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CONVENTIONS FOR THE AVOIDANCE OF DOUBLE-TAXATION. ROMANIA CASE

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ABSTRACT. The international double taxation occurs when one and the same taxable object is subject to taxation in two or more states, for one and the same time period. Legal means of disposal of such conflicts on international scale are tax Conventions, called international double tax. Tax regime of income obtained from activities carried in Romania shall be determined by means of harmonizing the Fiscal Code provisions with the articles of the international tax conventions. The paper aims at highlighting the international legal provisions in the field and their applicability within Romanian law framework.

Keywords: double taxation, legal provisions harmonization, fiscal law

With regard to the Convention of 23 July 1990 on the elimination of double taxation, one can see the need for both Member States and taxpayers to have more detailed rules for implementing the aforementioned Convention in an efficient manner. The necessity of developing a behavior code in tax matters, for Member States and taxpayers use, was identified among all parties implied. This Code of Conduct is a political commitment and does not affect in any perspective Member States’ rights and obligations or Member States and communities’ spheres of competence, which arise from the Treaty. Representatives of countries that participated in these negotiations have recognized that implementing a code of conduct to avoid double taxation, should not prevent seeking solutions process at a global level.
Without prejudice to Member States competence and to the community, the code of conduct aims at enforcing the Arbitration Convention and connected matters with regard to the mutual procedure as the double taxation conventions between states regulate. International double taxation takes place when the same object is subject to two or more taxes regulations, for the same period of time. The legal means of eliminating of such conflicts on international scale are represented by fiscal conventions, called international Double Taxation Avoidance Convention (DTAC)

The fiscal regime of incomes obtained in Romania is provided by corroboration of Fiscal Code provisions with the international fiscal conventions articles. Fiscal Code applies to the following subjects of fiscal law, which might be subject to double taxation: fiscal Romanian residents; citizens of states that don’t have double taxation convention; persons to whom applies the more favorable tax amount. Double Taxation Avoidance Conventions apply to: residents of states with which Romania has signed DTAC, on presenting the fiscal residence certificate; with priority to the fiscal code, in cases where the tax amount is more favorable.

The legal grounds of juridical framework between fiscal code and Double Taxation Avoidance Convention are regulated in: Romania Constitution provisions with regard to international law and internal law: “article 11 (1) the Romanian State is obliged to fulfill as it is stated and in good manners the obligations under the Treaties, to which Romania is part of; (2) treaties ratified by the Parliament, according to law, are part of internal law; (3) when a treaty states unconstitutional clauses with regard to the Romanian Law, it shall be ratify unless the Constitutional provisions are modified;” Fiscal Code provisions.

On international scale, there are two draft conventions on which the double taxation avoidance convention is based: Organization for Economic Co-operation and Development (OECD) Model Double Taxation Convention, which stands for developed countries advantages; United Nations Model Double Taxation Convention that represents a compromise between the source principle and the residence principle, though it gives more weight to the source principle than does the OECD Model Convention. As a correlative to the principle of taxation at source the articles of the Model Convention are predicated on the premise of the recognition by the source country that (a) taxation of income from foreign capital would take into account expenses
allocable to the earnings of the income so that such income would be taxed on a net basis, that (b) taxation would not be so high as to discourage investment and that (c) it would take into account the appropriateness of the sharing of revenue with the country providing the capital. In addition, the UN Model Convention embodies the idea that it would be appropriate for the residence country to extend a measure of relief from double taxation through either foreign tax credit or exemption as in the OECD Model Convention.

In international practice, there are three basic methods to avoid double taxation: exemption method - exempt income or capital from foreign sources from tax; fiscal credit - compensation of equal amount of taxes paid abroad within the holder’s account; deduction of the amount paid abroad - the deduction from the tax on the income of that resident an amount equal to the income tax paid in the other state.

Struggling to avoid double taxation, according to the internationally adopted principles there are two main concepts, which can exist even within the same tax system: territorial concept and global concept; they may apply not only to different taxes but to the same taxes in different situations. Territorial concept is based on the principle of territoriality of the tax; the element that is crucial in such cases is the source of income. Incomes that fall under this category are: profits, wages, income from professional counseling, interest, rents, dividends etc. The countries where this tax principle is used are: France, Hong Kong, Singapore, Israel, South African Republic, Brazil, Argentina, Mexico and Peru in part. Resorting to this concept the risk of double taxation is avoided; advantages are offered to operators in that State which receives incomes from abroad, because they will be exempt from paying taxes. Disadvantages will be recorded by members of society who earn income from abroad because the amounts will be taxed locally as well. Global conception is based on the principle of universality of income tax, the major feature of this approach is the residence of the taxpaying person. In general this approach applies in all developed countries like USA, Canada, Australia, Korea, India, Japan, New Zealand, etc. The disadvantage of this concept is that unlike the previous one, which encouraged the economic relations collaboration between states, on the contrary tends to inhibit international economic operations. As a result the tax systems may comprise favorable or unfavorable elements for cooperation among States in attempt to avoid double taxation, and at the same
time to establish specific criteria under which taxes are levied by one state over another.

In the current political and economic context, fiscal policy needs to provide consistent and focused support to face economical crisis of Member States of the European Union and beyond. Romania has signed a large number of Treaties for the avoidance of double taxation. Partner-countries range from the United Kingdom and Germany to Thailand, Ecuador, and Kuwait etc. The structure and some of the stipulations of these treaties are similar.

In Romania, the political-historical context has favored the development of a system of agreements and conventions for avoiding double taxation (tax treaties), which had before 1989 both a fiscal component and an extremely interesting political aim. These treaties marked or overlapped with tensed periods in the relation with the USSR and aimed at conveying the image of state having an independent international and economic conduct (Şaguna 2006:21). The first convention for the avoidance of double taxation was signed in India and covered the taxation of income resulting from operating aircrafts and ships in international traffic. The tax treaty was signed at New Delhi, on September 25th 1968. In the aftermath, a series of international tax treaties were signed with different states; thus, between 1973 and 1974, tax treaties were concluded with Germany, the USA, France and Great Britain. The same type of treaty was concluded with Austria in 1976.

Double-Taxation Avoidance Conventions usually contains stipulations on the taxation of capital gain, independent professions, pensions etc. It is important to be noted for those investors originating from member-states that the stipulations of these Conventions must also be corroborated with EU regulations (applicable in Romania through the Fiscal Code). For instance, international juridical double taxation can be defined as the imposition of income taxes in two (or more) states on the same taxpayer in respect of the same income. Juridical double taxation can arise, for example, where a resident of one country derives income from sources in the other country, and both countries’ domestic tax legislation would tax that income. It can also arise where each country considers the taxpayer to be resident in that country under domestic tax laws. Tax conventions reduce juridical double taxation by allocating taxing rights between residence and source states on various categories of income, typically by eliminating or limiting source country taxation or by
requiring a residence state to grant relief for source state taxation through a credit or exemption mechanism. For example, tax conventions typically provide that one country may not tax the business profits earned by a resident of the other country unless that resident has a taxable presence in the form of a permanent establishment in the first country and the profits are attributable to that permanent establishment. Tax conventions also reduce juridical double taxation by establishing criteria for determining an exclusive residency status for taxpayers. The most common instances of juridical double taxation disputes are disputes over residency or permanent establishment status, or over the characterization of particular items of income and their coverage under particular provisions of the convention.

Economic double taxation means the inclusion, by more than one state’s tax administration, of the same income in the tax base when the income is in the hands of different taxpayers. Transfer pricing cases are the best example of economic double taxation. For example, a tax administration adjusts a price charged between related parties with a resulting tax charged on the additional income in the hands of one related party, where tax has already been charged in another country on that same income in the hands of the other related party. Double taxation has a detrimental effect on the movements of capital, technology and persons and on the exchange of goods and services. Thus tax conventions, when properly applied, remove the obstacles of double taxation, thereby promoting the development and flow of international trade and investment.

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REFLECTIONS REGARDING THE CONCEPT, FORMS, CAUSES AND EFFECTS OF TAX EVASION

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ABSTRACT. The study targets at elucidating the multiple definitions attributed to the concept of tax evasion by Romanian and foreign doctrinarians, the analysis of its forms, as well as defining “legal tax evasion” and “fraudulent tax evasion,” the causes and prime methods of tax evasion. A major desideratum of the European Union consists in doing interstate business on a basis of fiscal neutrality. In this context, the EU orientates the governments’ activities in the direction of promoting efficiency, the management leading to a necessary convergence of tax systems through the harmonisation of the market’s mechanisms. By analysing the functions of direct and indirect taxation, as well as the tax evasion phenomenon, it is obvious that it produces a series of effects affecting the formation of the state’s income, economical, social and political effects.

Keywords: tax evasion, fiscal neutrality, tax system

The legal regulation of taxes and other revenue budget in Romania is susceptible of violations committed by any of the topics covered by this regulation regulatory law in this area. The many obligations that the tax laws impose on taxpayers as, or especially, the burden of these obligations, stimulated, at all times, taxpayers ingenuity in inventing different methods to circumvent tax obligations. Tax evasion is one of the most studied chapters of tax law, both by technicians and by theorists. However, despite everything about the principles, scale, control and penalties relating to tax evasion words that designate this phenomenon are unclear and the area which explore is uncertain. As such, tax evasion is a notion difficult to specify, in addition, there is no legal definition of tax fraud.
If indeed speaking of fraud, it is often the same as legal or legitimate fraud, illegal fraud, international tax evasion, legal evasion, illegal tax evasion, tax havens or shelters, the abuse of the right to run before tax, free choice of the least impressive track, or underestimation of tax, fraud law or underground economy. Terminological confusion is, in fact, the more important as the same words have different meanings from the author to author. However, tax fraud most often means, *stricto sensu*, an offense under the law and is distinguished from *tax avoidance* which could be defined as a skillful use of the opportunities provided by law. But there are cases when some authors assimilate, in part, the two concepts.

Imprecision of vocabulary is compounded through comparisons of the terminology of the laws of different countries, because the names used differ. Thus, in the Anglo-Saxon countries *tax evasion* means tax fraud, and *tax avoidance* means tax evasion. The phrase “*legal fraud*” is actually synonymous with the “*tax evasion*.” *Illegal fraud*, pleonastic expression, is required, practical, by authors who use the symmetry with the previous formulation. It means direct and open violation of tax law and it only covers the *stricto sensu* fraud so it is preferable to use the formula of tax fraud. Evasion involves beyond a violation of the spirit of the law and an intent of the legislator, a direct and deliberate infringement of the rules required for the establishment and tax. Thus is the case of dissimulation of taxable matters simply by the absence of the declaration or by fictitious operations or by creating fictitious companies.

In the case of *tax evasion* imprecision is even greater, associating three meanings and a double appreciation in terms of legality. The first effect that has been attributed to tax evasion especially between the two world wars, was one in which fraud takes an extensive form, meaning the notion of tax evasion is included in the fraud. The best known effect known as tax evasion is “*the art to avoid falling into the attraction field of tax law*.” According to this perception, tax evasion is somehow assimilated with fraud. The third effect is a generic term and covers all *manifestations of “escaping” from the tax*. This is a broad definition of tax evasion and fraud that come to embrace even the fraud. Tax evasion is the logical result of flaws and inconsistencies of a bad and imperfect legislation, of flawed methods and procedures of application as well as the improvidence, incompetence and excessive taxation which the legislator is just as guilty as those that cause them thereby to tax evasion. When the tax
burdens press too hard on taxable materials, it tends to escape. It is a species of “economic reflex” which is to clear the capital that the taxation authorities want to impose too much. *An excessive tax puts on the run taxable material.*

Tax fines will not determine the tax payer to declare exactly the taxable incomes, but it will cause him to take one more minute series of precautions to evade his obligations to the state. There is a psychology of the taxpayer never to pay only what cannot fail to pay. The spirit of tax evasion and corruption is found in their occult character and is born from the simple game of interest, whatever the tax rate put in charge and which is not only a form of human selfishness and greed. Here is one of the reasons why it should concern us to highlight the methods used by private sector operators.

In the market economy, tax authorities are facing an escapist phenomenon that takes on a mass scale, because of the tendency to remove substantial income from the law. The proliferation of illegal acts, especially those in the field of economic and financial - is a consequence of flaws in the legislation or lack of regulation. In the transition to a market economy, legislative gaps are evident. The means used for avoiding tax obligations are presented in innumerable forms, but they can be divided into two categories: unlawful procedures; untruths or even simple legal shortfalls operation. Tax evasion can thus be illegal, sometimes having a fraudulent feature. The fight by specific legal rules leads, ultimately, to achieving legal and social policy in the tax area.

**The concept and forms of tax evasion**

Romanian lawyers from the beginning of the century were concerned with defining tax evasion. Thus, Oreste Atanasiu consider *tax evasion* as represented by “all lawful and unlawful procedures by which all licit and illicit processes by which those interested back out from, in whole or in part, their property, the liabilities established by tax laws.” Unlike this definition which covers both licit and illicit means used by taxpayers to circumvent tax laws, in the doctrine it is given a definition according to which *tax avoidance* is “all deliberate stealing of tax obligations, committed not by direct violation of the law, but by circumvention, by passing them using only apparently real and simulated acts.” These legal provisions serve as interim measures as tax fraudulent manipulations made in order to escape, to withdraw,
to flee from tax liabilities, somehow bypassing the law, which is apparently respected.

This definition of the tax evasion does not fully cover the facts as it materializes. It mainly refers to legal tax avoidance. Romanian Explanatory Dictionary defines tax evasion as “avoiding paying tax obligations.” Tax evasion is defined as being theft by any means in whole or in part from taxes, from fees and other amounts owed to the state budget, local budgets, state social insurance budget and special extra-budgetary funds by individuals and Romanian or foreign legal entities known contributors. Tax evasion is the logical result of flaws and inconsistencies of a bad and imperfect legislation, of flawed methods and procedures of application as well as the improvidence, incompetence and excessive taxation which the legislature is just as guilty as those that cause them thereby to evasion. Close correlation is evident between the two facts: an excessive rate and tax evasion. The way business is done in the avoidance of tax regulations differentiation is made between: legal tax evasion; fraudulent tax evasion;

**Legal tax evasion**

*Legal tax avoidance* means taxpayer’s action to circumvent the law, resorting to an unforeseen combination and therefore tolerated “by the escape from view.” This form of avoidance is possible only when the law is incomplete or has discrepancies. If legal evasion is in question, the taxpayer is trying to position oneself into the most favorable position for the utmost benefit from the advantages of tax regulations. Tax legislation imposes tasks to the private for the state: equivocal cases should be held liable, as it is accepted in the material of the civil law which states: “agreements must be interpreted as favorable to the debtor.” *(Civil Code, Art. 989).* Legal tax evasion is achieved when a certain part of income or wealth of individuals or social groups is evaded from taxation because of the way tax law has the objective of determining taxable income. Rules on tax law require that charges cannot be understood by their extension. So there is not a tax applied by analogy to a situation. It also stopped to consider the scope envisaged by the legislator to complete the flaws of the text.

Taxpayers find some means and exploiting the deficiencies of the “legal” tax provisions to circumvent the law thereby avoid payment of tax in whole or in part, because of the failure of legislation. In doing so, taxpayers remain strictly within their rights and the state
can only defend itself by a well-studied, clear, precise, scientific legislation. The only person guilty of evasion production by such means is only the legislator.\textsuperscript{15}

**Fraudulent tax evasion**

Unlike legal tax evasion which consists in maintaining a prudent legal limits theft, tax fraud is committed by flagrant violations of law; by taking advantage of the specific way enforcement is made. By unlawful tax evasion means the taxpayer's action in violation (rape) of legal prescription in order to evade payment of taxes and contributions due the state.\textsuperscript{16} Tax evasion is fraudulent when the taxpayer is forced to provide data in support of the declaration under which one determines the rate of tax, resorts to concealment of taxes, to the underestimation of the amount of taxable materials or to the use other means of evading tax payment due.

**Causes of committing tax evasion**

Cases of tax evasion are multiple. Some authors consider the tax burden primarily excessive, especially for certain categories of taxpayers, excessively which has as right reasons precisely the extent that tax evasion has.\textsuperscript{17} In international practice, efficiency of tax system is not measured by the importance of both income tax, as the degree of willingness to tax which is inversely proportional to the degree of resistance to taxes, so with tax evasion. In the second step it has to be mentioned the lack of citizenship education and education of taxpayers as well as overzealous enforcement of tax bodies, sometimes prone to exaggeration. One of the major causes of the amplification phenomenon of tax evasion is the tax law system which in addition to being incomplete has large gaps, inaccuracies and even ambiguity, which makes possible that any evasion taxpayer to have a large space to “maneuver” in his attempt to escape from paying tax liability law.

Another reason for tax evasion is the subjective considerations of psychology education and insufficient taxpayer. It should also be noted that the lack of a control well organized and equipped with skilled personnel and properly can lead to major forms of tax evasion.
Last but not least, it should be noted that one of the important causes of evasion is the lack of clear regulations, accurate and uniform, to restrict this phenomenon and to prohibit it. Tax evasion is damaging both the state and the taxpayer.

**Methods of production of tax evasion**

Avoiding falls under the tax law and thus avoiding paying tax can be achieved through three main ways: 1. Tax law itself provides an evasion by the tax system favor (appropriate, in particular, arrangements for assessing taxable lump of matter); 2. Failure, pure and simple, of the taxpayer to perform work, taxable transaction or act. This method is common for an excessive income tax (higher tax burden) because the marginal tax rate is very high and the taxpayer prefers to refrain from providing an additional unit of labor. Evasion occurs in this case by substituting the labor leisure relieved by using tax and fiscal system gaps. In this case, tax evasion skill is limited to tax, or to choose how to pay as little tax; 3. Using means and methods that openly violate tax law.

VAT tax evasion would occur through the misapplication of deductions schemes, uncover age of operations that fall within the VAT tax base, paying the value added tax related to advances received from customers, misapplication of zero, avoidance of VAT by the declaration of the duty as temporary imports. Thus, analyzing the functions of taxes and tax evasion phenomenon can be observed that this phenomenon of tax evasion / tax fraud causes several types of effects, namely. Training effects on state revenues; economic effects; social effects; political effects.

**A. The impacts of state income tax evasion on the formation of state revenues**

The effects of state income tax evasion on the formation of state revenues are multiple that are considered beyond the immediate and obvious consequence of it (decrease state revenues) in terms of connections and deep influence that these (state income) have on the way in which any democratic state to fulfill its functions. The existence of the phenomenon of tax evasion is binding leads directly to lower the volume of state revenues. This reduction in state revenues
automatically determines a lower state budget which cannot cover demand for state financial funds necessary for the performance of its core. This increase in tax rates increases the tax burden, and as we have shown in this work, an increasing tax burden has in addition to many other effects, as a natural consequence of increased resistance to taxation, and therefore an increase share of tax evasion phenomenon.

