Finance Law. This allowed an increase in the financial autonomy of local public administration authorities, which is mentioned in the same report from 1999.

The time period after 2000 was characterized by an intense process of modernization of the legal framework of local public administration. A new law on local public administration was adopted (Law no. 215/2001), the local referendum institution was regulated by adopting Law no. 3/2000 on the organization and conduct of the referendum, the framework law on decentralization was adopted and a legislative response was given to the issue of administration transparency through the adoption of three important laws such as: Law no. 544/2001 on the free access to information of public interest, Law no. 52/2003 on decisional transparency in public administration, Government Ordinance no. 27/2002 on the regulation of resolution of complaints.

In 2003 there was the first revision of the Romanian Constitution[7] from December 1991, which allowed the completion and amendment of constitutional norms so as to be compatible with European requirements in terms of principles of organization and functioning of local public administration, of rights for national minorities and political rights. Thus, the fundamental act was completed in matters of local public administration

with a new principle, that of deconcentration of public services, thereby clarifying the concepts of deconcentration and decentralization. It was also recognized, at constitutional level, the right of national minorities with a significant share within administrative-territorial units to use the respective minority language in written and oral communication in the relations with local public administration authorities, and the decentralized services, but only under the law provided by the organic law. Through the provisions of Law no. 215/2001 constitutional norms were developed in a manner that places Romania among the countries with a high level of protection of the rights of national minorities. [8]

The category of political rights includes the right of European citizens to vote and to run for office at local level (local or county councilor only), if they meet the legal requirements [9], as a right that results from Romania's quality of European Union Member State, as a result of the accession, as stipulated in Title VI of the Constitution, entitled Euro-Atlantic Integration and in article 16, paragraph 4.

In line with the European requirements, regulations were adopted in the field of conflict of interests and incompatibilities of locally elected; in this respect the legislator adopted Law no. 161/2003. This law is part of a legislative package which aims to reduce corruption in public administration and leads to greater transparency of the status of local elected officials. Law 161/2003 is supplemented by Law no. 144/2007 on the organization and functioning of the National Integrity Agency, and by the Law no. 176/2010.

Amid pressure from European officials, national authorities have changed the status of the prefect, transforming it from a political agent into a high official, a status that is incompatible with quality of party membership. To strengthen the legal status of civil servants, Law no. 7/2004 on the Code of Conduct for Civil Servants was adopted in 2004, a normative act inspired by Recommendation R(2000)10 of the Committee of Ministers of the Council of Europe referring to codes of conduct for public officials, adopted on 11 May 2000. The consequence for adopting of the code of conduct for public officials was the adoption of a similar normative act for the contract staff of public authorities and institutions (Law no. 477/2004). Also in 2004 Law no. 393/2004 on the status of local elected officials was adopted.

The process of accession to the European Union and the requirements imposed by the various documents in electoral matters coming from the bodies of the Council of Europe have determined Romanian policy makers to adopt a new law on local elections, thus appearing Law no. 67/2004 on the election of local public administration authorities.

After closing all negotiation chapters with the European Union, Romania signed the Treaty of Accession[18] and adopted Law no. 157/2005 concerning the ratification by the Romanian Parliament of the Treaty between the European Union Member States and the Republic of Bulgaria and Romania on the accession of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005; Law no.157 / 2005 was published in the Official Gazette of Romania, Part I, issue 465 of 1 June 2005.

By adhering to the European space, the public administration in general, the local public administration in particular, is called to implement not only national regulations, but also European standards. Local public administration, through its authorities, should effectively participate in the process of European integration, fully consciously assuming its obligations as part of the state, concretely applying the specific European standards. Failure or misapplication of EU law by any public authority, and therefore by local public administration authorities, draws the responsibility of the state, as results from the jurisprudence [10] of the European Union Court of Justice.

Important changes in legislation occurred in 2006, when a new framework law on decentralization was adopted, Law no. 195/2006, taking on new regulations in the field of local finance as well (Law no. 273/2006) and public utilities community services (Law no. 51/2006).