B. The economic effects of the phenomenon of tax evasion

To fulfill the role and functions of states with a market economy, the budget structure reaches a number of important functions. In the first place state budget is a means of ensuring the overall economic balance. In countries with market economies, economic activity takes place without a strict control of the center. Adopted plans are purely indicative, they are not mandatory for operators. Tax evasion has also economic effects also on the taxpayers who did not meet their tax obligations.

Failure causes budget claims to obtain an increased income for that trader, income that remains to the taxpayer. This income cannot follow the natural course of the business cycle and in order not to have discovered the act of evasion, it must be hidden. Thus, the trader apparently has a higher efficiency, produce satisfactory income, but economically this revenue does not have any value in the economic process and cannot be used lawfully. These unreported incomes will go without any exception in certain disguised bank accounts at home or abroad, or will enter the economy contributing to its development. Development of the underground economy necessarily implies an increase in the share of tax evasion phenomenon.

C. Social effects of the phenomenon of tax evasion

A tax system is always a compromise between the need for input and care for social equity income for payments proportionate to the capacity of each taxpayer. Evading taxes is a serious offense, because the lack of funds provided as budget revenues, the state is unable to perform his duties. On the other hand, directly or indirectly, the individual who committed tax evasion, sooner or later he will suffer. In
other order of ideas, the state budget is considered as an instrument of socio-economic objectives through subsidies and tax incentives.

Grants are made both by direct expenditure made from budgetary resources, as it is by giving up some revenue to the state budget due to him under current legislation. Can get some grants both economic and social categories that are considered disadvantaged and need these “helpers” financial. Provide tax incentives relate to the adoption of measures to stimulate certain economic activities, promote the general interest or regional actions, or to favor certain social groups. These measures take the form of tax advantages - exemptions, reductions and delays in direct taxes – which the public authority grants or when they pursue the implementation of government or local programs.

**Political effects of the phenomenon of tax evasion**

After the Revolution of 1989, when Romania is considered to be a state of law, all electoral campaigns parliamentary, presidential and local had their basic principles in its current policy, namely the fight against corruption, informal economy, the phenomenon of tax evasion and, in general, the struggle for supremacy of law enforcement. Given that, as I stated, tax evasion is an important generator of social inequality and public confidence in the hands of taxpayers it (the phenomenon of tax evasion) is also a factor in generating confidence in the powers current policy period. In addition too many other factors (social, economic, political), tax evasion causes a pronounced distrust of political and administrative powers of the taxpayers, especially those political powers that are responsible for governance.

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15. id, 1058.
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THE ROLE OF NBFIs IN DEVELOPING MARKET.  
LEGAL FRAMEWORK

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ABSTRACT. The nonbank regulatory issues facing emerging markets are the same as those facing developed markets. Every country can benefit from a healthy sector of nonbank financial institutions (NBFIs) that provide a sound basis for economic growth. The regulatory structure for NBFIs is not only a critical factor in ensuring that these institutions perform their functions efficiently but also an important factor in stimulation or retarding their growth and development as part of the financial system. Excessive regulation can stifle their emergence. Equally unhelpful, a poor incentive structure can encourage growth for the wrong reasons and in the wrong forms, leading ultimately to problems, of not crises. The objective should be to provide a sound regulatory framework that enables NBFIs to flourish to the mutual benefit of all involved - neither forced to grow beyond the economy’s needs nor prevented from playing their natural role of increasing financial efficiency. This paper focuses on the importance of legal infrastructure, the role of financial sector professions, the role of incentives for the growth of NBFIs, the role of foreign competition, the importance of public sector governance.

Keywords: non-bank financial institution, financial stability

Definition

A non-bank financial institution (NBFI) is a financial institution that does not have a full banking license or is not supervised by a national or international banking regulatory agency. NBFIs facilitate bank-related financial services, such as investment, risk pooling, contractual savings, and market brokering. Examples of these include insurance firms, pawn shops, cashier’s check issuers, check cashing locations, currency exchanges, and microloan organizations. Alan
Greenspan has identified the role of NBFIs in strengthening an economy, as they provide “multiple alternatives to transform an economy’s savings into capital investment [which] act as backup facilities should the primary form of intermediation fail.”

Financial markets facilitate savings mobilization, by offering both individual and institutional savers and investors additional instruments and channels for placement of their funds at more attractive returns than are available on bank deposits. At the same time financial markets enhance access to finance for more firms and individuals, with competition also making such access more affordable. Developed financial markets also have the capacity to reduce volatility, distortions, and risk by operating in an environment that is transparent, competitive, and characterize by the presence of a diverse array of products and services, including derivative instruments that allow for effective risk management. Therefore, reforms in a country’s financial architecture often lay the groundwork for improved economic performance. In almost all advanced economies, financial systems deliver a broad range of financial services and sophisticated products, and the efficiency of such well-developed systems has contributed to macroeconomic stability and sustained economic growth and prosperity.

Legal framework

The general legal framework is an important determinant of NBI sector. “Legislation underpinning the specific regulation framework for NBFIs is the foundation stone of good regulation.” This includes both the acts creating and giving powers to the regulator and the acts underpinning the legal existence and behavior of the entities being regulated. It is obvious that these acts specify the powers of the regulator and the extent of the regulator’s coverage. There should be no ambiguity as to the meaning of terms such as securities, deposits, insurance, mortgages, and leases.

Equally important are the supporting laws, such as those governing accounting rules, property rights, and contract enforcement. The legal systems are separated into four major legal families: English, French, German, and Scandinavian. Although all four descended from Roman law, they evolved in different ways and, through colonization and conquest, spread throughout the world, providing the base for most modern legal systems. Differences in legal origin explain differences in the legal rules covering secured creditors, contract enforcement,
and the quality of accounting standards. A well-balanced prudential framework is one that seeks to implement the best of these systems, with strong and predictable rights for creditors, strong but fair enforcement, and a reliable system of accounting and disclosure. Not so long ago, Europeans were in principle obliged to manage and invest their money predominantly in their home country. Now, further to the liberalization of capital movements and payments which has accompanied the consolidation of the Single Market, EU citizens can conduct most operations abroad, as diverse as opening bank accounts, buying shares in non-domestic companies, or purchasing real estate. However, the rules concerning some of these rights remain governed by national provisions, which vary from one Member State to another.

Free movement of capital is an essential condition for the proper functioning of the Single Market. It enables a better allocation of resources within the EU, facilitates trade across borders, favors workers mobility, and makes it easier for businesses to raise the money they need to start and grow. Free movement of capital is also an essential condition for the cross-border activities of financial services companies. Indeed, the effectiveness of EU initiatives in the financial services sector would be compromised if capital movements within the EU were subject to restrictions. In 2005 the Commission completed the legislative phase of an action plan aimed at developing a true European-wide market in financial services and is now implementing a new strategy to deepen financial integration and deliver further benefits to industry and consumers alike. A more developed Single Market in financial services will provide consumers with a wider choice of financial products – such as loans, insurance, saving plans and pensions – which they will be able to buy from anywhere in Europe. It will also make it easier and cheaper for companies to borrow money, bringing down the cost of capital, goods and services for everybody.

Banking activities supervision, such as those conducted by non-bank financial institutions as well primarily refer to the safety and health of money creation, but it also involves the continuous monitoring of activities of this money services industry, essential to determine whether operative units, components of financial corporate function competitively and constructively, in compliance with regulation and their status.

In Romania, in order to assure and maintain financial stability of national economy, the state central bank should monitor non-bank
financial institutions registered in the general register, mainly on the basis of information provided by these entities in the reports submitted. Non-bank financial institutions must meet the requirements of the European legislation and submit to the National Bank of Romania any required information, to the end of monitoring money creation. The first requirement for the activity of credit institutions is constituted by the compliance with registration criteria of the special register.

Criteria may refer to: turnover; loan volume; indebtedness degree; total assets; owner’s equity, etc. On the basis of a well-established program, whenever deemed, the central bank organizes inspections at the headquarters of non-bank financial institutions and their territorial units, so that empowered personnel in banking supervision should verify the law requirements. A particular requirement, on which the further activity of non-bank financial institutions depends, is the quality of its significant shareholders and structure of groups to which they belong. They must ensure stability and development of the non-bank financial institution and allow bank evaluators to monitor and effectively supervise non-bank capital. In this respect, managers, administrators and members of the supervisory board must have good reputation and experience corresponding to the nature, duration and complexity of the activity of the non-bank financial institution and responsibilities entrusted. Management of central authority must be performed by at least two persons, in case of choosing the unitary management system regulated by the republished Law no. 31/1990, with amendments and subsequent completions.

None of the non-bank financial institution managers can be vested with management duties, according to legal provisions, in other non-bank financial institution or trade company, except for credit and financial institutions belonging to the same group as the non-bank financial institution. With regard to the first operations of non-bank financial institutions, their monitoring and supervision allow us to see if the activity took place in compliance with the requirements specified in legislation, which refer to: a) its own funds; b) exposure to a debtor and aggregate exposure; c) exposure to persons with special relations to the non-bank financial institution; d) organization, internal control, internal audit and risk management. In order to attain reference indicators regarding the quality of institutional activity, all operations carried out by non-bank financial institutions must take place on the basis of procedures and specific rules.
Rules, as approved by the statutory bodies of the non-bank financial institution, must be transmitted to the state central bank, together with other internal rules regulating the activity of the nonbank financial institution, within 5 working days from receiving the document attesting registration in the special register. In order to actively participate in the money creation and influence the financial stability by creating a currency account, an important requirement refers to how these entities are organized. Therefore, the organization and functioning of non-bank financial institutions are regulated by the provisions of Law no. 93 of 2009 on non-bank financial institutions, those of Law no. 31/1990 on trading companies, republished with amendments and subsequent additions, and those of the Government Ordinance no. 26/2000 on associations and foundations, approved with amendments and additions by Law no. 246/2005, as subsequently amended.

Minimum issued capital of non-bank financial institutions can’t be less than the equivalent in lei of the amount of 200,000 Euro and 3,000,000 Euro for nonbank financial institutions providing mortgages. Non-bank financial institutions, Romanian legal persons, can increase the share capital through monies contributions, incorporation of reserves constituted out of net profits and dividends from net income due to shareholders after payment of the dividend tax and reported result representing the net income Branches of Romanian non-bank financial institutions, foreign legal persons, may increase the endowment capital through new permanent monies contributions, available to the branch of non-bank financial institution, foreign legal person, and use of net profit reserves, existing in balance according to the last annual financial statements pursuant to approval of non-bank financial institution, foreign legal person. The funds of non-bank financial institutions consist of the company’s equity and additional capital.

The non-bank financial institutions equity includes: subscribed and paid up share capital (endowment capital); share premium account (the issue, contribution, merger, division, conversion and other share premium account), fully charged, share capital-related represented by shares; legal reserve; statutory or contractual reserves; other reserves, except those included in additional capital, for raising share capital or covering losses and registered in published financial statements of the nonbank financial institution; retained earnings representing the nondistributed net income. Interim profit made by the date of determining the level of its own funds, provided it is net of any fore-
seeable liabilities and verified by persons responsible to audit financial statements of non-bank financial institution.

Conclusions

By providing additional and alternative financial services, NBFIs improve general system-wide access to finance. They also help to facilitate longer-term investments and financing, which is often a challenge in the early stages of bank-oriented financial sector development. The growth of contractual/collective savings institutions such as insurance companies, pension funds and mutual funds widens the range of products available for people and companies with resources to invest. These institutions also provide competition for bank deposits, thereby mobilizing long-term funds necessary for the development of equity and corporate debt markets, municipal bond markets, mortgage bond market, leasing, factoring and venture capital. Collective savings institutions also allow for better risk management, while helping to reduce the potential for systemic risk through the aggregation of resources, allocation of risk to those more willing to bear it, and application of portfolio management techniques that spread risk across diversified parts of the financial system. Thus, countries have a lot to gain from financial markets and a mature financial services industry.

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THE FUNDAMENTALS OF SUSTAINABLE DEVELOPMENT

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ABSTRACT. The concept of sustainable development had a continuous improvement over the time, this fact being evidenced by the change in the manner of problems approaching during meetings at world level. Sustainable development is acting on the background of some principles, which characterize this concept, such as: the preoccupation for equity and correctness between the economy, society and environment. Its expression is made through an ensemble of coordinates compatible between them, ensuring the needs of present generations without jeopardizing the interests and needs of future generations.

Keywords: tourism potential, economic components, environment policy

The preoccupations regarding sustainable development are dating for more than 30 years when, at the Conference for the Environment from Stockholm (1972) it was agreed on the necessity to answer the problems raised by the deterioration of natural environment, by the prevention of aggravation of the ecologic disequilibrium and by the assurance of ecologic equilibrium onto the Earth. The Conference is showing the moment in which the humanity started to recognize the fact that the problems of the environment are inseparable from the ones of the welfare and generally from the economic processes. But the reference moment which marks a new vision for the development of contemporary countries is represented by the United Nations Conference for Environment and Development, held in 1992 in Rio de Janeiro. With this occasion, the economic development and environment protection were substantiated on a new concept, known as sustainable development, in this regard being adopted Agenda 21
and the Declaration from Rio de Janeiro, program documents of sustainable development.

In time, the formulation of this concept had a continuous improvement, through new specifications and new instruments for implementation of sustainable development, world countries gathering in a series of conferences and meetings, very important being the Conference from Monterey regarding the Finances for Development and Ministerial Conference from Doha, which established a clear and profound vision over the future of humankind. As a continuation of these international preoccupations, in year 2002 there took place in Johannesburg (South Africa) World Summit regarding Sustainable Development, which analyzed the manner of achievement of the objectives fixed one decade ago in Rio de Janeiro.

The sustainability comes from the idea that human activities are depending on the environment and on the resources. The health, social security and economic stability of the society are essential in defining the quality of life. A comparison between these meetings at international level shows the change in the manner of approach for long-term problems in the field of development of human society. Thus, while at Stockholm (1972), the approaches envisaged the decrease of pollution and prevention of finishing of the resources, at Rio de Janeiro (1992) there have been drawn up strategies promoting human development through economic development based on the sustainable development of fundamental natural resources and was supported an action plan for global development of 21st century. At World Summit from Johannesburg, apart of the exhaustive analysis made for the decade passed since World Conference from Rio de Janeiro, there have been decided new directions for action, which were written in the Declaration from Johannesburg regarding Sustainable Development of contemporary world.

The start point in formulation of sustainable development concept is represented by United Nations Report of World Commission for Environment and Development, known as Brundtland Report, in which it is recorded the idea in accordance to which ‘the humankind has the capacity to achieve a sustainable development – to guarantee the satisfaction of current necessities without compromising the capacity of next generations to satisfy their own necessities.’ Future development of humankind was formulated in a systemic, integrator vision, destined to answer to the necessity of equalization of chances for the generations existing and succeeding onto the Earth. The image
drawn regarding future development combines, in a unitary whole, the economic development supported with the keeping and amelioration of the environment, the equity, justice and affirmation of democracy into social life. The prefiguration of the new type of humankind economic development polarized around the definition of concept of sustainable development and finding of concrete, efficient means for achieving all its dimensions, which has become the central point of discussions regarding the problems on the economic development and the environment.

Sustainable development is understood as a new type of economic development, radical, opposite to the current type, which has dominated the economy of the 19th and 20th centuries, limited to ‘the use of natural resources of the planet, of the conventional and non-conventional forms of energy, concomitantly with the protection and preservation of the environment.’ Practically, the concept of sustainable development is designating all forms and methods of socio-economic development, whose foundation is represented in the first place by the assurance of an equilibrium between these socio-economic elements and the elements of natural capital.

Sustainable development envisages and tries to find a stable theoretical framework for decision taking in every situation in which there is encountered a report of human/environment type, either it is about the natural, economic or social environment. Although sustainable development was considered initially a solution for the ecologic crisis determined by the heavy industrial exploitation of the resources and by the continuous degradation of the environment and was seeking in the first place the preservation of environment quality, presently this concept extended over the quality of life in its complexity, also under economic and social aspects. The object of sustainable development is now represented also by the preoccupation for justice and equity between the states, not only between generations.

In World Report regarding Human Development, the concept of sustainable development was discussed during the works of Conference from Rio de Janeiro, where there has been decided the necessity for harmonization of relationship between the economy and ecology, as constitutive parts of the ecosystem. ‘From now on, nothing can be considered in the industrial, economic, human life, habitat fields without to be made an evaluation from the environment point of view. Only the coordination of both factors, economic and ecologic, will be able to assure a sustainable development.’ The key problem
of sustainable development is represented by the reconciliation between the two human aspirations, which, through their content, are supporting the necessity of economic and social development, but also of the preservation of the environment, as the only way for the increase of quality of life.

The sustainable preoccupations of the international and national authorities and institutions, of scientists from various fields of social activity, were pointed out and intensified by a complex of various processes, which worries more and more the authorities and world’s population. Among others, such processes are: 1. the persistence of poverty encountered in most of world countries; 2. the degradation of the environment and the aggravation of ecologic disequilibrium; 3. uncontrolled expansion of urban development, which affects the quality of life for an important part of world’s population; 4. the persistence of unemployment, which affects the human, considered as the most important production factor; 5. the manifestation of economic crisis under a multitude of forms, which have as disastrous effect the waste of immeasurable resources; 6. the loss of citizens’ trust into public institutions a.s.o.

Under the conditions in which the negative effects of the current type of economic development were initially observed at economic worldwide level, naturally the first studies regarding the theory and practice of sustainable development were approached at world level. At national level, such preoccupations appeared later on, at the beginning being limited to some economic, financial, ecologic, educational aspects, but not always investigated through the viewpoint of interdependences between them. Sustainable development is based on some major principles which characterize it: 1. the preoccupation for equity and correctness between the countries and generations; 2. long-term vision over the development process; 3. systemic thinking, the interconnection between the economy, society and the environment.