Romania, since joining, has become the receiving party of both the rights and benefits of the European Union, and of the obligations, contributions and joint efforts to ensure the development and sustainability of the European construction.[11]

In terms of legislative production on local public administration, the post-accession phase is characterized by a slowdown in regulation, a sign that some politicians have not understood that European integration has not ended with January

[18] Legal operation by which a state negotiates with other members of the organization the conditions in which it can manifest as a member of that organization, in the opinion of Prof. PhD Elena Simina Tănăsescu included in Ioan Muraru et al., The Constitution of Romania. Comment on articles, C.H.Beck Publishing, Bucharest, 2008, p. 1431.

2007. European integration means a continuation of the reform process in local public administration by adopting legislative, strategic and managerial measures. It is not enough just to correct some normative acts through others with the same or higher legal force; it is required to constantly bring into the legislation norms whose effectiveness has been experienced in the more developed states, or norms which have become European standards in the field.

The European normative heritage is permanently enriched with new regulations stemming either from national or European administrative practice, or from the experience of bodies involved in protecting democracy, civil rights, diversity of interests, such as the Venice Commission, the ECHR, the Congress of Local and Regional Authorities within the Council of Europe, or the Committee of the Regions of the European Union.

The Romanian legislator is required to keep pace with changes in Europe and to adapt the legislation on local public administration to the new European requirements. For example, the 12 principles of good governance at local level, promoted by the Council of Europe, may be subject to a legislative approach and can be included in national legislation. Also, there can be considered as landmarks of procedural regulation the norms contained in the Code of Good Administrative Behaviour existing in the European Union, or those contained in the Code of Good Administration, a production of the Council of Ministers of the Council of Europe. Recently the focus has been placed increasingly more on partnership, on multilevel governance, on much closer cooperation between the European, national and local levels, which triggers a rethinking of local action, and also of administrative-territorial organization of the country.

Finally, the requirements imposed by the ECHR jurisprudence must be considered so that local public administration regulations contain accessible and predictable norms as requested by the European Court of Human Rights.

The jurisprudence of the European Court of Human Rights, relating to the concepts of accessibility and predictability of the law, states that “a norm is predictable only when it is formulated with sufficient precision so as to allow any person who, in need, can call on specialist advice to correct their conduct”, and the Sunday Times case against the United Kingdom, from 1979, decided that “citizens must have sufficient

information on the legal rules applicable in a given case and be able to foresee, to a reasonable extent, the consequences that may arise from a determined act. In short, the law must simultaneously be accessible and predictable". This vision is completed by that contained in the Wingrove Case against Great Britain from 1996, which stipulates that "the internal law must be formulated with sufficient precision in order to enable those concerned, who may use, if necessary, expert advice, to predict, to a reasonable extent, in those circumstances, the consequences which may result from a determined act". Should these requirements be met, norms such as those governing the incompatibility regime of local elected, the lawful termination of their mandate, the validation of the mandate, the operation of local collegiate bodies or the relationships of local authorities with the state ought to be urgently improved to cease the manifestation of misinterpretations or institutional blocks.

Conclusions

The analysis allowed us to identify the main legal and political instruments at European and international level which have represented landmarks for the modernization of the legislation on local public administration. Learning the European requirements in the legislation governing local public administration has led to a reconsideration of the role and behavior of local actors. After 25 years from the revolution of 1989, and almost 8 years after joining the European Union, the local public administration in Romania currently benefits from legislation in line with European standards. However, social changes, the emergence of new problems that require solving, disruptions at economic level, political shifts require permanent settlement of social relations by finding an optimal legislative response. The dynamics of local public life and the foundation role of the European construction of local collectivities, call for the insurance of all constitutional and legal guarantees for local public administration so that local democracy can flourish.

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Compensation in medical civil liability – an utopia?

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Abstract
In order to protect against potential abuses the person receiving medical services, often characterized by indifference, negligence and incompetence, it was necessary to implement more restrictive provisions regarding the liability of the doctor. Therefore, the control and supervision of medical profession - as a liberal profession, implies prosecuting the violations of the rules of professional ethics, medical ethics and the rules of good professional practice which mainly attract special law enforcement.
That is why it must be given to the victim the opportunity to repair any harmful result, likely to affect the subjective rights or its legitimate interests.
Keywords: *delictual civil responsibility, medical civil liability, malpractice, illgal action, prejudice, causal link*

Introduction

Since ancient times, the doctor has played one of the most important roles in society. Whereas the doctor, considering his profession, takes care of the most precious "good" of man, namely the health and therefore the person's life, he must be an example of honesty and rigor in his professional activity. If in other branches of the labour law the implications and repercussions of such an error might not have a very large impact on the individual, the doctor's actions have direct consequence upon the person. Even a simple negligence can lead to permanent damage, both physical and psychological going up in specific cases even to the loss of life. In this extremely vulnerable position, it is medical professionalism that underpins the trust the public has in doctors. In order to protect against potential abuses the person receiving medical services, often characterized by indifference, negligence and incompetence, it was necessary to implement more restrictive provisions regarding the liability of the doctor.

"In this regard, we note that the current trend manifested in other european legal systems is to recognize a more wider category of repairable damages, by engaging the delictual civil liability in order to support the interests of the victims for a full reparation (moral damages caused by undermining the honor, dignity and reputation of a person, his liberty, family life; in the case of the damage to a person's corporal integrity – the damage consisting in psychological sufferings, aesthetic damage, recreational damage,

sexual damage, specific contaminating damage; in case of death of a person-the affectation damage suffered by the deceased loved ones etc.). " [1]

DAMAGE-INTERESTS

Damage-interests's evaluation time

At what point is born the victim's right to compensation?

If the evaluation of the damage suffered shall be made, as it normally is, on the date of the pronouncement of the judicial decision - whereas it is necessary to have a point of reference fixed – the damages granted being later indexed in accordance with the inflation rate, the right to repair is born from the occurrence of the prejudice moment, as art. 1381 of the Civil Code requires.

Evaluation of the damage

The judge, in order to grant the damages, in evaluating the prejudice must take into account two elements, namely:

(a) ***Damnum emergens*** – the loss suffered by the victim;

(b) ***Lucrum cessans*** – the gain from which the victim was deprived.

In order to be repaired, the prejudice must be:

(a) ***Certain;***

(b) ***Not yet repaired .***

A prejudice is certain when its existence is sure, undeniable, and at the same time, it can be evaluated in the present.

Future prejudice is also subject for compensation if there is a certainty in its occurrence, as well as sufficient elements to determine its extention.

In matter of delictual civil liability, the reparation of the injury aims to fully remove the effects of the illegal acts.

Under no circumstances, this may not constitute a source of gaining further incomes, in addition to the damage suffered, because it would be a matter of unjustified enrichment. In accordance with this principle, the victim is fully entitled to a single repair of the damage that could not combine two or more compensation for the same damage.

Material damages suffered by the patient

Violation of an obligation of means

Generally, the doctor has an obligation of means, which means that, in order to be engaged the responsibility of the practitioner in question, it is subordinated to the victim's proving of the fact that the doctor has not submitted all the necessary efforts required in granting the medical care to his pacient.

It is therefore incumbent upon the victim to make the evidence of any breach of this obligation, in which case, if the injury will be proved, the prejudice will be entirely repaired, both for the material damages, as well as for the moral.

Violation of an obligation of result

Although the doctor's obligation is generally one of means, he can also assume any obligations of result. In this case, the victim's task is much more facilitated, because the burden of proof overturns, the doctor or health unit being the ones who must prove the absence of causal link between the illicit act and the prejudice

For example, it is the case of the damages suffered as a result of a breach by the practitioner of the obligation of result for informing, in which case the doctor must prove that the obligation to inform the patient was carried out fairly and with due attention.

Total or partial loss of the capacity of work

The New Civil Code brings as element of novelty the regulation of the loss of the ability to work, in terms of art. 1388-1389. The individuals who, because of that harmful fact, have been deprived- partially or totally – by the revenue or other results and advantages that could be achieved through work, are entitled to demand compensation for damage.

The new Civil Code goes one step further and regulates the method of establishing the loss or failure to achieve earnings from that work. Moreover, it is taken into account the existence of certain future earnings, even if the employment contract had not been put into practice.

Even if the person was not employed, but she is minor, she may receive compensation from "the date when, under normal circumstances, (...) she would have finished the professional training that she was receiving", having " the age required by the law to be party in an employment report".