Having in view these general principles, the concept of sustainable development is characterized by fluidity, emphasized by the multitude of its interpretations. Thus, from the apparition of first formulations regarding the concept of sustainable development and until present, its content had a continuous improvement, by adding of new coordinates, theoretical, methodological and practical valences, which are reflected in more than 60 interpretations. Common to these is their interpretation in a global vision, through which there
are emphasized the complex and dynamic interdependences between the economy, ecology and social-human. Their specific consists in the difference between the points of view approaching the sustainability, as follows:

1. economic, based on the principle of generation of a maximum income under the conditions of capital maintenance (physical, natural, human), sustainable development is referring to the value of capital (natural and human). From the accounting point of view, the sustainable development consists in the accumulations which must exceed the consumes, which means the approach under the aspect of economic efficiency;

2. ecologic, based on the support of natural and anthropic biological systems, sustainable development is approached as a population in continuous increase and as a consume of resources decreasing the stocks and the potential of restoration, with negative consequences on the general economic equilibrium. In the trend of offering as many opportunities as possible for the future generation there can be mentioned also the preservation of global bio-diversity, regardless the advantages known presently for certain species;

3. socio-cultural, based on the maintenance of stability of social, educational and cultural systems, for determination of intra and inter-generations equity, through the preservation of cultural diversity and the encouraging of pluralism of ideas, the effect of a permanent education envisaging the amplification of human potential, its improvement with new valences, thus assuring the more efficient use of material and production factors;

4. moral and spiritually, the sustainability is put into relationship with the ethical values of human behavior, as a factor for increasing of social work efficiency;

5. temporal, it is approached in the sense of improvement of sustainability measurement by a system of indicators through which to be emphasized the size of processes of replacement and renewal comparing with the ones of depreciation, the first to exceed or to be equal, on short-term, with the other part of the equation.

In the economic and ecologic literature, the sustainability was considered an essential coordinate in the elaboration of development policies. We encounter various approaches of the sustainability, such as:

1. Allen Robert – sees the sustainability as a use of species and ecosystems at the levels and manners allowing them to renew them-
selves for any practical scope ... the development providing the satisfaction of human needs on long-term and improving the quality of life’ (*How to Save the World*. New Jersey: Barnes and Noble Books, 1980).


the sustainable development is a model of structural and social economic transformations which optimizes the economic and social benefits available at present, without putting in danger the probable potential for obtaining of similar benefits into the future ... the sustainable development involves the use of renewable natural resources so that these should not be exhausted or degraded or not to be reduced their utility for the future generations ... involves, as well, the exhausting of non-renewable sources of energy at a rate ensuring a high probability for the transition towards renewable sources of energy....

3. J.K. Lynam and R.W. Herdt define the sustainability as ‘the capacity of a system to maintain its output at a level equally or higher than its historical average’ (Lynam, J.K., Herdt, R.W., *Sense and Sustainability: Sustainability as an Objective*, International Agricultural Research, 1989).

4. In accordance with David Pearce, ‘the criteria of sustainability asks for necessary conditions for the equal access to basic resources, which must be valid for each generation’, which means: a set of constraints, establishing that the rates of consume for the resources not to be higher than the rates of their natural regeneration; the use of environment as a ‘place for storage of wastes, so that the rates of waste production not to exceed the rates of (natural) assimilation by the corresponding ecosystems’ (Pearce, D.W., “Optimal Prices for Sustainable Development,” in Collard, D., Pearce, D., Ulph, A. *Economics, Growth and Sustainable Development*, New York: St. Martin’s Press).

5. In the conception of executive manager of United Nations environment program, M.K. Tolba, sustainable development envisages a support for the very poor ones, since they do not have any other option but to destroy of their environment; the idea of a certain development, in the framework of constraints imposed by the development of natural resources; the idea of development of cost-efficiency,
which uses various economic criteria from the traditional approaches, which means that the development must not damage the environment, nor to reduce the long-term productivity; important problems related to health control, corresponding technologies, food security, clean waters and shelters for everybody (Tolba, M.K., Sustainable Development – Constraints and Opportunities, London: Butterworths, 1987).

6. For FAO, sustainable development implies the arrangement and development of natural resources and the orientation of technical and institutional changes in a manner such as to satisfy the needs of present and future generations .... the preservation of lands, waters and phyto and livestock patrimony, the use of materials non-dangerous for the environment, well adapted from the technical point of view, economically viable and socially acceptable. Thus, the sustainability is not limited only to ecologic aspects of sustainable development, the concept has a global character, all agro-economical, economic and social factors being of an equal importance, referring to the optimization of resources, to the management of the environment and to the assurance of abundant and stable productions (Development durable et environnement, Roma: FAO, 1992).

There can be drawn the conclusion that the various definitions regarding the sustainability are approached in the vision of reconciliation between the economy and the environment on a new way supporting the human progress, not only in several places and for several years, but for the entire planet and for a future as long as possible. For this purpose there has been made a set of economic and social objectives referring to the assurance of: 1. economic development considering the preservation and protection of natural resources; 2. essential requirements for work, food, energy, water, houses and medical assistance for humans; 3. a new quality of processes of economic development; 4. controlled increase of population; 5. preservation and increase of reserve for resources; 6. restructuring and maintenance under control of possible risks; 7. integrated approach of the environment protection, economic increase and the necessity for energy.

Referring to the necessity of poverty eradication, the global problem of contemporary world, Brundtland Report underlines that ‘for the essential needs of the poor world, the priority should be represented by their satisfaction.’ In other words, sustainable development must assure an increase of humans living level, with special accent on the prosperity of poor world, avoiding in the same time, the costs over
the future. The content of sustainable development is expressed in an assembly of coordinates compatible between them, through which it is assured the satisfaction of present needs without endanger the interests and needs of future generations.

In the conception of Thomas Sterner (Sterner, T., (1994) Economic Policies for Sustainable Development, London: Kluwer Academic Publishers, 75), the sustainability is presented as a union of three dimensions – economic, social and ecologic. The economic attached to the ecologic influences the process of economic development by affecting the natural resources and the biodiversity; the social attached to the ecologic assure a rational use of the natural resources, a preservation of biodiversity, a respect for the nature through culture and education. The academician N.N. Constantinescu explains the content of sustainable development through the view of four dimensions – economic, technical, human and environmental, reunited in a dynamic and flexible functional process. The optimal level corresponds to that development which can be supported by the four dimensions. In order for the model to be operational, it is necessary for this support or viability to be applicable for all subsystems corresponding to these coordinates of sustainable development, which means starting from energy, transport, agriculture, industry and until investments, human sites and biodiversity conservation.

Thus, practical achievement of sustainable development is a very complex and difficult process, being defined by the dynamic union between eight coordinates: ecologic; economic; technico-technological; social-human; political; cultural; legal; and spatial (national-state, regional and international). In the conditions of assuring the compatibility between anthropic environment with the natural environment, the ecologic coordinate approaches the process of economic development through the necessity to prevent the ecological disequilibrium, to maintain a dynamic equilibrium in any system. We cannot imagine or develop an economic activity without taking into consideration the ecologic reason, since to create welfare there are contributing the human, physical and natural capital. The natural capital includes the renewable and non-renewable resources.

Sustainable development is a factor generating wealth, which must assure the protection of natural capital, under quantitative and qualitative aspect, at a minimum level necessary for the biologic reproduction of ecosphere, meaning of the critical natural capital. The contribution of critical capital to the economic development depends
on the maintenance of stocks of natural resources and on the limitation of pollution of natural environment. Sustainable development is a manner for substantiation of means to increase the national wealth. For this purpose, it is necessary the prudent use of common natural resources, so that the renewable resources to be able to be maintained and the non-renewable ones to be able to be used taking into consideration the needs of future generations. To achieve a sustainable development there must be defined a critical natural capital. The limit determination in using critical natural capital is to make further application of some minimal salvage norms, thus being determined a use limit. The use of renewable resources must not be higher that the rate of usual regeneration for the respective resource, while the non-renewable resources must be treated through the viewpoint of their eventual replacement with renewable resources.

The range of potential dangers to which it is subjected the natural capital increases more and more, that is why it is imposed the adoption of options to use these resources with maximum prudence. The economic coordinate represents the essential factor for sustainable development. The economy assures, through work, the transfer of substance and energy from the natural environment into economic goods destined to the productive and non-productive consume. The circuit made by the exchanges of substance and energy and the anti-entropic sources (the information and knowledge) is resumed permanently, constituting the support of life and development onto the Earth.

The technical-technological coordinate represents the link assuring the compatibility between the coordinates of sustainable development. The current technical manner of production, having an aggressive character, is causing multiple disturbances in the subsystems of human activity, especially in the economy and environment. For this reason, it is imposed its removal and its replacement with a technical and technological manner of production able to avoid the damage to the nature, to the economic activity and to humans living conditions. The technical-technological coordinate represents the decisive factor of economic development.

Social-human coordinate expresses the link between the process of economic development and the social finality, the prosperity of human society. In the social component there are included activities related to the production, educational, cultural, sanitary, sportive, tourism a.s.o. Sustainable development approaches the concept of life quality under all its aspects, promoting an integrated process for
decision elaboration, as well as correct distribution of development costs and benefits between generations and nations. The guarantor of democracy is represented by the political coordinate. Through the state institutions, the political organizes, coordinates and controls the social actions of a state. In Romania, it is imposed the elimination of interests conflicts between political and economic, by the enlargement of democratic framework and of the framework for exercising of rights and obligations of society’s members. Moreover, there are imposed measures for reduction of corruption and abuses, for regaining of population’s trust into public institutions.

A special importance is given to the educational coordinate, this fact being discussed at the World Conference from Rio de Janeiro (1992), in Agenda 21, chapter ‘Political education, formation and conscience,’ through which there has been decided that every country to make an own strategy regarding environment education. In 1997, at the 19th Extraordinary Session of UN General Assembly, it was emphasized the fact that it is necessary that the financing of educational systems to be made in a suitable manner, in order to allow to everyone to develop the individual capacities and aptitudes. The progress depends more and more on the capacity of research, innovation and adaptation of the new generations for the present and future needs. The education must not be regarded only through the viewpoint of school instruction, this must be extended also to the non-formal and informal areas. The reorientation of education in the perspective of sustainable development must be made through new school programs, offering the youth the possibility to select and initiate efficient actions regarding social activity, to investigate and elaborate strategies onto whose achievement depends the sustainable development of local communities and through which there can be contributed to the achievement of national and international objectives.

The cultural coordinate is referring to the formation of a new way of thinking and of individual’s behavior in relation with the other individuals, in relation with the dynamic economic-social realities and with the natural environment. Through the development of human capacities, the civil society must acquire ethical principles and must go beyond current frontiers of knowledge. The legal coordinate approaches the legal and institutional framework necessary for the sustainable development and includes all fields of human activity. In our country, this fact implies the responsible implementation of community acquis, as well as the consolidation of specific community
institutions. The spatial coordinate is generated by the process of globalization of world economy and it is referring to the assurance of compatibility of optimization criteria at all structural levels of the economy (national, regional and international). Through the development strategies it is emphasized the necessity of cooperation inside and between the economic, social and environment sectors, as well as the interdependence between local and global, developed states and under development states. Sustainable development means ‘to think global and to act local.’

*Agenda 21* of World Conference for Environment and Development from Rio de Janeiro (1992) pointed out a series of principles of sustainable development for whose achievement it is necessary the promotion of some strategies substantiated from all points of view. Among these there can be named: the equality between sexes, the individual must be in the center of all initiatives for development, peace, order, national unity, democratic participation to decision taking, social justice, spatial equity, institutional viability, viable economic development, ecologic health, equity between bio-geographical areas, global cooperation of nations onto the Earth. Sustainable development is important for any society, but its benefits must be higher than the costs. The attention must be focused on the manners through which the principles of sustainable development can be put into practice in various sectors of the economy.

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THE EVOLUTION AND INTER–DEPENDENCE OF TOURISM WITH THE ENVIRONMENT

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ABSTRACT. In the economic and social life there often occur changes and the notion of tourism must be permanently adapted, confronted and correlated both with the practical activity, but also with the other fields of the economy. The demographic explosion generated by the increase of welfare, the rapid industrial revolution has caused an ascending evolution of tourism activity. But the touristic phenomena cannot be separated from the status of the environment since its quality, variety, and aesthetic aspect are basic resources in order to carry out touristic activities.

Keywords: sustainable development, economic, ecologic, socio-cultural

World Tourism Organization and other similar organisms within European Community understand that ‘the touristic potential’ of a country or of an area is the assembly of natural, cultural and social-economic components which express possibilities for valuation in the touristic field, offer or give a certain functionality to the territory and constitute premises for the development of tourism activities. Thus, the aspect of touristic space is determinant, fundamental for travels and tourism. The advertising regarding the attractive landscapes always contains geographical references. For this reason, the tourist or the potential tourist creates its own vision on a geographical space, including on the touristic facilities, even before visiting them. The components of the natural environment or the ones of the anthropic environment, through their qualitative or quantitative, aesthetical or
cognitive value, can become ‘touristic attractions,’ constituting real touristic ‘resources’ for tourism industry.

Miossec (1977) considers that “touristic image is an introduction into tourism geography’ which is composed of three main sequences: 1. Global image – which means a general idea of the tourist, a cliché; 2. Cultural image – which can be imposed and served as a global image, in the measure in which it becomes preponderant for the tourist; 3. The ‘new’ image – this contains, comparing with the previous ones, an industrial component (tourism industry).

The concept of touristic attraction expresses the affective, cognitive-aesthetical side of various elements from the structure of touristic potential, which produce impressions of a strong intensity, influencing directly certain segments of touristic demand. The tourists will be attracted by the image, grandeur, uniqueness, beauty of some components of touristic potential, such as falls, quays, abrupt sides, outstanding paintings, imposing buildings, floristic elements.

In various publications it is encountered the concept of touristic attraction synonymous with the one of touristic resource. However, the latter is more complex and complete, including besides touristic attractions suitable for visiting, natural or anthropic elements which can be valuated directly in the touristic activities as ‘raw material’, generating various forms of tourism (mineral springs and the mud promote the bathing tourism; the wind, snow, waters are generating sportive tourism; the various types of bio-climate and the air full of ozone – climatic tourism; mountain agriculture – agro-tourism; the villages – rural tourism, a.s.o.) The notion of touristic resource was introduced during the last decades, from the moment when the tourism became a real industry based on the exploitation and valuation of some resources, the same as any other economic activity.

Besides the two concepts there is also a third one, i.e. ‘touristic stock.’ This includes the whole natural, social-cultural and historical resources for touristic valuation which represent the basis of the potential offer of a territory to which there are connected the presence or the absence of tourism activities. O. Snak (1976) names this concept ‘primary tourism offer’ and considers it as being the essential premises in the touristic arrangement of an area and in the development of certain forms of tourism.

Current tourism puts into circulation, using the mass media, variable images of the same touristic area, each image being destined to a certain group of tourists. Thus it is observed the contrast between the
tourism performed during the past centuries and the contemporary one, the first one being the prerogative of the elite, involving the simple movement or travel and admiring of nature. The spectacular development of mass tourism during the 20th century lead to the multiplication of forms of tourism, going from natural landscapes to modified landscapes, even arranged for the purpose of tourists attraction. In this regard, there occurs a differentiation of the offer in order to be able to adapt the product to a differentiation of the demand. The differentiation of the offer shows the proportions not only in space but also in depth of the tourism, especially in the industrialized and urbanized countries with a high living level. The space restructured for the purpose of touristic consume suffers a degradation and an increase of its fragility due to touristic pressure which tends to go beyond control in certain moments.

In 1896, E. Guyer Freuler published a first definition for the tourism in Contributions to a statistics of tourism, considering it as a

\[ \text{phenomena of modern times, based on the increase of necessity for repairing of health and change of the environment, for cultivation of the feeling of receptivity towards the beauties of nature \ldots result of trade, industry development and of the improvement of means of transport.} \]

In this manner, it underlines besides the travel motivation the existence of a connection between the tourism and the economic development. Later on, in 1938, Leville-Nizerolle gives a definition more expressive to the tourism, seeing it as ‘the assembly of human’s non-lucrative activities, outside residence area.’ A more complex approach of the tourism as an economic-social phenomenon is made by W. Hunziker and K. Krapf. They define the tourism as being ‘the assembly of relationship and phenomena resulting from the travel and sojourn of persons, outside their residence area, as long as the sojourn and travel are not motivated by a permanent settlement or by any lucrative activity.’

Specialist in tourism economy, Kalfiotis (1972) defines the tourism as a temporary travel of individual or grouped persons from their residence to another place, for the simple pleasure and satisfaction of some moral interests or intellectual necessities, thus leading to the performance of some economic activities. Three years later, Kaspar gives a new definition for the tourism. He sees it as the
assembly of relationships and phenomena resulting from the travel and sojourn of persons, for which the place of sojourn is not the main and durable residence or the usual place of work. The travel and sojourn remain the fundamental components, to which there are added the transport, the accommodation and the trade. The geographer Michaud (1983), the chief of Superior Council of French Tourism, shows that the tourism groups the active assembly of production and consume, generated by one-night travels or by the travels for several nights, from the usual residence, the reason of this travel being the pleasure, the business, the health (thermal treatment, thalasso-therapy) or the attendance to a professional, sportive or religious reunion, a.s.o.

Thus, for the tourism, the main criteria is the travel for a period exceeding 24 hours and involves a predominantly economical approach, while the entertainment has the basic motivation the travel for entertainment with a predominantly social approach. In order to clarify the concept of tourism there must be also analyzed the subject of the travel, the tourist. The same as for the notion of tourism, in the specialized literature there is a diversity of opinions for the concept of tourist. Thus, there can be quoted the points of view expressed by F. W. Ogilvie in *Small Encyclopaedical Dictionary*, which includes in the category of tourists all persons meeting two conditions: they are located in places far from home for less than a year and they spend money in the respective places without earning them there, or by A. J. Norval in *The Tourist Industry* for whom the tourist is that person who enters a foreign country for any other reason than settlement of a permanent residence or for business and who spends in the respective country the money earned elsewhere.

In 1937, Nations Society Council recommended the defining of international tourist as ‘that person who travels for at least 24 hours in another country than the one where his permanent residence is.’ In accordance with this definition, there can be included in the range of tourists also the persons who travel for their own pleasure, for domestic reasons (family reasons) or for health, who attend various international manifestations or missions of any nature, the persons who travel for business purposes, the ones who make maritime cruises, regardless the length of their sojourn. In the category of ‘international tourists’ there cannot be included the persons arriving in a country (with or without work contract) in order to be on a position or to exercise a paid activity, the ones settling their permanent residence into another country, pupils and students living temporarily abroad,
the persons with the residence in one country and the place of work in a neighboring country, travelers in transit, even if the length of travel exceeds 24 hours.

The International Union of Tourism Official Organizations (O. M. T. nowadays), at the reunion from Dublin in 1950, included in the range of tourists the pupils and students living temporarily abroad. Three years later, the Commission for statistics within the same organism defines also the international visitor. In the United Nations Conference on tourism and international travels (1963) it has been recommended the term of ‘visitor’ in order to designate ‘any person visiting a country, other than the one where it is located his usual residence, for any other reason than carrying out a paid occupation inside the country visited.’ From this definition results two categories of visitors:

1) tourists – temporary visitors who stay at least 24 hours in the visited country and the purpose of their visit is recreation, health, sport, rest, studies, businesses, family, missions, reunions;

2) excursionists – temporary visitors who travel for their own pleasure and stay less than 24 hours in the visited country.