The loss of a chance

The prejudice caused by the loss of a chance to obtain an advantage represents an innovative element inserted in our legislation with the adoption of the New Civil Code. Thus delictual liability may be engaged for those negative consequences caused directly by committing an illegal act, consequences which consist in missing one real and serious possibility of the occurrence of a favourable event in the victim's life which could have brought her fulfillments and accomplishments in the personal or economic plan, through the projects development.

We notice that, in the new wording of legal text, the loss of chance is also interpreted from the perspective of avoiding the occurence of a damage, which would represent a real "advantage" for the victim. [2]

The birth of a child with disabilities

The prejudice in the case of a child born handicapped with the fault, even partially, of the doctor, does not consist in the loss of a chance, but even in the handicap suffered, which must be fully compensated. For example, the fact that the gynecologist did not inform the mother about the abortion opportunity due to some fetal handicaps, which led to his birth with serious deficiencies, attracts the liability of the doctor. [3]

Moral damages suffered by the patient

Physical and mental pains

We summarize here the physical and psychological pains suffered by the victim of the illicit act. These are the most frequent and most common, but also the most serious consequences caused by corporal assaults and strikes.

From the physical point of view, the victim may suffer a decrease of the exercise capacity, creating her a physiological damage, biological, a functional deficit resulting from the malfunction of one or multiple organs of a person.

Moreover, the human being, through the whole bio-psychological, moral and social features which define it, illustrates the most obvious dialectical-indissoluble, objective relationship,connection between matter and conscience, between material and spiritual aspects of its existence. Any touch brought to physical integrity or health of a person translates into a whole string of negative repercussions, among which we can identify, almost always, patrimonial consequences and non-patrimonial as well.

As a form of moral damage, the physical or mental suffering is expressly hereinafter referred in the legal literature as "pretiumdoloris", naming that actually concerns the material repairs which the author of such damages owes to the victim and which she is entitled to pretend.

The psychological damage is the result from violating the doctors's obligation to inform and is subject to full compensation. If due to the brutal manner in which the victim was informed about a medical intervention she has developed a mental malady requiring regular psychiatric counseling, this damage must be fully repaired.

Recreational damage

The recreational damage, not regulated in the old legislation, gave rise to a multitude of interpretations and judgments, the practice of our courts being completely heterogeneous.

The recreational injury is the result from "defilement of the satisfactions and pleasures of life which consist in the loss of the opportunities for spiritual enrichment, entertainment and relaxation."

As innovation in the New Civil Code, the legislator has regulated in art. 1391 the recreational damage, defined by the doctrine as "arising from violating both physical and psychological integrity of the human being, being expressed both through physical pains that are consecutive to injuries and through mental sufferings as result to perceveing by the injured person of some restrictive situations regarding some recreations of life."

In this category we may include the so-called recreational injury reported to the fact that the victim was suffering for what are called generic joys of a normal life (family life, professional activity, the opportunity to practice a sport, travel, etc.). The French doctrine recognizes the right to compensation for all the losses suffered, including this recreational damage, even to the person in the vegetative state, thus unconscious, in so far as it can be demonstrated that it caused these serious consequences in the victim's existence. [4]

Aesthetic damage

Aesthetic damage involves the mental sufferings felt by the injured person when she realizes her mutilated person situation.

Furthermore, for certain categories of persons, this "disability" may be always annoying, which in return may cause mental diseases and complexes, having the effect of removing from society of the injured person or even marginalisation, also being affected the interhuman relations.

In addition, there are those "professional categories" such as mannequins, film and television stars, hostesses, stewardesses etc., for which the physical harmony is an essential requirement to fulfill their profession.

Chronic vegetative state

An important and highly disputable problem was whether the persons who are in a state of prolonged coma, more or less deep, could benefit from the right to identify the damage, being given the condition in which they are. An argument against repairing the damage in this case was that, being unable to realize their condition these persons are not likely to suffer, so that any compensation for their moral damage is excluded.

To put an end to this situation, the second civil chamber of the Court of Cassation of France stated that the damage must be objectively repaired in its entirety, irrespective of the representation of the person of its own reality. Vegetative state does not exclude the right to full compensation for damage. [5]

Prejudices suffered by ricochet

Although long accepted in French doctrine, the principle of compensation for the damage by ricochet was regulated in Romanian legislation through the coming into force of the New Civil Code. The damage by ricochet is that indirectly prejudice suffered by third parties, indirect victims, damage caused by the initial injury which affected the direct victim. Their predilect domain is the sphere of corporal injuries, but neither the sphere of moral damages can not be excluded.