In the same time it is defined also the traveler (tourist) in transit as being the person crossing a country, even if he stays more than 24 hours, with the condition that the stops to be short and / or to have another purposes than the touristic ones.

By similitude it can be defined also the internal tourist as ‘that person visiting a place, other than the one where it is located his usual residence, inside his country of residence, for any other reason than the one of exercising a paid activity, performing a sojourn of at least 24 hours.’ There are various references of the written word ‘tourist’ (instead of traveler) in various publications starting with year 1800 (Smith, 1989), 1838 (Feifer, 1985), 1876 (Miecykowski, 1990).

In the economic and social life always occur changes and the notion of tourism must be permanently adapted, confronted and correlated with the practical activity, with the other fields of economy. However, the tourism has the characteristics of a distinct field of activity, representing a field of activity of the national economy, this field being integrated in the area of tertiary sector.
Transformation of tourism in time

Our life is lived in conditions more and more exigent of the contemporary activities influenced by the super-development of technology, by the informational and communication explosion. The consume of nervous energy is higher and higher and the degree of wear and tear of work capacity in a short time is very high as well. Intense work over a long period needs the restoration of energy resources from time to time. This restoration of energy resources cannot lead but to various touristic activities.

Spending of spare time (‘loisir’ in French; ‘leisure’ in English) in a pleasant manner is practiced since most ancient times. It was considered to be a touristic phenomenon only upon the industrial revolution. Demographic explosion generated by the increase of welfare, at the same time with the rapid industrial development after the 2nd World War started a so-called touristic explosion.

In the development of tourism there are noted three stages: 1) Incipient tourism (pre-industrial stage); 2) Modern tourism (industrial stage); 3) Contemporary tourism (post-industrial stage). The name and delimitation of the stages is relative since they vary within certain limits from one country to another.

The incipient tourism

The travels existed for always so we could say that we had ‘tourism’ activities since the most ancient times. In antiquity, in the life of aristocracy of developed antique civilizations (Greek, Roman) there are mentioned the strolls and travels for pleasure. These were performed on short distances, around the large urban centers, such as Athens, Rome, Napoli, Alexandria, Cartagena. There were considered as forms of tourism the pilgrimages to sanctuaries (to the temple of Apollo from Delphi, 6th century B.C.), the first sportive manifestations – Olympic Games, started in Greece in the honor of Zeus, travels for study (Alexandria, Athens, Rome), the travels to Roman temples (Pamukkale, Herculane Baths). In the Roman Empire there are encountered the beginnings of bathing and climatic tourism. It is known the fact that the Romans tapped many thermal springs in order to use them for therapy and bathing purposes. In insular and peninsular Europe, in Asia Minor, in Egypt took amplitude the travel for knowledge or even for discovery of new territories. It is noted in this
period that the tourism was oriented towards the sea shores, rivers and lakes sides, around the springs with curative character, towards the large centers of culture and civilization, towards commercial centers along the large routes.

In the Middle Ages and in modern period – pre-industrial the tourism is remarked through the amplitude of large geographical discoveries and through the exacration of religious practices. Thus, the main touristic flows were crossing Southern and peninsular Europe, Near East (Istanbul, Bursa, Damascus, Palestine) and Middle East (Tehran), Northern Africa (Alexandria), Southern Asia (India) and South-Eastern Asia (Indochina), Eastern Asia (China and Japan). The most known religious centers are Mecca, Medina, Rome, Jerusalem, Lhassa (Tibet Plateau). These were attracting numerous believers of various religions especially during certain periods of the year.

The commercial travels intensified during the large geographical discoveries. Numerous ways became known very quickly and were used more and more intensely. There could be made connections between Atlantic shore and Western Europe with Central and Southern Europe but also with the Black Sea (Pontus Euxinus) through Anatolian Plateau with ramifications towards Eastern and South-Eastern Asia, until Pacific shores. Population’s willingness to travel and to know new territories is intensified as the time went by. There is started the tourism activity, it is true that in an incipient form, but with clear trends of development.

**The modern tourism**

The stage of modern tourism is overlapped with the apparition and amplification of the industry, practically from the second half of 19th century. The same as in the past period, it is manifested in the first stage the willingness for bathing-climatic, religious and commercial tourism, maybe with a slightly higher intensity. The development of cities but also the population more and more numerous and stressed by life problems lead to apparition of modern tourism. The littoral, mountain (and even the mountain climbing) and cultural tourism start to intensify. There are amplified the excursions on short distances at the end of the week, the holidays (further vacations), thus outlining the mass-tourism. There are developed more and more the touristic movements, being necessary the organization of this activity by touristic enterprises such as agencies, organizations, clubs.
In 1941, Thomas Cook initiates the first touristic travel and in the second half of the 19th century he sets the base of organization of travel agencies. Between 1850 and 1950 there are set up numerous tourism associations, societies, agencies and clubs. The 19th century is identified with the most important stage in tourism development through the development of the resorts (bathing, bathing – climatic, maritime, mountain), of touristic endowments, of touristic organizations and institutions, of special means of transport (cable transportation). There appeared the first maps, guides and materials for tourism information.

The contemporary tourism

Contemporary tourism can be identified with mass tourism, this appearing due to development of towns, to the progresses of science and technique, to information, automation and influences of cybernetics, all of these generating spare time. There were setup numerous national tourism companies such as: Balkanturist (Bulgaria), Ibús (Hunagry), Orbis (Poland), Cedok (Czech Republic), Djata (Japan), Fiabet (Italy); international tourism companies (Thomson Travel, Travel Trust, AETA in England; Mediterranean Club, European Club, FUSAB in France; Neckermann, Quelle in Germany) and even transnational companies (Turopa, Sofitel etc). For an increasing number of countries, the tourism becomes a field of national economy, which contributes more and more intensely to the increase of GDP.

Becoming a social-economic phenomenon in continuous development, the contemporary tourism outlines some specific features:

1) mass character of the tourism – due to the increase of tourists number;

2) tourism internationalization – appears an increase of foreign tourists number in total tourists number. The distance of travel and its length of time increases further granting of some facilities by various states, organizations and national institutions;

3) the enlargement of touristic market – there are countries and regions less known from the point of view of their touristic potential, which offer small prices thus attracting an increasing number of tourists;

4) the reverse order of touristic flows – countries which some time ago were just providers of tourists, now enter into the tourism circuit;
5) diversification of types and forms of tourism – there are also other forms of tourism such as eco-tourism, agro-tourism, photo-safari;

6) the development of tourism for leisure – it is intensified the tourism practiced on short distances and for a short period of time;

7) tourism democratization – in the sense of attendance to touristic activities of some social groups with more reduced material possibilities further increase of life levels;

8) attendance of all categories of age and of persons with various occupations, inclusive from rural area;

The development of tourism in the current period is marked by the influence of two types of factors:

1) supporting factors: the increase of population’s income in several regions of the globe, the increase of spare time, the development of numerous types of transport and of the infrastructure used for tourism;

2) propulsive factors: psychical effort, the degree of preparation and the degree of urban development which act together on the stress level of the individual and from here results the increasing need for relaxation which leads to the increase of tourism demand.

In the last years more and more people working in the area of tourism begin to recognize a reality: the tourism is not a simple commercial activity, but it is constituted as a very complex social phenomena which affects – besides the economic side – also the educational, cultural, psychological, political sides; the nowadays tourist is not any longer only a man going from one settlement to another. He wants to cultivate himself through travel, to learn something every time, to know not only new places, but also their history and their present, their people and customs.

In the specialized literature it was attempted over the time to make a differentiation between the touristic activities and their classification in various types and forms. In this regard, there appeared opinions for and against, supported or criticized more or less, and here we can name Poser – 1939, Hunziker and Krapf – 1941, Swizewski, Boniface and Cooper – 1994. If the types mark the content, the forms show the characteristics of tourism development. From Poser’s point of view, there are identified five types of tourism: for treatment, for summer recreation/leisure, for winter sports, for leisure on short distances, for transit. While Hunziker and Krapf describe several types and a series of forms, Swizewski and Oancea describe the
structural types (mountain, sportive, cultural, commercial), dynamics (for travel, for circulation, for transit) and stationing (with short, medium and long sojourn) and Boniface and Cooper talk about the forms of tourism established on geographical grounds (upon place, distance, purpose, a.s.o.)

We often find in the specialized literature the following types of tourism: tourism for entertainment and leisure, tourism for health care (bathing or curative), cultural tourism, social tourism, educational tourism, polyvalent tourism (of a complex type). In the same geographical space there can be practiced several types of tourism, this depending on the resources existing in the respective space. Regarding the forms of tourism practicing, these are depending on area of tourists’ origin, distance, length of sojourn, type of transport used, tourists age, manner of development, price paid, particularities of region of destination, interaction of tourists with the place of destination, number of tourists, a.s.o.

Thematic parks have proved how capital investments in the new technologies have produced rapid changes and have been transformed into extraordinary objects destined to tourists’ entertainment. From the thematic parks most visited by the tourists, there can be named: Blackpool Pleasure Beach from England with more than 6.5 million visitors, Fantasialand in Germany with 2.2 millions; Tivoli in Denmark with 4 million tourists; Euro Disney near Paris which attracted in 1993 about 11 million visitors a.s.o. At the end of 20th century appeared new forms of tourism such as rural tourism, agro-tourism, eco-tourism. The new forms of tourism imply a higher degree of flexibility of production, of the offer, models of consume performed at smaller level and diffuse in space comparing with mass tourism.

**Reciprocal relationships between the tourism and the quality of environment**

Touristic phenomena cannot be separated from the environment since the quality and the variety of the environment, its aesthetical aspects are the basic resources for most of tourism activities. However, the tourism does not protect the environment, but it rather creates problems if not very well organized. Generally, the natural and social environments, especially the unique and the fragile ones, attract the touristic activities with a higher intensity. In the relationships estab-
lished between the two elements – the environment, as factor and the tourism, as activity – there are both positive and negative influences. The quantitative and qualitative value of the natural and anthropic resources is determinant over the tourism. The irrational exploitation creates the risk of destroy the support onto which it depends any touristic activity.

Any anthropic activity or any natural manifestation with positive or negative impact over the environment is reflected directly or indirectly over the touristic activity from one area. Any modifications to the environment are temporary, so reversible, restoring during a certain period of time, but others are profound and become irreversible, without any hope of restoration. There are numerous areas frequently affected by natural hazards such as earthquakes, volcanic activities, hurricanes, floods, mud sliding, mud running, where there is necessary the practicing of a controlled tourism (monitored). The areas in which occurred the technological hazards such as the nuclear accident from Chernobyl affected the touristic activity also in the adjacent areas.

In the polluted and unhealthy areas, the touristic activity is of short length, even though there exists some valuable touristic activities (the case of Prahova Valley at Comarnic or of Turda Quays where the polluted air due to cement factories reduces the visibility, makes breathing difficult, and the powders spread in the atmosphere become cores of condensation increasing the frequency of orographical rains, and their entrance into the soil through the water). There are also activities of exploitation of underground resources, which degrade the environment within periods of time lasting sometimes until resources exhaustion or even more. Due to numerous causes destroying the environment, seen as the basic resource for touristic activities, it becomes higher the necessity of research of environment impact environment over the tourism. Environment indicators can be used in order to determine the costs and benefits of its restoration but also for establishing of adequate environment standards. Thus, it will be conceived an arrangement of the environment for practicing of a qualitative tourism. In this regard, there must be made a good planning of tourism activities in the destination areas in order to protect the environment.

On the other sides, the forms of a poor tourism destroy irreversibly the natural environments, not being able to be calculated a long-term profit – mangroves swamps which were a place for fishing
and a natural adjustment for the floods were partly drained in order to create entertainment places; touristic circulation in the area of corals spread, especially in the Large Coral Barrier from North-Eastern Australia affects severely corals’ aspect and life a.s.o. The normal life of the inhabitants from the touristic areas is affected through the high consume of resources for tourists’ needs (poor resources of water of some regions taken from the inhabitants – farmers – in order to be used by tourists into hotels; the forests cut from the mountain areas in order to make ski tracks lead to the erosion of mountain sides and implicitly to numerous losses of human life).

The tourists, sometimes knowingly, sometimes from ignorance, contribute to the destruction of the environment. But a good organization of touristic activities, a quality management and a rigorous education of the tourists can decrease the destruction of the environment. The reciprocal relationships between the environment and the various forms of tourism are fundamental and very complex. Today, within the limits of consciousness of importance of environment protection and of sustainable development, there are sought solutions for the use of its components without affecting its qualities.

**Risk phenomena in tourism**

The positive qualities of the environment are favorable elements for the development of touristic activities. The extreme natural manifestations or the natural dangers affecting the human communities are considered factors excluding or impeding tourism development.

A series of natural phenomena and anthropic activities, manifested suddenly and at parameters higher than normal values are producing damages to the touristic activities, and here there can be mentioned:

1. Natural risks: cutting forests for ski tracks can produce the erosion of mountain sides causing avalanches, sliding, running of mud; abundant precipitations, floods, stones falling, blocks rolling; earthquakes which have catastrophic effects on small areas; current volcanic activity.

2. Technological anthropic risks: the pollution of air, waters, soil; aid rains in the old industrial regions such as Germany, North-Eastern USA, North-Eastern China, Japan; production accidents; nuclear accidents; political tensions, conflicts, wars, terrorist acts;

For the littoral area there is a series of phenomena which lead to the creation of some natural risks and here there can be mentioned
the strong winds generating huge waves, typhoons, hurricanes; the pollution with fuels bring the black waves or the black tide. The floods occur both in shore regions but also along the rivers further some exceptional precipitations. Generally there are places preferred by the tourists and are arranged for this purpose. The population often becomes helpless in front of such disasters, situation in which occur material and human life losses. Since these disasters started to repeat more often in the last decades, the local, regional and international organisms began to take act and measures for their prevention. In this regard UN launched The International Decade for the Prevention of Natural Disasters (IDNDR) between 1989 and 1999, followed by the International Strategy for the Prevention of Disasters (ISDR) between 2000 and 2010.

Present tourism became a global, mass phenomena, a movement including million of people traveling all over the globe. These cannot remain unaffected, in one sense or another, by the natural disasters. The attenuation of disasters can be achieved by evaluation of risk processes, disaster prevention and their preparation. In the countries receivers of tourists, known for the repeated phenomena with character of disaster, there have been created national assistance organizations for the purpose of disasters (The Organization for Assistance of National Disasters) which collaborated with the tourism national administration and with the main tour-operators from generating countries. In our country works the Commission for Prevention of Natural Disasters within Romanian Government.

As organism with role of national coordination, the organization will transfer through delegation the responsibilities of other agencies and departments, including the ones of National Tourism Administration. Disasters prevention is synonymous with risk prevention (OMT, OMM, 1998). The risk involves the sum of all losses, which can occur in a touristic area due to occurrence of a certain phenomena. As the tourism is classified as being an economic activity, the damages caused to the enterprises and touristic facilities will have in the first place economic consequences for the population. The activity of disaster preparation involves a good warning in touristic destinations. An area well prepared to cope with the disasters offers security to international tourists, which are warned about what can happen. The measures for disaster prevention include: the law and the regulations; the preparation for disaster situations; mechanisms for prevention and warning; planning of organization for evacuation
and other decisions to be taken further warning; the education and training of local population; other organizations for the management of disaster situations, including the preparations for the operational plan and training of involved personnel, storage of products and obtaining of necessary funds.

The study of tourism and disaster prevention in tourism areas involves an understanding of socio-psychology of tourism and of the natural disasters. The researches regarding the national and international tourism show that the tourists have a level of education over the average so it is easily to communicate with them, they can receive easier the information and can be warned in due time. Based onto these aspects, the tourism will continue its development adapting to the more diversified requirements of the population.

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ROMANIA’S VULNERABILITY TO ECONOMICAL, POLITICAL AND TERRORIST THREATS

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ABSTRACT. The present paper discusses economic threats, from the crisis perspective and financial loans which indebted the population, as well as from the wage cuts points of view. Analyzing IMD reports, we emphasis the vulnerability of each state in accordance with foreign capital inflows. Another issue is represented by international terrorist networks that have access to modern technology and can benefit from bank transfers and rapid means of communication, infrastructure and support provided by ethnic and religious extremist organizations, by the support of the cross-border organized crime or by the support of corrupted regimes, all of which constitute risks and threats to national security of the country.

Keywords: loans, economic outlook, weapons of mass destruction

We have chosen to discuss, first of all, about the economic threat because Romania, at this moment, is facing a severe economic crisis, which could have consequences more serious than a terrorist attack, which can take place across the country. In our opinion the financial loans taken in the latest years, the wage cuts of the public servants who really work in the country’s defense system will create a lot more sore points that can be exploited by potential enemies.

The striking poverty, a nation indebted during several generations, and a kind of corruption which cannot be stopped (although the present government has wanted to reduce it for years, this is not going to happen soon) have led to mass movements organized and supported by the political opposition in Romania. Although a large mass of people has shown up to stop these strategies which led to increasing poverty and indebtedness, the government has not changed
anything, keeping on borrowing huge sums of money from foreign bank consortiums and FMIS. Romania is among the last countries in terms of capacity to deal with the crisis which has affected the economy of many countries from all over the continents.

In an IMD report entitled “Stress Test of Competitiveness,” where countries are classified according to their ability to improve their competitiveness, Romania ranks as 54 out of 57 total. The countries analyzed were subjected to a stress test. The purpose was their future orientation, exposure, training and resistance to a prolonged recession. The poor preparation, at all these levels, of our country, places it in the queue list. When evaluating the strength of the countries during this crisis, the IMD has taken into account four criteria: the economic outlook, the government involvement, the involvement of business and of the society. The top ten places, which designate the countries, which can most easily cope with the crisis, are occupied by Denmark, Singapore, Qatar, Norway, Hong Kong, Switzerland, Sweden, Australia, Finland and Malaysia.

Although the economic forecasts for 2011 are still weak, Denmark tops the rankings as a result of the resistance of the local business environment and company stability. Other smaller countries (having less than 30 million inhabitants) in Northern Europe and Southeast Asia have achieved leading positions in the top of the IMD.

“Smaller economies are often better suited to adapt to such difficulties. Another explanation is that many of these nations have suffered quite severe crises, financial and real estate ones, in the past, and they may have been more cautious in their policies. Qatar and Chile, also displays advantages to confront the crisis,” said Professor Stephane Garelli, Director of IMD. The United States ranks in the top 28, the main questions when it comes to the U.S., being the market depth concern during the crisis and the time it will pass over it.

The middle top positions are occupied by countries considered great exporters such as: China (18), Taiwan (21), Brazil (22), Germany (24), Japan (26) and Korea (29). Ireland, which is ranked 25, could have occupied a place in the lead, but his ability to handle the crisis has seriously been affected by the intensity of the real estate crisis, which has used serious damage. As far as the second largest European economies, namely, Great Britain and France, these have alarming positions, 34 and 44 respectively. Worse, Italy is ranked only 47 and Spain 50, the recovery of the gap in these countries.
being hampered by structural rigidities. Among the latest in the top is Russia, which occupies the 51st position. “In short, this stress test shows that the smaller nations which have export-oriented economies, with flexible and stable socio-political environments prove to be better-equipped to overcome this crisis. Despite all this, only the performance of some large exporters such as the U.S.A., Germany, China or Japan will send a credible message to the world,” concluded Prof. Garelli.

The countries of Eastern Europe are the emerging markets the most vulnerable if the crisis gets worse, according to a S & P report, entitled “Why the global credit crisis could affect more the sovereign states on the emerging markets than other states.” “We are of the opinion that the sovereign states of Eastern Europe are the most exposed, while Asian and Latin American countries with significant trade surpluses and foreign reserves are, generally speaking, better protected against the lack of liquidity which could occur if the global economy recorded a more marked decline,” said Standard & Poor's analyst Moritz Kraemer. However, the vulnerability of each state is determined by its dependence on the foreign capital inflows to finance the current account of deficit and avoid crises in this regard, the report said. This trend is highlighted by S & P index of vulnerability in terms of liquidity, calculated for 40 states.

The policy vulnerability, in my opinion, is the second Achilles heel. The political decisions taken by the current government in the recent years have further deepened the existing conflict between the current parliamentary majority and the parties in opposition. I cannot keep in mind that in 2012, there will be elections, and the opposition already talks about their winning strategy and organization to suspend the current President of Romania. The existence of this major political instability can lead to much larger street movements than those known in late 2010. Due to the failure of the political parties in the country to have a comfortable parliamentary majority, the corrupted people will attempt to organize alliances, which I still believe, will have at least the fate of the alliance YES, this leading to a further and more serious political crisis.

Given that budgetary policy of the moment is very much criticized by foreign investors, it demonstrates, once again, that on medium and long term we have no viable strategy to turn Romania into a country attractive to foreign investors. Against this background, I must mention the political influence exerted by the most powerful
neighbor from South East, namely, Russia. Because of the wealth held by this country and the infrastructure inherited from the former USSR, Russia is the strongest player in this area who will never settle for the leftovers from NATO.

International terrorism: the terrorist attacks in September 11, 2001, against two of symbol-sights of the American civilization and power, the actions of the same kind occurred in Madrid, London, Moscow and Istanbul, as well as those that occurred in the Middle East, Caucasus, Africa, Central Asia, South and South-East, prove that the international terrorism of religious extreme origin, structured into border networks, is the most serious threat to the life and freedom of the people, to democracy and other fundamental values on which the Euro-Atlantic community is based.

The international terrorist networks have access to modern technology and can benefit from bank transfers and rapid means of communication, infrastructure and support provided by ethnic and religious extremist organizations, by the support of the cross-border organized crime or by the support of the corrupt or unable regimes to govern democratically. They can cause massive loss of human lives and material destruction, widespread, and – with their possible access to weapons of mass destruction – the consequences of their actions can become devastating. The open nature of the modern democratic societies, as well as the globalization requirements, determine that each and every individual state and the international community as a whole, should remain vulnerable when confronted to the international terrorism, so that the imperative of fighting this scourge and the cooperation of the democratic forces to counter it, is a vital requirement, including joint actions conducted in areas which generates terrorism.

The proliferation of weapons of mass destruction: nuclear, chemical, biological and radiological is another threat, very serious in terms of potential for destruction. The access to such tools becomes easier and easier from the technological point of view, and the temptation of their acquisition increases threateningly, simultaneously with reducing of the guarantees of responsible behavior of the authorities who enter their possession, especially when we speak of the regimes driven by political ideology or religious extremism. We notice increases concerning the development of the means of transport of such production and storage of the weapons and their dual use.
The anarchic collapse or the evolution of some states possessing weapons of mass destruction, the decreasing authority exercised by some governments on their military headquarters, and the existence of some regions – including Europe – outside the state control, promote the development of an active black market for such tools. From the perspective of the national security concern, the amplification of the phenomenon of terrorism and the proliferation of weapons of mass destruction is the main factor generating uncertainty in the field of global security, while the undemocratic, totalitarian regimes can ensure the most dangerous operational and logistical support.

The regional conflicts: Despite the positive developments of the last decade and a half, which made Europe a safer and more prosperous place, the strategic area where Romania is located, is still rich in local conflicts, inter- and intra-state, with strong implications for local and European peace and security. Auxiliary products of dismantling, more or less violent, of some multinational states in the area, the inter-ethnic or religious conflicts - in fact, politically strong motivated conflicts - represent a serious threat to regional security, even if, following important efforts of the international community, most are kept under control. With their large numbers, so-called “frozen conflicts” in the region, alongside other tense situations, territorial disputes, separatist tendencies and situations of instability present in the strategic proximity to Romania, generate uncertainty strategic cause wasting many resources and perpetuate poverty. They also feed other forms of violence and criminality and promote terrorism.

Transnational organized crime: It is both an expression of the proliferation of some adverse events which are amplified under the conditions of globalization and also a direct consequence of the inefficient management of the political profound changes, economic and social, occurred in Central and Eastern Europe in the process of the disappearance of the communist regimes. Against such a background, the area of strategic interest Romania is located, is a source, namely a transit and destination area of criminal serious activity consisting of illegal trafficking of weapons, ammunition and explosives, narcotics trafficking; illegal migration and human trafficking, trafficking in counterfeit goods; activities of money laundering and other financial aspects of economic and financial crime. The kind and magnitude of such activities are encouraged by local conflicts and, in their turn, they may encourage terrorism and the proliferation of
weapons of mass destruction or can contribute to the perpetuation of the separatist regimes. An important role in the process of strengthening of the stability and security of the new democracies in Central, Southeastern and Eastern states and societies is the ability to promote efficient management of public affairs, to ensure the responsible and effective exercise of power, in keeping with the principles of democracy and human rights requirements.

The public expression of these requirements is good governance; where in Romania - as in most countries in the area - were recorded remarkable progress, in the years since the collapse of communist regimes. At the same time, however, the new democracies in this area continue to face many negative phenomena, which affect the quality of government. In this context, ineffective governance, affected by institutional corrupt and political cronyism, government inefficiency, lack of transparency and public responsibility, excessive bureaucracy and authoritarian tendencies, undermines the trust of the citizens in public institutions and may constitute a major threat to the states security. In the area of strategic interest of Romania, the ineffective governance often puts at risk the normal exercise of fundamental human rights and freedoms affecting the international obligations - including those aimed at the protection of national identity - can generate cross-border impact of humanitarian crises. The national security can also be jeopardized by a series of serious negative phenomena such as geo-physical or weather-related ones, coming from the environmental surroundings or reflecting its degradation, as a result of dangerous human harmful or irresponsible activities. Among them, we can mention: disasters or other natural phenomena or weather-related geo-serious (earthquakes, floods, global warming and other sudden and radical changes in living conditions), tendency depletion of vital resources, industrial or environmental disasters having as consequences the loss of human lives, substantial disruption of life and serious pollution of the environmental economical and social domestical and in adjacent regions, the increased possibility of pandemics.

The risks and threats to the national security can be enhanced and amplified by the existence of vulnerabilities and shortcomings, among which may be considered as generators of concerns and dangers, the following ones: the high dependence of some vital resources which are hard to get; the persistent negative trends in demographic and massive migration; the high levels of social insecurity; the persis-
tence of chronic poverty and the deepening of the social differences; the reduced proportion, the fragmentation and still insignificant role of the middle class in the organization of the economic and social life; the fragility of the civic spirit and the difficulties of the manifestation of the civic solidarity; the strategic infrastructure underdeveloped and insufficiently protected; the poor state and the low efficiency of the health insurance system; the organizational weaknesses, the lack of resources and the difficulties to adapt to the requirements of the society of the educational system; the low level of expertise, the inadequate organization and the scarcity of the resources for the crisis management; the insufficient involving of the civil society in the debate and the solving of the security issues.

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ABSTRACT. Educational corruption is a problem in every country, particularly at the college and university level. With illustrations drawn from the United States, this article considers what “basic principles” should shape efforts to deter, expose, and penalize corruption in academic institutions. The article then identifies “best practices” that should be followed by colleges and universities aspiring to high standards. The discussion explores the role that ethics codes and ethics education can play in fighting corruption. More specifically, the article addresses what types of substantive rules and systemic procedures are essential parts of effective higher education ethics codes. Mindful of the fact that reformers are fighting educational corruption in countries around the world, the article notes difficulties that may arise in transplanting American “best practices” to other cultures.

Keywords: ethics, corruption, honor code, higher education

1. The Continuing Challenge of Ethics in Academia

In every educational institution, in every country and generation, there is a struggle between corrupt practices and the continuing quest for high ethical standards. In many instances the problems are blatant, as where bribes are taken by college or university officials in exchange for academic favors; fraudulent invoices are submitted for payment; or funding is wasted on lavish or unauthorized spending, or on private, rather than institutional, purposes. In other cases educational corruption is subtler. This is true where conduct that is neither criminal, fraudulent, nor a breach of fiduciary duty nevertheless undercuts the moral foundations of the educational enterprise. For example, if academic honors, such as membership in a learned society, are con-
ferred based not on merit, but on political loyalty, the process is arguably corrupt. Such an award, like giving grades to athletes for little or no work, helping students to cheat on exams, or changing grades for money, erodes the intellectual integrity of the institution. When that happens, the educational enterprise is diminished in a very real sense.

Just as a country is poorer overall if corruption levels are high, so too an educational institution is poorer if its members engage in corrupt practices. Such misfeasance wastes limited resources, demoralizes participants, and adversely affects productivity.

Educational corruption comes in many forms. A distinction may be drawn between widespread institutional corruption and the corruption of renegade individuals within an otherwise ethically sound educational program. The latter is as morally repugnant as the former, with the caveat that such individual corruption may be easier to correct (e.g., through prosecution or expulsion) and may cause harm that is that is less far ranging. Institutional corruption is not only ethically odious and difficult to remedy, but also socially dangerous, for it strikes at the very core of democratic institutions.

The terms “corrupt” and “unethical” are synonymous. All corrupt practices are unethical, but not all unethical practices are corrupt. For example, certain forms of university medical research – such as embryonic stem cell studies – may or may not be unethical, but so long as that research is carried on honestly and fairly within the bounds of the law, corruption is not a problem. Similarly, a professor’s biased editing of digital video clips or a university’s retailing of apparel made in low-wage countries may be unethical, but those practices are not necessarily corrupt.

Corruption in education entails (1) serious criminal conduct, (2) tortious conduct in the nature of fraud or intentional breach of fiduciary duty, or (3) conduct that betrays the values that form the moral basis for the educational process, foremost among those being intellectual honesty. In order to constitute educational corruption, conduct must relate to the performance of educational duties. Persons associated with colleges or universities may engage in criminal conduct in their private lives that has no direct connection to the work of the educational enterprise. That conduct is not properly viewed as corruption, even though the misconduct may indirectly reflect adversely on the educational institution. If a professor is charged with spying on a foreign government, the charges do not raise an issue of edu-
cational corruption unless the alleged spying involved the performance of university duties. The same is true if a university administrator is alleged to have molested a student or obtained a teaching or administrative position by presentation of fraudulent credentials. To be corrupt, conduct must also harm or tend to harm, in a significant way, either the educational institution, its constituents, or its beneficiaries. Conduct that neither causes, nor is likely to cause, harm is not “corrupt.”

Corrupt educational practices often relate to the work of college and university employees, such as faculty members and administrators. However, cheating by students is also a form of corruption because it betrays the values that underlie the educational process and relates to students’ performance of their duties as members of the academic community.

Corruption in education must be distinguished from both incompetence and imprudence. An educational institution that employs inept teachers or fails to prepare its students adequately for their chosen careers is incompetent in those respects because the institution fails to possess or exercise the knowledge and skills that its programs require. However, that institution is not inevitably corrupt. Further, a school that wastes the time and money of students on the study of insignificant subjects may be imprudent, but that lack of wisdom does not automatically signal the malignancy of corruption.

2. Educational Corruption in the United States

In the United States, many educational institutions appear to operate in accord with high ethical principles and to be free of significant corruption. Yet, the news media frequently report blatantly wrongful conduct. For example, in one case, a former college president pleaded guilty to embezzling $3.4 million in student loans and Pell grants and using “the funds in part to cover . . . school debt and . . . operating costs.” In another case, a community college lost its accreditation and was “effectively closed” when it was “unable to produce a budget due to lack of accounting systems,” and one of its trustees, who was accused of setting up a sham company to offer bogus classes, pled guilty to misappropriating more than $1 million and was “sentenced to four years in prison, ordered to pay . . . restitution and agreed to never again hold public office in California.” In a third case that attracted national headlines, directors of financial aid at three major
universities “held shares in a student loan company that each of the universities recommends to student borrowers, and in at least two cases profited handsomely.”

Other corrupt practices in American higher education include no-show jobs that deplete university budgets, over-billing of the government, prohibited payments to athletes, obstruction of justice, over-payments as a result of no-bid contracts, improper gifts, kickbacks related to student loans, and, occasionally, even bribery of college or university officials.

Some observers of higher education allege that wealthy Americans buy their children’s way into the most prestigious colleges and universities by making lavish donations to those institutions, such as endowed scholarships, study centers, and buildings. Such practices have a long history in the United States, and are sometimes found abroad, too. Lavatory facilities for the first women to enter the Yale School of Medicine in 1916 were funded by an alumnus whose daughter wanted to apply to the school, and who was soon thereafter admitted and graduated.

Critics also allege, armed with abundant facts, that the growing influence of corporations that results from new financial arrangements between the business sector and higher education imperils “the ideal of disinterested inquiry.” For example, one university granted a billionaire “the right to screen all medical inventions at the university and pick the best ones to be developed, rather than leaving the decision to university professors and patent officers.”

Athletic scandals regularly mar the reputation of great colleges and universities. In the worst cases, the conduct amounts to “essentially fraudulent academic programs whose only function is to keep athletes who could never survive in a real college classroom eligible to play [college sports].” Academic pampering of athletes takes many forms, including the simple failure to apply customary standards for admission or class attendance.

In the United States, as in other countries, there are continuing efforts to fight educational corruption, although these efforts are sometimes not as strong as they should be. State attorneys general regularly investigate and prosecute corrupt practices that harm students. One particularly hopeful sign in the battle for high ethical standards is the increased willingness of colleges and universities to self-impose penalties when academic fraud is discovered in athletic programs.
3. Basic Principles for Promoting Ethical Conduct

Basic principles for structuring a legal regime to fight corruption in education can be drawn from other fields of endeavor raising important issues relating to ethics in public life. In particular, the normative standards and practices which have emerged during the past forty years to promote ethics in the legal profession,\(^8\) in the judiciary,\(^9\) and in government\(^10\) offer a useful starting point. A review of those sources suggests the following:

First, it is as important to fight the appearance of corruption as corruption itself, for perceived unfairness, dishonesty, or unequal treatment threatens public confidence in, and indeed the survival of, important institutions. To avoid bad appearances, public entities must operate transparently, as far as possible.

Second, corruption should be fought with a combination of legal and ethical tools, including (a) prohibitions of clearly improper conduct, (b) disclosure requirements that expose questionable practices to public scrutiny, and (c) clear statements of aspirational principles. None of these tools – prohibitions, disclosure requirements, or aspirational principles – is as effective when used without the others to fight corruption. For example, mandating disclosure of, but not prohibiting, certain bad practices, sometimes amounts to little more than requiring a person to post “price lists for the cost of doing business.”\(^{11}\) This would be true, for example, if a university administrator were required to disclose gifts from applicants or students, but not prohibited from accepting them. Similarly, prohibitions alone are less than optimal for sometimes they are too severe. In cases where conduct is not inevitably improper but raises ethical questions, disclosure may be sufficient to dispel any appearance of impropriety or to ensure neutral scrutiny of a transaction, relationship, or other facts. In addition, prohibitions and disclosure requirements are more effective when backed up by clear statements of aspirational principles. Such principles guide the interpretation of rules of conduct, and encourage persons to surpass legal or ethical minimums.

Third, ethics codes, accompanied by ethics training and enforcement mechanisms, can perform an important role in fighting corruption in education. When codes of conduct identify impermissible practices, require disclosure of pertinent information, or articulate aspirational objectives, they reaffirm the moral basis of the educational process. If well-drafted, codes of conduct provide an important
resource for ethics instruction. When framed in precise legal terms, codes also supply a standard by which to judge and punish errant practices. Importantly, the attention focused on corrupt practices in the process of drafting or revising an ethics code often clarifies which types of conduct are or are not permissible.

Fourth, it is important to recognize that corruption in education and many other contexts is not only a question of bad conduct, but of unequal treatment that calls into question the moral integrity of an enterprise. For example, in the educational arena, when one applicant, student, or employee is treated differently than another in important respects without good reason, there is a risk of actual or perceived unfairness. The difference in treatment may be viewed as a variety of corruption. Consequently, fighting educational corruption entails not only rooting out bad practices, but putting in place measures that ensure a certain level of predictable and reasonably equal treatment and consumer protection in admissions, grading, expulsion, and other important actions of educational institutions.

Fifth, it is not sufficient merely to state, however prominently, key ethical principles. Rather, those principles ultimately must be enforceable, sometimes through internal disciplinary processes within educational institutions (such as honor code hearings into plagiarism charges) and sometimes through the courts (such as civil or criminal actions to redress misappropriation of funds). Enforcement must be regular, not selective; independent, not manipulated; and adequately resourced, not underfunded. Procedures must encourage the reporting of alleged wrongdoing, and assure its investigation, while at the same time discouraging the filing of frivolous charges.

Sixth, ethical leadership is essential. Those in top positions must act in a manner that is consistently fair and honest and avoids any reasonable suspicion of corruption. More specifically, leaders must set an example, punish corrupt practices, support those who seek to act ethically in the face of countervailing pressures, and urge compliance with legal and ethical principles. For example, when the government investigates a university for allegedly fraudulent conduct, it is important for the university president to write a letter to the faculty and staff urging them in the strongest possible terms to provide complete and truthful replies to questions about those matters. In the college and university context, ethical leadership sometimes means that administrators must resist market pressures that trench upon good educational practices. Although students in a sense are
customers, they are not always right. Thus, thoughtful observers have decried the willingness of colleges and universities, focused on the economic bottom line, to make excuses for student plagiarism and other bad practices. Good education requires a firm commitment to high moral principles even when that may place an academic institution at a disadvantage in the marketplace. Because ethical leadership plays a vital role in fighting corruption, it is important that those in high offices be held accountable for their misconduct. This is especially true at the college and university level because higher education institutions play a key role in preparing graduates to fight corruption in the public sector.