The indirect victim is any person connected by a patrimonial interest or or non patrimonial relationship with the direct victim and who, due to the immediate corporal damage, suffers an economic loss or is injured in her affection feelings for the immediate victim.

The ascendants, the descendants, brothers, sisters and the husband/wife of the deceased are the persons entitled to compensation. However, the regulation also

mentions others persons who can exercise their right to compensation if, in return, they can demonstrate the existence of the damage in their patrimony.

REPAIRING THE DAMAGE

The principle of full reparation of the damage

By repairing the integral damage we understand the removal of all damaging consequences of an illegal act, for the purpose of restoring the previous situation of the victim, namely the situation in which the victim would have been if the injurious act would have not occured.

Or, as the Supreme Court stated, "granted compensation for damages arised from illegal acts must always represent the full coverage of the loss suffered, so that the victim of the harmful act to be put, as much as possible, in the previous situation".

As reiterated in the Civil Code in article. 1357 para. (2) the gravity of guilt does not constitute a criterion in establishing the amount of damages, because the author of the damage must answer even for the easiest fault.

Consecrated in the old regulation, doctrinal and jurisprudential, the principle of full compensation for injury finds its express regulation in art. 1385 of the New Civil Code. So it is questionable, however, as was well pointed out in specialized literature [6], which was the reasoning for the establishment of the phrase "unless the law provides otherwise" and if, somehow, this prejudices the provisions of art. 6 ECHR.

However, even without an express consecration in the New Civil Code, the principle of full compensation for damage finds its applicability in the Methodological norms for the application of the Title XV of the Law. 95/2006.

In conclusion, full reparation of the damage is a fundamental right of the injured person which can not be limited.

The principle of the reparation of the damage in nature

Basically, the repair of damages must be made in kind. If this is not possible in nature, the repairing is made by equivalent in the granting compensations form. [7]

Although in doctrine [8] and jurisprudence was outlined the idea that the compensation through equivalent must come as a result of the impossibility to repair in the nature the injury, the new Civil Code introduces an element of novelty in this regard,

giving the possibility of the victim who is not interested in compensation in kind to demand a payment of damages.

Anyway, in the matter of medical law, we can not talk about compensation of the damage in nature in the event of an injury to health or corporal integrity whereas such repair is practically impossible.

The specific of this damage is that is very hard to accurately asses the damage caused to a person, whereas the health status of a person can quickly change, either in the sense of deterioration, either in the sense of its improvement.

Therefore, for these specific hypotheses that occur after the moment when the court decision remains final, the compensation can be modified by increasing or decreasing it, as appropriate.

Nevertheless, as rightly been claimed, if the infirmity decreases or even disappeares, with the natural consequence of the decrease or disappearance of damage, the court may dispose the reduction or even the interruption of the payment, but only if the compensations were established as regular payments.[9]

The rationale behind this mechanism is derived from the temporary nature of the damages awarded in the form of regular benefits, compensations which were granted under the condition of maintaining the same health status of the victim as with the one which gave rise to compensation in first place.

However, this situation must not be mistaken with the one in which the victim adapts its living conditions. In this case, the payment of the compensation must not be stopped since, although apparently we could talk about a lack of injury, practically the victim submits an additional effort in adapting to the new conditions given, effort that she would not have been obliged to make if the prejudice in question would not exist.

Determining the moment in assessing the amount of compensation through monetary equivalent

In the juridical doctrine and the judicial practice there have been proposed various (and controversial) solutions in determining the correct amount of compensations.

We will analyze below the most important directions in this matter:

a) To be taken into account the existing reality at the moment of producing the damage as a result of the commission of the culpable illegal act.
b) The damages calculation to be made at the moment when the court is seised with the victim's in claims application.
c) The compensation to be calculated at the moment of the court's pronouncement of the decision. [10]

Taking into consideration that between the moment of the producing the damage and the moment of the court's pronouncement of the decision, it could pass a long period of time, the first opinion was received by jurists and public opinion with reticence and criticism.