Seventh, it is important to differentiate ethical principles from budgetary practices. As a matter of principle, the total elimination of corruption is an appropriate goal—perhaps the only appropriate goal. However, insofar as expenditures on constructing and enforcing an ethics regime, a goal of zero corruption is no more realistic in academia than in other contexts. At a certain point, the rules and practices that must be implemented to further fight bad practices are so rigid, burdensome, and expensive that the benefits they produce are outweighed by the costs they impose. An ethics regime should seek to eliminate corruption in education as far as possible, mindful of the fact that perfect enforcement of ethical principles should not be the objective. This course also offers practical advantages beyond optimizing institutional expenditures on ethics. Rules that are too stringent may have the opposite effect by inducing violations because compliance is too costly.

Finally, alternative dispute resolution (ADR) may have a role to play in ethics enforcement, as it does in many other contexts. For example, in the American civil litigation system, most cases are resolved not by trial and appeal, but by negotiation, arbitration, and mediation. This reality does not mean that civil-liability rules and related legal procedures are a sham. Rather ADR mechanisms recognize that sometimes public and private interests are better served by less formal dispute-resolution processes. Of course, there is a critical difference between efficiently and informally resolving ethics charges, on the one hand, and sweeping unethical conduct “under the rug,” on the other hand. In some cases, informal resolution is not appropriate. But in other cases, the contrary is true. Thus, it is not surprising that some higher education institutions permit a dean to exercise discretion by resolving a complaint of unethical conduct informally, or that
some cases of alleged attorney misconduct are resolved by streamlined procedures and imposition of a “private” reprimand, rather than by a plenary trial and appeal process and public sanction. Few ethics regimes could function well if full compliance with elaborate procedures were insisted upon in every case.

4. Best Practices in Higher Education

A. Job Security and Benefits

Within an educational enterprise, persons who lack security of position or benefits are more susceptible than others to pressure by their superiors. If managers are corrupt, such subordinates may lack the ability to resist demands that they engage in illegal conduct or accord unqualified persons preferential treatment. Vulnerable subordinates may also be unwilling to expose corruption within their institutions for fear of retaliation. Consequently, reasonable provisions for job security, like the tenure system common in most American universities and comparable regimes, can play an important role in fighting corrupt practices.

Many types of educational corruption, such as embezzlement, misuse of funds, misappropriation of property, and bribery, are rooted in economic needs and wants. Workers who are underpaid may be tempted to engage in these types of improper conduct to make up the deficiencies in their salaries or wages. In addition, ill-compensated employees are likely to be unmotivated in their performance of duties, and persons who interact with the educational institution through those workers may be willing to propose and pay bribes or confer other pecuniary benefits in order to receive more efficient service or preferential treatment. Moreover, adequate pay plays an important role in the efficacy of sanctions, for unless teachers and others are adequately paid, the threat of losing one’s job as a result of corruption may inflict little pain, and may therefore not deter bad practices. Consequently, under-compensation produces multiple disincentives, which increase the risk of corruption. While no one would suggest that ethical conduct can be expected only from the economically comfortable, or that high pay can eliminate the risk of corruption, adequate compensation of those who work in education can help to
eliminate corrupt practices. This is why conventional civil service systems pay career officials appropriate salaries.

**B. Codes of Conduct**

At every educational institution, there should be codes of conduct that govern the behavior of students, faculty members, administrators, and other college or university representatives. Codes of conduct (sometimes called “honor codes” or “codes of ethics”) can be traced back in the United States to the 18th Century, when students at the College of William and Mary introduced an honor code which addressed deception, cheating and theft. A code of conduct should clearly identify the types of conduct proscribed, the disclosures required, the procedures observed to investigate complaints, and the sanctions used to punish violations. Of course, ethics codes should be clearly written. Codes of conduct must afford rudimentary due process by providing fair notice of what is prohibited or required and specifying reasonable procedures for resolving alleged violations. In particular, institutional codes of conduct should define what level of culpability gives rise to liability (e.g., intent, recklessness, negligence, or strict liability), who bears the burden of proof (presumably the institution), and how convincingly guilt must be established before a sanction may be imposed (i.e., whether a violation must be proved by a “preponderance” of the evidence,\textsuperscript{13} by “clear and convincing” evidence,\textsuperscript{14} or “beyond a reasonable doubt”\textsuperscript{15}). Under the terms of the code, investigative and adjudicative personnel should be sufficiently independent and immune from retribution as to allow the process to enjoy the confidence of relevant stakeholders. Normally, an initial determination by a factfinding body regarding the merits a complaint should be subject to some form of appellate review that ensures that required procedures were followed and normative standards were correctly interpreted and applied.

In drafting the procedural provisions of an ethics code, a careful decision must be made as to whether there should be a rule prohibiting *ex parte* communications. In the United States, the rule against *ex parte* communications plays a vital role in the adversarial court system. The rule prohibits one side of a case (or persons outside the litigation) from communicating secretly with a judge about the merits of the dispute. This restriction ensures that each party has the opportunity to learn what another party or third person says and
to challenge those statements either through cross-examination, opposing testimony, or argument. Interestingly, many American educational institutions have disciplinary procedures, which do not prohibit *ex parte* communications. Yet, it easy to see how secret communications can prejudice decision-makers and taint the fairness of an adjudicatory process. University procedures could often be improved by the adoption of a rule against *ex parte* statements. In American educational institutions, this drafting choice would not be surprising, for it would be consistent with fundamental tenets of the American justice system. However, it is less clear whether the same type of rule would be as appropriate in other countries that have an “inquisitorial,” rather than “adversarial,” justice system. At a minimum, the issue should be addressed, for disciplinary fairness in any legal system requires that decisions not be based on secret information or irrelevant considerations. It is essential to minimize the distorting influence of such factors.

It is also important to consider under what circumstances a potential decision maker must step aside from the decision making process because of bias or prejudice relating to the complainant or the accused. Most American educational institutions operate, quite appropriately, with a level of formality considerably less demanding that the procedures followed in a court of law. It would be unreasonable to expect colleges and universities to adopt the same rules on recusal that are applicable in civil and criminal court proceedings. In the United States, that complex matrix of rules requires a judge to step aside whenever his or her impartiality “might reasonably be questioned.” Those rules include very specific provisions dealing with a multitude of circumstances where recusal may be required. Yet, even if educational institutions operate with less formality than courts, recusal rules of some form should still be followed. For example, misconduct charges against a student or faculty member should be decided by someone who is not closely related to the complainant or the accused, and probably by someone who was not involved in the underlying facts. The recusal provisions of the Code of Judicial Conduct and related precedent offer a useful checklist for thinking about situations where recusal might be appropriate in academia.

Educational institution codes of conduct need not be all encompassing for they operate against a backdrop of other control mechanisms, such as laws imposing criminal and tort liability and employment
personnel rules. Nevertheless, it is essential that student and faculty honor codes address important topics, which are otherwise unregulated. Some college or university ethics codes apply to students, faculty members, and administrative personnel alike. However, the conduct issues relating to students (e.g., for disruptive partying or cheating on exams) are different than the issues that arise with respect to employees (e.g., improper economic benefit from official duties or conflicting outside employment). Therefore, it may be appropriate to be different codes for students and faculty members. Many of the faculty code provisions should also govern the conduct of college and university administrators, staff members, and trustees. There is little reason to exempt members of these latter groups from a rule, applicable to faculty members, prohibiting the misuse of official power or position to secure economic benefits for close family members. These types of issues arise in many cases, such as where a member of a law school’s board of directors pressures faculty members to appoint her husband to a tenure track position.

1. Student Codes

The most critical provisions in a student honor code are those which define what constitutes academic misconduct, including, for example, cheating on examinations or using prohibited sources when writing research papers. Such infractions are clearly harmful, for the “cheater is a free rider and therefore gets higher marks than he or she deserves,” while the “efficiency of the country’s educational system is reduced, because cheating distorts competition, diminishes the student’s incentive to study, and leads to inaccurate evaluation of the student’s abilities.” However, academic misconduct is frequently neither described nor proscribed by normative standards other than a student ethics code. While academic misconduct may take many forms, the connecting thread is that such actions give offenders an unfair advantage over other students in obtaining academic opportunities or fulfilling academic requirements.

It is important for “academic misconduct” to be defined broadly by a student ethics code because the varieties of such malfeasance multiply as technology and business practices change. Not long ago, no one would have thought of text messaging or other cell phone use during an examination as a form of potential academic misconduct, but they certainly are today. Yet, defining academic misconduct only
in broad terms – for example, as all acts or omissions that confer on one student an “unfair advantage” over others in satisfying degree requirements – would be undesirably vague. A good ethics code serves not only as a basis for enforcement, but as a tool for education. As far as possible, the definition of academic misconduct should place students clearly on notice of what is forbidden. Consequently, it is desirable in writing a student code of conduct to couple a general rule against academic misconduct with specific examples, presumably in an “including, but not limited to” drafting format. This type of rule may afford a college or university flexibility in adapting the prohibition to new technologies and other developments while nevertheless offering concrete examples of forbidden conduct that can be useful in educating students about their obligations. An example is set forth in the margin.19

Some honor codes impose a duty on students to report knowledge of a violation of the code by others. The feasibility of such a provision presumably varies greatly depending on the country, for in many countries attitudes with regard to cheating differ considerably.

2. Faculty Codes

A dedicated effort to articulate enforceable ethics standards for college and university faculty members would do well to borrow principles from the government ethics field. While American government ethics codes vary greatly in their scope, coverage, and enforcement mechanisms, certain principles of good conduct have emerged with clarity and enjoy widespread acceptance. Among these principles are basic rules against using official power for improper economic benefit, unfairly advancing or impeding private interests, trading reciprocal favors, accepting inappropriate gifts, and engaging in conflicting outside employment or business activities. These topics are as relevant in higher education as in other areas of public life.

C. Preventing and Prosecuting Financial Corruption

The United States and other countries have used basic civil and criminal laws to address financial wrongdoing and other forms of corruption in education. The New York Attorney General’s wide ranging investigation of student lending abuses was based on state consumer protection laws that are intended to penalize deceptive trade
practices. In another recent American case, the top educator in the
state of Georgia was sentenced to eight years in prison after pleading
guilty to charges of embezzling $600,000 to fund her failed cam-
paign for governor and cosmetic surgery.  

In the United States, there are civil remedies for certain types of
educational corruption. An aggrieved person or institution can sue
for conversion, fraud, and tortious interference with contract or pros-
pective advantage, among other things. It is important for public
officers to pursue these remedies aggressively. This often means
insisting on collection of a court ordered judgment, rather than en-
tering into a compromised settlement. A newspaper editorial in one
major American city praised a local school board for refusing an
offer to settle for $10,000 a civil court judgment for $380,000 against
an architect who had overbilled the district and was later sentenced
to two years in prison as the “central figure in a . . . bid-rigging and
bribery scandal.”

It is possible to address some forms of corruption, such as
financial mismanagement, quite specifically through procurement
procedures or other business-conduct requirements. A New York
grand jury investigating financial wrongdoing in public schools
recommended creating a state inspector general for education to
investigate and report on corruption and other criminal activity in
local school districts. The grand jury further recommended passing
new laws:

- requiring public school employees, school board members
  and persons doing business with a local district to report information
  about possible criminal conduct;
- creating compensation committees, including at least one
  local resident, to oversee and report to local school boards on all
  proposed contracts and make recommendations regarding proposed
  fringe benefits;
- requiring school boards to post on their websites or otherwise
  publish all employment contracts and any amendments at least one
  month before any board vote;
- requiring school business administrators in large districts to
  have at least a master’s degree in accounting or finances; and
- requiring the state Department of Education to provide man-
  datory continuing education every two years in accounting principles,
  fraud prevention, and fiscal management for every superintendent,
assistant superintendent for business or business manager in a local school district.\textsuperscript{23}

These are appropriate legal responses to the problem of the financial corruption in the public sector. Some college and university ethics codes already address related issues. For example, the \textit{Howard University Code of Ethics and Conduct} quite sensibly provides that:

\begin{quote}
The accounts and records of the University are maintained in a manner that provide for an accurate and auditable record of all financial transactions in conformity with generally accepted accounting principles, established business practices, and all relevant provisions of controlling law. No false or deceptive entries may be made and all entries must contain an appropriate description of the underlying transaction. To the extent not needed for daily operating transactions, all University funds must be retained in the appropriate University accounts with appropriately designated financial institutions and no undisclosed or unrecorded fund or asset shall be established or maintained for any purpose. All reports, vouchers, bills, invoices, payroll information, personnel records, and other essential business records must be prepared with care and honesty.\textsuperscript{24}
\end{quote}

Presumably, these types of ethical provisions will proliferate in the United States since nonprofit educational institutions, including private colleges and universities, have begun to follow as “best practices” the type of institutional integrity guidelines that were mandated for certain public-sector business entities by the federal Sarbanes-Oxley Act.\textsuperscript{25} One expert concluded that “no college or university can afford not to adopt the ‘spirit’ of Sarbanes-Oxley”\textsuperscript{26} and listed ten “best practices” that colleges and universities should consider: “1. Background checks for new hires; 2. Annual disclosure of conflicts of interest, required of employees and trustees alike, pursuant to a written conflict of interest policy or bylaw provision; 3. Code of conduct for employees and trustees that includes sanctions for non-compliance and a credible system for investigating and responding to allegations of improper conduct; 4. Written whistleblower policy and procedures that provides confidentiality and protects the caller from retaliation; 5. Periodic ‘risk assessments’ by outside consultants; 6. Annual audit of financial statements by an independent certified public accountant (and, if the institution is
large enough, hire an internal auditor); 7. At least one ‘financial expert’ on the board; 8. An audit committee of the board, with a written charter specifying its jurisdiction and detailing its authority; 9. A nominating committee of the board, to ensure board independence from the president and senior management; and, 10. Standing instruction to legal counsel to notify general counsel, president, chair of board audit committee, and/or chair of board of wrongful conduct that is material to the institution.”

5. Plagiarism

Plagiarism is a worldwide problem, which has been greatly aggravated by the availability of virtually endless text to “cut-and-paste” from the Internet into research papers and scholarly publications. The failure to properly attribute information not only gives some students an unfair advantage in satisfying academic requirements, but, when exposed, reflects badly on innocent students by calling their own academic integrity into question merely as a result of their association with a college or university where plagiarism occurs.

The key dispute with respect to penalizing plagiarism concerns culpability. Some argue that only intentional appropriation of the words of another should give rise to liability; others argue that any failure to attribute sources violates the ethical principles against plagiarism. Of course, there is a middle ground between intentional wrongdoing and strict liability, which is to require evidence of lack of care (negligence or recklessness). However, there is great dispute as to whether culpability (intent, recklessness, or negligence) is an element of the offense of plagiarism, or whether culpability bears only upon the issue of what sanction is appropriate. These concerns can be addressed by a well-draft ethics code, but many codes of conduct fail to do so.

Aside from cut-and-paste plagiarism is the related problem of customized papers purchased from vendors who frequently operate over the Internet. This form of academic fraud is vastly more blatant than the type of misattribution that results from an erroneous understanding of the rules on citation or simple inadvertence. A student who submits a paper that is nothing more than customized plagiarism normally should be subject to stringent sanctions.
6. A Battle Never Finally Won

The quest for high ethical standards in education is a goal never permanently achieved. New students, faculty members, and administrators replace their predecessors, and these changes in personnel, along with new technologies and business practices, multiply the opportunities for corruption. Often, it is necessary for one generation of academicians to re-conquer ethical territory firmly held not long before. But, comfortingly, it is also possible for a new group of actors in higher education to successfully fight corruption where their earlier counterparts had failed.

The key to success in this never ending battle against the forces of corruption is to draw upon the insights and tools that have been developed in other similar contexts where progress has already been made. The wisdom that has emerged from efforts to foster ethics in government or ethics in the professions offers valuable insights for crafting a regime composed of ethical principles and legal restrictions to promote ethics in higher education. Prudent use of these resources for formulating “basic principles” and “best practices” can provide reformers with the firm ethical footing and moral support that they need for minimizing the harm caused by corruption in education.

NOTE

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REFERENCES


13. “This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.” *Black’s Law Dictionary* (8th ed. 2004).

14. Clear and convincing evidence is evidence “indicating that the thing to be proved is highly probable or reasonably certain . . . This is a greater burden than preponderance of the evidence, . . . but less than evidence beyond a reasonable doubt.” *Id.* (defining “evidence”).

15. Reasonable doubt is the “doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty.” *Id.* (defining “reasonable doubt”).


19. Section 2.02 of The Student Handbook of St. Mary’s University School of Law provides in relevant part:

(a) An academic matter is any activity which may offer or in any way contribute to the satisfaction of requirements for graduation. Academic matters include, but are not limited to, examinations, research, or other class assignments.

(b) It is a violation of the Code for any student to engage in conduct which tends to gain that student or another an unfair advantage in an academic matter. The following applications of this rule . . . are illustrative, not exhaustive.

1. In an examination, a student shall follow all instructions concerning its administration, shall not use any materials other than those specifically authorized by the professor, and shall not converse or communicate with any person(s) other than the person(s) administering the exam.

2. In research or other writing assignments, a student shall not use materials specifically forbidden by the instructor and must fairly identify passages or ideas from the work of others. The student shall make attribution by proper use of quotation marks, citations, or other forms of reference.

3. A student shall not submit or have submitted as his or her own, the work of another. Nor, except by permission of the instructor after full disclosure, shall a student submit in fulfillment of an assignment any work prepared, used, or submitted in another course or for a law journal, clinic, law firm, government agency, or any other organization.

4. A student shall not hide, mutilate, deface, or remove, without permission, library materials or the materials of another student.

5. A student shall not breach the security maintained for the preparation and storage of exam materials . . .

6. A student shall not discuss an examination he or she has already taken with a student scheduled to take a deferred examination in the same course or with any other person under circumstances likely to endanger the security of examination questions.

7. During the course of and prior to the completion of any examination, research, or other assignment, a student shall not provide to, compare with, or obtain from another student any answer or part of an answer, unless authorized by the professor.


23. See id.


27. Id. at 375.
THE RELATIONSHIP BETWEEN THE CARRIERS PARTICIPATING IN THE PERFORMANCE OF INTERNATIONAL RAIL FREIGHT

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ABSTRACT. The international carriage of goods may have standing to bring the sender, recipient that their rights assign. The action against the carrier is for the one who legitimately possess the transport document. The rule is that the passive subject of legal action is the carrier. In the case of successive carriers, the active subject is entitled to choose between the first carrier (who took possession of the goods), the last carrier (who delivered or had to deliver the goods) or the carrier who performed the carriage during which the event giving rise to the proceedings occurred. In all cases the CIM Uniform Rules are applicable, the liability of the carrier can be employed only under the conditions and limits set by these rules. The carrier who has paid compensation is entitled to recourse against the carriers who participated in the transport.

Keywords: successive carriers, compensation regulations, liability, recourse

1. Introduction

In the carriage of goods, the carrier may assume liability in principle compared with the other contractor, for improper performance or non-contractual obligations. The carrier’s deed, violating the obligation agreement, brings the contractor harm, consignor or consignee of the goods leads to its contractual liability, as the basis of repairing the damage caused. In the field of liability set not including the failure by the carrier of obligations which were undertaken by other contracts, at different transport, even if it has connections. Thus, the carrier hire, at the request of the cosignatory person for a tarpaulin to protect the cargo transported in bulk wagons is regarded as a stand-alone contract. It is therefore a lease of goods. If the sheet, was not
god quality, left the rain to run into it, which caused degradation of the load, conditions and the effects of liability are resolved independently of proper transport, which in terms of displacement, was carried out without any flaw, so without the carrier’s liability, as such, can be employed in any way.

2. General conditions of coaching responsibility

The general premise of contractual liability is the legal act bilaterally, therefore the pre-existing contract non-occurrence of the damage caused by the obligation assumed (Eliescu, 1979, pp. 63-66). The contract of carriage may confer contractual liability classification if it meets three requirements simultaneously. First it must be legally valid. The grounds that appeal to annul, retroactively canceling, removing the contractual nature of the liability arising in the amount of time was being performed. Secondly, because contractual liability is required, pursuant to the convention, to establish direct legal relationship between the injured and the author of the injury (a relationship between the carrier on the one hand, and the sender or the recipient in question, on the other part). Finally, there is the responsibility necessary to have contractual nature of the damage resulting from total or partial failure of an obligation arising from the legal document, which binds oneself injured by the author of the damage.

The general conditions of contractual liability are the same common law, namely: a) committed an act detrimental to the debtor (carrier); b) correlative damage suffered by the creditor (sender or recipient), c) the causal link between the harmful act and injury; d) guilty of causing damage by his action.

3. Active subject of legal action

In cargo, the shipper may have standing to bring the recipient that their rights assign. The action against the carrier is one who, legitimately possess transport document. Judicial proceedings for refund of amounts paid under a contract of carriage belong to those who made it. Active subject of legal action is the sender until the recipient withdraws the waybill, or connects their merchandise supports his rights under art. 17 paragraph 3 of the CIM (the right to request delivery of the goods and delivery consignment note), or according to art. 18 paragraph 3 (right to dispose of the goods).
4. Passive subject of legal action

The rule is that the passive subject of legal action is the carrier. In the case of successive carriers, the active subject is entitled to choose between the first carrier (who took possession of the goods), the last carrier (who delivered or had to deliver the goods) and the carrier who performed the transportation during which product-giving rise to legal action. In all cases the CIM Uniform Rules are applicable, the liability of the carrier can be employed only under the conditions and limits set by these rules. Also, the carrier's liability, damages should be held in accordance with article 42, namely by preparing a report which should be referred, in accordance with the nature of the damage, the condition of the cargo, its weight and, if possible, significant damage, the cause and time of its occurrence. Lack of finding damages according to the procedure in 42 lead to the extinction of the right to legal action.

5. Redress for loss or damage to goods

A carrier who has paid compensation for total or partial loss or damage to goods in the uniform rules shall be entitled to recourse against the carriers who participated in such transportation: 1) carrier caused the damage is solely responsible for this; 2) if damage was caused by several carriers, each responsible for the damage he has caused a distinction is possible if the compensation is divided between them; 3) if you cannot prove which of the carriers has caused damage or is the rate at which carriers have contributed to its production, the compensation shall be borne by all carriers in proportion to the remuneration received transport. Carrier proves that the damage caused, however, will not participate in the distribution of compensation.

6. Redress for failure to perform the contract of carriage

The provisions on recourse in the event of loss or damage to goods shall apply in case of compensation paid for exceeding the performance of the contract of carriage. If damage was caused by several rail carriers, the compensation shall be apportioned among them in proportion to those lines during transport.

Deadlines for implementation of the contract of carriage shall be divided as follows: a) when two carriers have participated in the transport: Shipping time is divided equally; transmission time is
divided in proportion to the distances of charging kilometer. b) when three or more participating carriers to transport: Shipping time is divided equally between teaching and rail track destination; transmission time is divided between all the carriers: third equally; remaining two-thirds proportion of charging kilometer distances.

This extension to the carrier by a rail carrier has the right to assign this. The time between the delivery of goods by the carrier and the start time of shipment which carrier is assigned exclusively to teach merchandise. Dividing the period as stated above was not taken into consideration only if the total period of performance of the contract of carriage was observed.

7. The procedure for recovery action
Distribution of compensation between carriers is governed by article 50 of CIM-51. The object of damages is the amount paid by a national railway network for cargo loss or damage, or delay in performance of the contract. The quality of an applicant who has paid compensation carrier is required by sender or recipient. So the carrier status of the applicant, “solvens” that have a recourse action to recover from the other carrier rates in the total amount of damages, but provided that, “solvens” and he is not liable for damages (Paulin, 2005, 134). The quality of the defendant carrier may have caused damage as the only responsible. Most of the times but the damage is more guilt stemming from the railways, in this situation, namely the multiplicity of defendants, the damages being individualized, demand recourse against all networks simultaneously be brought to bear mistakes which damage proportionate to the damage that have caused (Ciobanu, 2000, 167). Demarcation of responsibilities is based railways of the injury, the contribution to the damage caused, it was determined via expert.

It can arise where there are several carriers but there is evidence of guilt of each and if you can not prove any damage was caused by the fault of one or more individualized transport. In this case recourse damage will spread among all carriers participating in transport. Distribution is proportional to the distances of charging kilometer. From kilometer distribution rule may be an exception, namely the extent to which one of the defendants to prove that damage was not relevant evidence in the territory of his country. In connection with this action for recovery, to indemnify the question is one of the
carriers of the effects of insolvency of debtors. In this case, the amount to be paid by one of insolvent carriers, according to art. 60 of C.I.M. is to be paid by all other carriers participating in the shipment, but no longer take into account the mileage, but the criterion is the rate of taxation and accessories that they have received.

It should be noted that the debtor insolvent carrier can be invoked by the action for recovery only if it is found and certified by OCTIF. Otherwise it would be easy to invoke the impossibility of payment in exchange for exemption from that flow. The validity of the payment made by the carrier exercising recourse of action can not be disputed by the carrier against whom recourse is exercised if the compensation was determined by a judicial authority. The judge must decide by one and the same decision on all recourse before it. Carriers cannot use any pull action further setback.

8. Jurisdiction in actions for recovery

In the judicial power regarding resolving recourse are known several rules and some exceptions. As a general rule, the jurisdiction belongs to the jurisdiction of the defendant’s seat, applying rule “actor sequitur forum rei.” So, in principle, the action must be brought before the competent court having jurisdiction of the state railroad sued in court, which will have to pay compensation regression.

There are two exceptions to this rule: a) The first exception concerns the assumption of alternative power, i.e. where there are two or more defendants railroad. In this case, the plaintiff “solvens,” who has paid compensation to the sender or recipient has the option, i.e., he can choose one of competent jurisdiction. However, he is obliged to summon to court all railways-payment. If there are two or more defendants, and plaintiff brought the action against only one of them at its headquarters and has asked the court concerned the introduction of others, the sanction may consist of revocation of right of recourse (Article 62 pct. 2 C.I.M.). b) The second exception concerns the voluntary extension of jurisdiction. According to regulations C.I.M. understanding between the railroad allowed on the trail, so that the applicant be able either to bring separate actions against each defendant, either call on all defendants to trial in a country other than that resulting from applying the general rule “actor sequitur forum rei.”
9. Rules of procedure

Procedural matters in actions for recovery are covered by article 62 of CIM, as follows: a) The first part, as one generally covers defenses that the defendant may invoke the court setback, i.e. to prove absence of fault. In addition, the defendant may also challenge the legitimacy and amount of payment made by the applicant “solvens.” For these reasons, the texts allow the defendant in particular, to challenge the legitimacy of the payment and amount. From this general rule there are exceptions, namely the challenge is excluded if the compensation was determined by a court decision in the relationship between rail “solvens,” recourse applicant, and the person injured. In other words, the principle “res judicata” - res judicata prevail. b) The second aspect is to establish procedural rules, in principle, linkage of all claims of recourse obligation, if several defendants, and also prohibit the severance. Accordingly, the court must decide the case before a single decision in the application of several defendants; c) The final issue concerns the inadmissibility of regression subsequent procedural. Thus, the defendant in court was obliged, by regression, to pay a certain amount of money the plaintiff is not entitled subsequently to introduce, in turn, a request summons against the other railway networks.

10. Conclusions

Rail carrier's liability examined so far, is a liability based on fault and not an objective one. As long as the presumption of guilt has not been removed, is engaged mechanism carrier's liability in any form or degree of guilt. Each carrier is responsible for enforcement of the transport on the entire route up to delivery.

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DEFINING THE CONCEPT OF HUMAN RIGHTS
IN THE LIGHT OF JURIDICAL VALUES THEORY

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ABSTRACT. The present study is structured in three parts: 1. The justification of the scientific approach. 2. Concept delimitation in the field of juridical values. 3. A diachronic approach to the concept of human rights and their definition in lights of theory of juridical values – selective aspects.

Keywords: theory of values, human rights, juridical values

1. The justification of the scientific approach

The approach of knowledge of the juridical values theory in law, in general, and human rights, in particular, may be motivated at least by identifying the relevant provisions in the matter, set by the following documents, from those with symbol value to the current standards in the field of human rights:

1.1. The Preamble of the United States Declaration of Independence, it is expressed the belief of being self-evident the following truths: all men are created equal, they are endowed by their Creator with certain inalienable Rights, and among these rights are Life, Liberty and the pursuit of Happiness;

1.2. In the first article of the French Declaration of The Rights of Man and of the Citizen proclaims that men are born and remain free and equal in rights. Social distinctions can be based only on the common utility;

1.3. The Preamble of the Universal Declaration of Human Rights states the following principles: a. recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the
world; b. Uno peoples have reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and have determined to promote social progress and better standards of life in a larger freedom;

The Article 1 also states the philosophical assumption met by the Declaration: All human beings are born free and equal in dignity and rights. Thus, the ideas inspiring the Declaration are defined: a. the right to liberty and equality is a right acquired from birth and cannot be alienated. b. as man is a moral being endowed with reason and differs from other creatures of the earth, he can claim certain rights and freedoms that other creatures do not enjoy.4

Moreover, Article 2 of the Declaration formulates the essential principle of equality and non-discrimination regarding the use of human rights and fundamental freedoms, thus developing the provisions in the Charter of the United Nations, according to which the United Nations should encourage the use of these rights and freedoms for all without distinction as to race, sex, language or religion. The pre-amble to the International Convention on Civil and Political Rights and that to the International Convention on Economic, Social and Cultural Rights assume and develop the content of the principles in the Charter of the United Nations and in the Universal Declaration of human Rights, which represent universal values unanimously accepted by the international community.

1.4. The third paragraph of the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms proclaims the principle according to which the aim of the Council of Europe is to achieve a greater unity between its members and that one of the ways to achieve this goal is the protection and development of human rights and fundamental freedoms. Also, the Article 1 of the Convention establishes the obligation of the Council of Europe Member States to respect human rights established by Title I of the Convention.5

1.5. We believe that it is important for this study to remember the concept of Human Dimension implying to respect all human rights and fundamental freedoms and those on human contacts and other humanitarian issues, as defined in the Section named The Human Dimension of the C.S.C.E. of the Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the
Basis of the Provisions of the Final Act Relating to the Follow-Up Conference. 6

We also believe that this study requires to present other components of the Human Dimension which, in our opinion, result from the Seventh Principle of the Decalogue of the Final Act of the CSCE, Helsinki 1975, 7 that includes the following reference components: a. the respect for human rights and fundamental freedoms, including freedom of thought, religion or belief for all without distinction as to race, sex, language or religion; b. universal recognition of human rights and fundamental freedoms and the commitment of participating states to respect them in their mutual relations and to strive individually and jointly, including in cooperation with the United Nations to promote universal and effective respect for them;

In this sense, in our opinion, we should remember the principles of human rights, democracy and the rule of law set in the Charter of Paris for a New Europe: 8 a. the Heads of State or Government of the participating States undertake to build, consolidate and strengthen democracy as the only system of government of their nations and in this endeavour they will abide by the following: a.1. The human rights and fundamental freedoms are inherent to all people, inalienable and guaranteed by law. a.2. Democracy is founded on respect for the human person and the rule of law. a.3. Participating states are ready to join all states and each of them in a joint effort to protect and promote the fundamental human values.

1.6. In the Preamble to the Treaty on European Union 9 it is confirmed the commitment of the Member States representatives to the principles of freedom, democracy and respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States (as amended by the Treaty of Amsterdam, 1997). It also expressed willingness to deepen the solidarity between their peoples to respect their history, culture and traditions. Moreover, in the Article B of the Title I, among Union’s objectives there was introduced a principle to strengthen protection of rights and interests of nationals of Member States through the introduction of a citizenship of the Union. The text mentioned is reiterated in the Article B to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts in 1997. In addition, the Article F paragraph (2) states that “The Union shall respect fundamental rights as guaranteed by the Convention for the Protection of Human Rights and Fun-
damental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States, as principles of Community law."

1.7. In the second paragraph of the Preamble to the Treaty of Lisbon, December 2007 – regarding the amendments to the Treaty on European Union and the Treaty establishing the European Community assumed the following principle of universal values: Drawing on cultural, religious and humanist heritage of Europe which have developed the universal values that are the inviolable and inalienable rights of individuals, and the freedom, democracy, equality and the rule of law; Also, the Article 1 of the General Provisions of the Treaty sets the principle according to which the Union is founded on the values of respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, including rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

Furthermore, we must remember the principle of promoting the values that contribute to the protection of human rights, made in the Article 2, paragraph (5) of the General Provisions of the Treaty: In its relations with the rest of the international community, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. This contributes to peace, security, the sustainable development of the planet, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and especially child rights and the strict observance and development of international law, including the respect for United Nations Charter principles.

1.8. The Preamble of the Charter of Fundamental Rights states that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and the classification of these rights by the criteria of values listed, Preamble and Titles I-IV of the Charter.

1.9. In the Title I of the Romanian Constitution amended in 2003, title entitled General Principles establishes the citizens’ rights and freedoms, human dignity, the free development of human personality, justice and political pluralism as supreme values and guarantees them, article 1 paragraph 3;

1.10. Multiplying the state and conventional constitutional laws at regional and universal level by inserting, recognizing and pro-
tecting the moral values, idea supported by the doctrine of natural law;

1.11. We can see in Europe today, and this finding can be extrapolated to the international society, that there is a transformation of all values and an establishment of their quintessence.

At least these considerations have led us to approach the concept of human rights in light of Romanian constitutional values, European conventional values, guaranteed universal values and components of the human dimension.

2. Conceptual delimitation in the field of juridical values

The word “axiology” in Romanian comes from the Greek word axios = value + logos = study. In essence, we should observe that axiology is a branch of philosophy that has as research object the study of value. On the other hand, the Romanian word „epistemology” comes from the Greek word episteme = knowledge + logos = study. In its substance, the epistemology is part of gnoseology which has as research object the process of knowledge, as it is carried within the sciences in general or the theory of scientific knowledge.

By using the compound expression epistemological-axiologic approach we wanted to use the study of values knowledge in the field of law, in the scientific approach. We must point out the complexity of the study and its location in a condominium belonging to the philosophy of law, gnoseology and field of law. Referring to the time of transformation of all values, Nicolae Râmbu\(^{13}\) considered that now a new objective spirit, i.e. a new way of thinking and being, of building and creation, a new sensibility are about to be set.

Moreover, the reflection on values is a parameter of the philosophical spirit, but it becomes central in crucial moments of history. Otherwise, people live in the world of values without being aware of them, as they are not aware of the air they breathe. In this respect, it seems evident what is the truth, good, beauty, happiness, freedom, etc. We consider that the author cited addresses an exhortation to the awareness of values and learning their content. We can also say that the philosophy of value and knowledge of juridical values has become more than ever a cardinal problem of the contemporary world. In addition, quantification of values and their improvement became a part of human society at national, regional and universal level, thus tending to confirm Hegel’s statements, according to which on the
one hand, the law ought to be a comprehensive whole, closed and complete; and yet, on the other hand, the need for further determinations is continual.\textsuperscript{14}

For this study we take into consideration the following concept of value, considering it sufficiently general and comprehensive to cover its research and application in law and in particular in establishing the concept of human rights in light of the theory of juridical values. The concept “value”, in a general philosophical sense, includes the acquisition of some things, events and actions to which a human society grants appreciation under their correspondence with its needs and ideals generated by them.\textsuperscript{15} The studies in the field supported the idea according to which values are related to all forms of manifestations of social relations and human behaviour.\textsuperscript{16}

Regarding the criteria according to which the values were classified, they are:\textsuperscript{17} a. the validity of values; b. their quality; c. their subject; d. the reasons that determined the values; e. their object; f. the mental faculty from which the values spring; g. the field of their application. We take into consideration the fifth criterion of classification, namely the object of values, according to which values can be classified as economic, juridical, ethical, political, etc. and the seventh criterion, namely the field of their application, according to which the values can be individual, social and universal. Starting from the idea established in philosophy that the man knows the reality to use it, we consider that between knowledge and value there is a bi-univocal correspondence. It follows that the foundation of the value should be based on logic and theory of value. As the studies in the field showed, the object of value is value as a phenomenon, or as a given fact, outside of man.

Referring to the philosophy of value, Petre Andrei\textsuperscript{18} considers philosophy to be the science of the life and reality ultimate values, thus highlighting the subjective nature of philosophy, since we do not know realities, but values that we ascribe to psychological and logical datum that we objectivise. Consequently, the great problems of philosophy of value can be summarized in three main categories of research: that of reality, that of knowledge and that of action. Given the above, we believe that the universal, regional and constitutional theory of value can be studied by structuring it on two general accepted levels of genesis: a. knowledge of reality and configuration of the social values to which a human society gives its appreciation based on their correspondence with the essential requirements or needs
determined by the objectives and goals of society and its general ideals; b. recognition of values or valuing the social values in order to create a table of values or their hierarchy;

The two levels of the value genesis have general application not only in the field of philosophy of value and sociology of value, but also can be applied to the study of social reality in different specific areas, such as: economic, political, legal, ethical, historical, aesthetic, religious, social, cultural, etc. It follows that the interdisciplinary approach of the theory of values is a parameter of the modern science, a condominium of study for the contemporary sciences in the matter. We conclude that in today’s national, regional and universal society, there are a lot of values in the field mentioned above, which have an open content.