Setting the amount of compensation at the time of the request introduction of the person injured, has raised big discussions, because it was concluded that in such cases, the author of the illicit act will have to repair not just the initial damage, but also the damage which has its source in the price fluctuations between the moment of the initial damage and the moment of the legal action's introduction.

The third optinion seemed the be most equitable of all, managing to give birth to a full compensation without leading to an increased or decreased compensation in comparison with the real value of the prejudice suffered by the victim.

Cumulation between the repair in nature and the repair through monetary equivalent

Even though it is also expressed the opinion that " it is used the cumulation between the repair in nature and the repair through monetary equivalent, imposing to the debtor defendant alternative obligations as to give, to do or not to do, and in case of failure, requiring just compensation", we support the contrary.

From our point of view, the cumulation involves both the repair in nature of the damage and the award of compensations through monetary equivalent. However, the up-mentioned situation exposed by the author does not imply that these two remedies shall be applied at the same time, simultaneously, but a situation of an alternative repair of the damage stated by the court, in the sense that, if the repair in nature of the damage it is not possible it will be applied the repair through monetary equivalent, without requiring a new action in this regard, the role of this alternation being to protect

the victim as well as possible and to ensure the repair of the damage by any means recognized by the law.

CONCLUSIONS AND LAW FERENDA PROPOSALS

Although the legal framework exists, the sanctioning of the doctors and the repair of the damage often remain an utopia, these being consecrated more on a theoretical level, rather than in practice. We consider that a reassessment of the "causal link" concept is necessary to regulate as specific as possible the consequences of an injurious medical act. In this optic, we think that we should have independent commission (to be objective) to analyze the cases of malpractice and to provide a fair analysis of the facts.

Nowadays, the trust in the medical system in Romania is in a continuous decline. What was once perceived as a noble profession, for the benefit of the society, it is to be seen now strictly as a machine of "making money", the attention to patient being non-existent in the majority of cases.

In these coordinates, it is beyond any doubt that, recently, the responsibility has established itself as a central concept, irrespective of the nature of the theoretical perspective from which it is approached. With the modernization of the national legislation and the enforcement of our four new codes also arises the need to orient the research towards issues relating to the implementation of the new law at european level, capturing the national system implications.

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A Uniform European Investment Policy?: The unwritten EU Model BIT

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Abstract
With the entry into force of the Lisbon Treaty the EU has acquired new competences in the area of international investment. As the world's biggest investor and recipient of foreign direct investment, the EU's investment policy will have considerable impact on the future shape of international investment law. This article analyses the expected content of EU investment agreements including the scope of application, substantive standards, and dispute settlement by scrutinizing available EU documents and existing scholarship. As a special point of reference, the recently concluded investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is considered for possible wording and structure of future EU investment agreements.
Keywords*: European Union, model BIT, investment law, transatlantic trade and investment partnership, EU-Canada Free Trade Agreement*

1 Introduction

With the entry into force of the Lisbon Treaty [1] in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment.[19] The EU is hence expressly entitled to negotiate and conclude international investment agreements (IIAs) or free trade agreements (FTAs) including chapters on investment comparable to those concluded by EU Member States individually before that.[20] Thus, the EU's comprehensive investment competence marks the beginning of a unified EU approach toward international investment law. This will undoubtly have a considerable impact on the future shape of international investment law as the EU is the world's biggest investor and recipient of foreign direct investments. [2]

[19] Article 207(1) TFEU provides: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." [emphasis added]; for a discussion of the precise scope of the new investment competence see e.g. Lentner, G.M. (*forthcoming* 2014). The Scope of the EU's Investment Competence after Lisbon.
[20] According to Article 3(1) TFEU, the common commercial policy of the European Union, including foreign direct investment, is an area of exclusive EU competence.

Whereas the EU Commission clearly indicated that a Model bilateral investment agreement (BIT) will not be adopted,[3] the significance of the EU's investment policy for the world economy necessitates a more comprehensive look at the expected content of such agreements to be concluded by the EU.

Against this backdrop, this article presents and analyses what has been called the invisible or unwritten EU Model BIT.[4] The available EU documents and existing scholarship is being taken into account. As a special point of reference, the recently concluded investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[5] is considered for possible wording and structure of future EU BITs/IIAs.

Firstly, the scope of application of the EU Model BIT is addressed after which the core standards of treatment of foreign investment (expropriation, fair and equitable treatment, national and most favoured nation treatment, umbrella and transfer clauses) are examined. In conclusion, procedural issues are addressed with special emphasis on Investor-State Dispute Settlement and policy issues discussed in light of the presented analysis.

The scope of application of the EU Model BIT

Defining the material and personal scope is one of the most important issues in international investment law. The definitions adopted in the CETA text appear to be indicative of the unwritten EU Model BIT adopting a broad definition of both terms.[6] Uncertainty regarding what kind of investors and which types of investments are being protected has led to divergent arbitral jurisprudence and heavily-criticised treaty and forum shopping.[7] For these reasons, Article X.1 of the CETA Investment Chapter seeks to narrow down the general scope of application by excluding certain industry sectors (aviation), which is, as *Bungenberg* points out, rather atypical for IIAs. It further excludes 'activities carried out in the exercise of governmental authority' from the general scope of application, [8] which is thematically misplaced. [9]

Turning to the definition of the term 'investment', the CETA investment chapter defines 'investment' as "[e]very kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources,

the expectation of gain or profit, or the assumption of risk."[10] It then provides for a demonstrative list of forms of investments typically included in BITs. This definition resembles the *Salini* criteria without including the requirement of 'contribution to the development of the host State'. [11] Thus, it is clear that the EU favours the asset-based approach with an open definition rather than adopting an exhaustive list of covered investments.

With regard to the personal scope, 'investor' is defined as "a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party." [12] It is then further elaborated that the CETA text applies the dominant and effective nationality test in case of dual citizenship of natural persons, thus only providing jurisdiction on the basis of the more 'effective' nationality. Defining juridical persons, the CETA uses the country of organisation criterion, leaving the home state the discretion to define which legal persons should or should not enjoy protection. With the clear requirement demanding "substantial business activities in the territory of the Party under whose law it is constituted or organized", the CETA text ensures that treaty shopping via shell companies will not be protected under EU IIAs.[13] State-owned enterprises (SOEs) and sovereign wealth funds (SWFs) will be met with some transparency obligations to determine whether the state affiliated entity in question acted on behalf of the state making a political or economic consideration. [14]

Admission/Market Access

Liberalisation is a key objective of the EU's international investment policy. [15] Before gaining a comprehensive investment competence, past investment related agreements of the EC/EU were limited to admission, in which a GATS-inspired market access approach was adopted. [16]

The new EU's investment power now covers not just investment access/admission questions, but rather comprises all standards of investment protection included in IIAs or BITs respectively (including expropriation).[17] While admission/market access is generally not regulated by BITs, [18] the draft CETA text extends – in line with the EU's liberalisation objective its national treatment obligation to establishment, acquisition and expansion of investments, [19] coupled with a negative

list of sectoral reservations and exceptions.[20] It also includes a comprehensive prohibition of performance requirements.[21]

Standards of treatment in the invisible EU Model BIT

Expropriation

The expropriation provision included in the CETA text follows largely a standard wording found in various EU member state's BITs. As *Reinisch* points out however, "EU negotiators could not avoid some degree of 'NAFTA contamination,'"[22] meaning that Annex X.11 of the CETA text provides for clarification which "reproduces the shared understandings already expressed in the Canadian Model BIT 2004 and the US Model BIT 2012".[23] Accordingly, a finding of indirect expropriation requires a case-by-case, fact-based inquiry and provides a number of relevant factors, such as the economic impact of the measure, its duration, the extent to which it interferes with "distinct, reasonable investment-backed expectations," and the character of the measure or series of measures, notably their object, context and intent, in order to determine whether specific measures constitute indirect expropriation.[24] The requirement of intent was particularly criticized by *Kriebaum*, who correctly points out that this would impose an almost impossible burden of proof on the investor.[25] This should not be included in an EU Model BIT.

Furthermore a clarification is included that the right to regulate should prevail over the economic impact of state measures when they protect the public interest in a non-discriminatory way. [26]

Fair and Equitable Treatment

The fair and equitable treatment (FET) standard is of highest practical relevance of all protection standards. [27] In the CETA text, the content of this standard is clarified by naming the following measures that constitute a breach of FET obligations:

Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment [28]

A determination whether a measure or a series of measures constitute a breach of FET obligations should take into "account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated". [29]

While such clarifications of the FET standard in EU agreements is welcome, in an overall assessment *Kriebaum* notes that "by adding qualifiers to some of the FET elements the CETA norm on FET creates new uncertainties, rather than reducing them." [30]

Non-discrimination, national treatment and MFN

The non-discrimination standards, national treatment and MFN of the CETA text, provides interesting insights for future EU IIAs. As evidenced from the CETA text, the EU Model BIT, as it stands, will most probably reflect EU Member States' BIT practice as regards national treatment and MFN clauses. [31] The exception being that, as noted above, the CETA text extends the scope of national treatment obligation to establishment, acquisition and expansion of investments to ensure coverage of market access/admission. [32]

Article X.6 on national treatment provides that:

Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

It is further clarified in paragraph 2 that this treatment means "[…] treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors." As *Tzanakopoulos* points out, while "arguably, a 'no less favouarable' treatment obligation means that the protected investor and/or their investment may be treated better than a national or a third state investor and/or their investment in like situations," this will not be of significance in practice. [33]

An important clarification is contained in Article X.7(4), which stipulates that MFN treatment does not cover investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. [34]

Umbrella and Transfer Clauses

The inclusion of an umbrella clause in future EU IIAs remains contested. This stems from the fact that EU Member States do not endorse a uniform approach in that regard. [35] While proposed in the draft text by the EU, the CETA text as it stands does not contain an umbrella clause.[36] However, according to the negotiation directive issued by the Council, the negotiations with the US regarding the TTIP, aims at its inclusion. [37] It is thus likely that the (unwritten) Model BIT will include such a clause.

In contrast to umbrella clauses, transfer provisions are included in all EU Member States BITs.[38] They grant investors the free transfer and conversion of funds related to their investments. [39] Contested remains the exact scope of exceptions to this rule. The CETA text contains a number of exceptions, such as provisions exempting measures relating to bankruptcy, insolvency, protection of the rights of creditors, trading in securities, criminal offences and administrative and adjudicatory proceedings.[40] This will satisfy the Commission's concerns to restrict the free transfer obligations when adopting restrictive measures under Articles 66 and 215 TFEU. [41]

3 Investor-State Dispute Settlement

Dispute Settlement fulfils a crucial function in effectively securing the substantive protections granted by International Investment Agreements. [42] It must be recalled that basically all BITs of EU Member States include ISDS,[43] and that the EU Model BIT should aim to provide for an effective investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement. [44]

CETA as well as the recently concluded EU-Singapore Free Trade Agreement, provides for investor-state dispute settlement (ISDS).[45] However, in the context of the TTIP negotiations between US and the EU, this mechanism has attracted considerable criticism. [46] Albeit included in the negotiation directive,[47] Reports point to the potential exclusion of ISDS from the TTIP.[48] It is thus submitted here that another possibility to ensure effective enforcement of investor rights modelled after the WTO's

Dispute Settlement should be considered to address the legitimate concerns of critics of the current ISDS mechanism.

4 .Conclusion

The conclusion of the first EU investment chapter included in the Canada-EU trade agreement provides interesting insights for the anatomy of the (unwritten) EU Model BIT. Generally speaking, it builds on existing 'best practices' of its Member States' BITs, but adds a number of important features and further details regarding the exact meaning of certain substantive standards. Herein the influence of NAFTA or the US/Canada Model BITs cannot be denied. As *Lavranos* notes, CETA as well as the Singapore FAT largely follow NAFTA and the 2012 US Model BIT. [49] The same is true with respect to the investment chapters of the FATs negotiated with Japan, US, India and China. It remains to be seen how these provisions are applied in practice by investment tribunals and whether they then actually present "[a] new start for investment and investment protection" [50] "[a] new start for investment and investment protection," striking "a better balance between the right of states to regulate and the need to protect investors," [51] as well as for an improved investment arbitration system in international investment law. [52]

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