As Petre Andrei has stated, the juridical values can be a subject of a science of law, juridical sociology or philosophy of law, depending on the way we study them as formal phenomena, rational and imposed by the state, as regulatory social phenomena of the social reality, or abstract concepts of the practical life. By law, individual conduct in the social life is subject to norms or mandatory rules. These mandatory rules or norms of conduct are general, impersonal and apply iteratively when the reality or facts circumscribed to these appears. Also on the juridical value, another author makes the following statement: the juridical value is thus a normative value, from a special point of view, which is that of the rightness of an action. There is a normative value of existence, as these obligations, we say it is true that a person is or not required to do something, and that it is not true that its action exists or not. It follows that the dyad of the value genesis presented above is not sufficient for the juridical values.

c. Therefore, it requires a third level of genesis called the achievement of value by its transformation through positivism, i.e., passing a value from the non-legal, moral or legal or customary field in the juridical or law field.

Starting from the idea that values are social phenomena, juridical values are related to all manifestations of individual behaviour in society. Human rights as value are rooted in the historical development of human society, being theorized by both natural law doctrine and the doctrine of positivism. We point out that the first two levels of value genesis have a social nature, they are outside the law and only after positivity they become juridical values.
Positivity implies the shift of the value from the non-juridical field to a juridical one, thus becoming a value in positive law. Values of positive law form a system of values. So as the law system has a hierarchy of the rules and its branches, it follows that the value system of positive law will experience such a hierarchy. In essence, according to the facts mentioned, in our opinion, the following system of hierarchy of values functions, but we do not consider it comprehensively approached:

2.1. Absolute values, as determined by the philosophy of law as a science of ultimate reality and life values that cannot be challenged, of which we mention for the this study: the truth, good, beauty, happiness, justice, justice, life, liberty, equality, dignity, good faith, the rule of law, etc.

2.2. Universal values generally accepted by the international community and proclaimed *expressis verbis* in the preamble or normative content of international documents, among which we mention for this study: human rights, human dignity, freedom, equality, solidarity, the human person, etc.

2.3. Supreme Values or constitutional values proclaimed *expressis verbis* by the general principles of the Constitution of the State, for which the Constitution is the supreme law or the law of laws. For example, the Romanian Constitution of 1991, revised in 2003, proclaims *expressis verbis* in art. 1 paragraph 3 entitled General Principles, the following supreme values: human dignity, rights and freedoms of the citizens, free development of human personality, justice and political pluralism.

2.4. Fundamental values, declared in the preamble or the content of universal or regional documents in the matter, as well as in general principles or content of the constitutions of states, among them we mention: the general provisions of Title I and the common wording of Title II of the Constitution of Romania, the preamble of the Convention for the Protection of human rights and fundamental freedoms, etc.

2.5. Relative values declared as juridical values and related to other values or other reference system of values against which they define themselves. For example, protection of juridical values by the other fields of law, of which we mention: the protection of human rights by means of criminal law, civil law, labour law, financial law, etc.
2.6. Moral values are required to be discussed according to the theory of values in law. If juridical values are imposed by the legislature, i.e. outside the will of the individual, moral values or moral law is an externalization of the individual personality and will be imposed by the internal will, because, as Ihering says, moral man is the product of social evolution. In essence, we must remember that both values are rules of conduct for the individual except that for non-moral values we cannot apply the coercive force of the state. Finally, we must observe that absolute values should be subject to positivity in law for their achievement, but only according to universal or regional documents or the normative content of fundamental laws.

Moreover, moral values must be discussed in the context of the present theme having regard to the constitutional provisions of art. 11 paragraph 1 proclaiming that: The Romanian State pledges to fulfil in good faith the obligations deriving from the treaties it is party. We noted the following definition of morality: a set of concepts and rules of right or wrong, good or bad allowed or disallowed. Good faith is a moral concept deriving from international customary law of the states compliance with their obligations assumed in treaties concluded by their agreement. In our opinion, the set of values of the European Union should build a condominium with the set of national values such as the European people to feel part of the same Union, thus defining a set of ethical values that can be called the Union ethics. Finally, we observed that absolute values also could be subjected to positivation in law for their achievement, but only as part of basic universal or regional standards or normative content of the basic fundamental laws of the states.

3. A diachronic approach to the concept of human rights and their definition in light of theory of juridical values – selective aspects

The idea of human rights has undergone a difficult and winding way, full of a series of long struggles and sacrifices for its supporters, to reach the form we know today. In ancient societies, slave and feudal, the first sources of human rights were religious doctrines. The way to secularization has gone through philosophical writings, culminating in “Enlightenment” as it is called the eighteenth century, to their establishment in written documents of a constitutional nature. From
antiquity, there have been attempts of codification of human behaviour. In this respect we mention the Code of Hammurabi. Its 282 articles contain legal, religious or moral rules. The regulations contained in this code try to establish a system from which the arbitrariness to be excluded. Hammurabi’s Code is dominated by the idea of justice, considered as a law of nature, it is not the same for all people - it belongs to them more or less - only because they are people.22

It is stated even today that the human rights are a creation of antiquity from Protagoras, Sophists representative and a supporter of slave democracy, who questioned the existence of gods by saying that: man is the measure of all things.23 Given the age of human rights issues, we consider valid and accurate the statement that “the history of human rights is the same as human history.”24 As the studies in the fields say initially, the human rights were called natural rights, the words human rights are relatively recent.25 The concept of human rights has its historical and philosophical roots related to the natural law.

According to this conception “man has a set of rights inherent to human nature, outside and above the positive law, opposing to the state, rights with a superior juridical nature, they are universal, the same always and forever.”26 These natural rights are distinct from other human rights that are a creation of human society in evolution, they derive from the laws of nature and the essence of human nature and have a legal nature under the concept of natural law school, different from that of fundamental rights. The emergence of a coherent concept and, more importantly, of the actual practice of exercising such rights was the result of a long evolution, during which the prerequisites necessary to crystallization of the legal bases of human rights have been accumulated.27

We consider Magna Carta (1215) to be a symbolic first document in the history of human rights, which establishes and protects certain rights and freedoms. In England we face some important declaration of principles on human rights, but the Petition of Rights - 1628, Bill of Rights - 1688, Act of Settlement – 1701 protect British subjects in a certain age. Rights or freedoms set out in these documents were not imposed to the King and not to the Parliament. Another document in the history of human rights is the U.S. Declaration of Independence - 1776. Declaration established the belief that human rights are transcendent values earlier and higher than state when proclaimed the
following: We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and Pursuit of Happiness. That to secure these rights Governments are instituted among Men, deriving their just power from the consent of governed.28

In the same vein and given the historical considerations, we ought to mention the French Declaration of Human Rights and Citizen of 1789, as amended. Starting from the concept of natural law, which held that natural rights are not created by government, they require it being above and outside the state. Those who drafted the declaration considered it sufficient that they be proclaimed without the need for them to be included in a bill with the legal force of law. The French Declaration is a step forward proclaiming human rights and citizen. By this, the declaration recorded the mutation made by man from natural state to the status of legal citizen who has juridical connections with a human society organized in state.

In the new condition of man-citizen, human rights field acquires a new dimension; a new generation of rights that complete the sphere of natural rights appears. We believe that the name of human and citizen rights given to the title of the declaration expresses the message of those who addressed it to the future societies organized in the state, so that the spheres of the two categories of rights be the same. Even if these declarations are not legally binding for the state and individuals, they represent an ideal of those who drafted them, hoping that they will be included in the fundamental law or ordinary law.

Human rights issues concerned and still concerns each individual state and international community through its specialized bodies in the area, claiming that human rights are not any new moral or a secular religion; they are more than a common language of people everywhere. The idea of adopting a universal declaration of human rights was stated for the first time at the Conference of San Francisco - April 26 - June 26, 1945, which ended with the adoption of United Nations Charter. This idea was materialized by the adoption by the UN General Assembly on 10 December 1948 of the Universal Declaration of Human Rights.

This document, as its title indicates, is merely a declaration and not legally binding agreement. Because of its moral status and legal and political importance acquired over time, the Universal Declaration of Human Rights stands next to the Magna Carta, the Declaration of Independence of America, the Bill of Rights and the French
Declaration of Human Rights and Citizen. Given the above we point out the notions of human rights and rights of citizens. Although part of the current vocabulary of human rights concept, scientifically talking, it is difficult to establish and define its scope and content.

The studies in the field often cite the definition of human rights given by René Cassin, French jurist, that took part in drafting the Universal Declaration of Human Rights: the science of human rights is defined as a particular branch of the social science, the object of which is to study human relations in the light of human dignity while determining those rights and faculties which are necessary as a whole for the full development of each human being’s personality.²⁹

We noticed the following elements of this definition: Human Rights constitute a science; the human rights research should be done in an axiological conception whose basic values are: the human dignity and the development of human personality; the research object of this science is the rights and faculties that secure these values. This definition has a high degree of generality and relativity; its research object may vary depending on age, societies, local and international context.

The first definition in Romanian legal studies states that: human rights refer to the rights of human beings, a being endowed with reason and conscience and whose natural rights are recognized as inalienable and indefeasible.³⁰ This definition highlights that the research object of human rights is formed by the rights of human beings whose natural rights are recognized as inalienable and indefeasible. A second definition observed for this study mentions that: the human rights mean the rights of any person who is inside the sovereignty of a state, regardless of his/her relationship with the State.³¹ The components of the definition are: the research object of human rights is the rights of any person; in order to benefit from these rights the person must be inside the sovereignty of a state; a person benefits from these rights regardless of his/her status, that of a citizen, foreigner or stateless person.

An axiological approach defines human rights as those powers conferred by the national law and recognized by the international law for each individual in his relations with the community and state, and give expression to the fundamental social values and aim at meeting the basic human needs and legitimate aspirations, in the socio-economic, political, cultural and historical context of a particular society.³² This definition highlights a fundamental triad of human
rights research: needs-values-rights. The values express the essential needs, which are then positivated in rights. The research object of human rights means the powers conferred by the national law and recognized by the international law for each individual. One last element that we mention from the definition above is the diachronic approach to the human rights taking into account the socio-economic, political and cultural context of a particular society.

In French juridical studies, the human rights are defined as either abstract powers recognized for human nature, or the minimum necessary privileges necessary for human nature. French juridical studies also mention that: the object of human rights is the study of individual rights recognized nationally and internationally and which in the context of a state of civilization ensure reconciliation, firstly between the assertion of a person dignity and his/her protection and secondly maintaining the public order.

We believe that the elements of the definition are as follows: the beneficiary of these rights is the person as a human being; human rights research should be done in an axiological approach whose fundamental value is the affirmation of dignity; the research object is the rights of a person, recognized nationally and internationally and that ensure reconciliation between the assertion of dignity and his/her protection and maintaining the public order. We appreciate as correct the view presented above according to which the human rights represent a branch of science. The science “human rights” has a proper research object, which is the inherent human rights, inalienable and indefeasible natural rights. The research of human rights forms the object of study both for the discipline constitutional law and political institutions and for the discipline public international law.

In our opinion, the study of human rights is beyond the science of law. Identification, selection and conceptualization of fundamental social values are also the object of study of social and political sciences. Only after completing these steps, we can talk about the positivation of new rights that meet essential requirements for human beings. The international community is also concerned with protecting and promoting human rights and fundamental freedoms. Thus, we can talk about a universalization of human rights. Gaining universal recognition, human rights become indivisible and inalienable, being inherent to human beings.
Approaching synchronism between national law and treaties on fundamental human rights to which Romania is party, requires an analysis of the simultaneity of valuation process and positivation of human rights on three levels, namely: universal, regional and state or national level. But in the case of positivation there might arise a lack of synchronization on the three levels mentioned. In support of this theory, we mention as an argument the provisions of the revised Constitution, referring to international treaties concerning human rights proclaiming that: if there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall prevail, unless the constitution or domestic laws contain provisions more favourable.

Given the constant and variable components listed above, we define in light of juridical values the human rights as those rights inherent to the human being, to which they are established and recognized his/her natural rights, they are components of the human dimension, universal values, European values and in Romanian Constitution, guaranteed in relation to the state, other individuals and the collectivity to which they belong and which subsumes the four determinations of relativity: the first determination of relativity relates to addressing the evolution of the human rights in time, the second determination of relativity relates to addressing the socio-economic, political and cultural context of a society organized in state, the third determination of relativity relates to the diversity of approaches of human rights issues explained by heterogeneity of the international community, and the fourth determination of relativity concerns the lack of synchronization between the rules at universal or regional level and those at state or national level.

NOTES AND REFERENCES

3. Pavel, Nicolae. (2004), Constitutional Law and Political Institutions. Vol. I, General Theory. Bucharest: România de Mâine, 222; Art.1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Art. 2: paragraph (1) Everyone is entitled to all the
rights and freedoms in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. paragraph (2) Furthermore, no distinction shall be made on the basis of the political, jurisdictional or internal status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.


10. *** (2007), Official Journal of the European Union, C30612, 17 December; In addition, we observed the general principle of action of the Union on the international scene which is based among other principles on the principle of universality and indivisibility of human rights and fundamental freedoms proclaimed in paragraph 1 and paragraph 2 letter a of the Chapter I of the Treaty, which states: paragraph 1 The Union’s Action on the international scene is based on the principles that inspired its creation, development and enlargement, and intends to promote in the world: democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity, and to respect the principles of the United Nations Charter and international law. paragraph 2 letter b: strengthen and support democracy, rule of law, human rights and international law.


12. *** Romanian Constitution,*** revised in 2003, was published in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003, article 1 paragraph (3) Romania is a state of law, democratic and social, in which human dignity, rights and freedoms, free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people’s democratic traditions and ideals of the Revolution of 1989, and are guaranteed;


16. Năstase, Adrian. (1992), *Human Rights, a Religion of the End of the Century*. Bucharest: Romanian Institute for Human Rights, 32; The author further states: individual participation in political, cultural or social life reflect the influence and impact of the values, category of maximum theoretical and philosophical generality, that finds its manifestation at the axiologic level of the social consciousness, objectiving the social norms that ordinates the behaviour in the different spheres of social life.

17. Petre, Andrei. *Philosophy of Value*. ed. cit., 47; The same author believes that the following are social values: a. economic values; b. juridical values; c. political values; d. ethic values; e. historical values; f. aesthetic values; g. religious values; h. cultural and social values;

18. Ibidem, 13;


20. Djuvara, Mircea. (1995), *General Theory of Law (Legal Encyclopaedia)* Rational law, Sources and Positive Law, Bucharest: All, 439-442. On the same line of thought the author made the following addition: The legal rules are thus violable by nature and their very definition, they cannot claim to ascertain facts, i.e. whether or not to be violated; also, the laws of science say what it is and can be seen, but it will never lay down in the final analysis what we are rationally obliged to do based on ideas of justice, as a practical rule sets.


26. Rivero, Jean, (1991), *Les libertés publiques*, Tome 1, « Les droits de l’homme », Paris: Presses Universitaires de France, 23-24. So it is possible to apply them the sanction which makes them enter the positive right. This is what happened in the international law, namely the human rights - as they were proclaimed by the Universal Declaration of the Human Rights in 1948 and consecrated by the two pacts in 1966 - define, in the international society, a juridical category to which the Declaration’s texts attach a protective regime; The author adds: “It is less important that the positive law of a country or of a period of time does not establish them. Although ridiculed
by the laws of the state, human rights for those accepting their principle do not persist less.” The concept thus transcends the recognition by the legal texts. But such recognition is possible, human rights indeed have characteristics that make it possible to identify a right, within the meaning of the word as a possibility recognized to that a man, an object and a subject opposing to it. It is therefore possible to apply the sanction that makes them shift to the positive law. This is what happened in international law, meaning that human rights as they were proclaimed by the Universal Declaration of Human Rights in 1948 and established by the two pacts in 1966, define international society, a legal category to which the texts of the Declaration attached a protective regime.

32. Adrian Năstase, *op. cit.*, 36.
33. Burdeau, Georges. (1972), *Les libertés publiques, Librairie générale de droit et de jurisprudence*. Paris, 13. Two phases must be distinguished in the process of achieving human rights. One ending by enshrining the rights of human nature and one which is characterized by the efforts of individuals to obtain from the government the effective exercised of the powers recognized to the human nature.
34. Rivero, Jean. *op. cit.*, 24. Human nature requires a minimum of security, among others involving health and the possibility of finding a paid job, and also a minimum of intellectual development, in connection with the access to education, to culture and information.
HISTORY, PRESENT AND PERSPECTIVES IN DEMOCRACY

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ABSTRACT. The democratic forms of organization have their roots in the prestate period and have begun since the appearance of man. Some ethnographical savants claim that democracy is one of the main factors of anthropogenesis, because it has stimulated the development of communication between individuals as well as the freedom of thought. Thus, we can speak without any doubt, of forms of organizations specific to societies that have been set, evolved or conserved throughout history. In this paperwork I have set the goal of bringing in discussion the concept of democracy from history’s point of view, and that of constitutional right, observing the evolution, the perspective, as well as the challenges it encounters in the theoretical and practical horizon.

Keywords: democracy, constitutional law, heritage, forms of governing

The appearance of the first forms of organization has determined, as it was natural to happen, a new political and social form of organization. Whether we take in consideration the antique democracy as a model of order of the polis, or we relate to the great colonial empires, or to the absolute monarchies, we can speak of forms of organizations specific to societies that have been set, have evolved or perfected throughout history. Thus we can affirm that modern democracy, in its perfect and perfectible form, has been formed as a consequence of theories cumulated for many centuries, theories that have enforced models of governing – antiquity serving as a model for all these theories.

Democracy is without any doubt a complex phenomenon, whose analysis has constantly challenged in time philosophers that have tried to propose ideal models of democracy, historians that analyze its development, ascension or decline, political analysts that tried to
offer answers and empirical explanations referring to the fundaments of affirmation, functioning and maintaining or diffusion of democracy\(^1\) and even great constitutionalists preoccupied to find a proper governing form for each identity of each state.

In the history of democracy we can highlight a succession of distinct phases that present qualitative accumulations. Thus, we can discern: the antique democracies that have acted in the citadel state (Athenian, Spartan and Corinthian); modern democracies (the contemporaneous state characterized by the apparition of multiple and diversified systems of representation); democracies of the future (with forms of expressions much more efficient of democratic life);\(^2\)

In antique Greece we can find the etiological sense of democracy: demos – people and kratos – power, authority, meaning having and exercising the power by the people. This was a political concept; democracy itself was a political democracy. In accordance with the opinion of some specialists,\(^3\) at its origins, democracy was state and society in the same time, ensemble of citizens, governing directly, by active participation in political life, Athenian democracy offered both the rich and the poor the possibility to play a part in the society’s governing, by their direct participation in the decisional process needed for managing the existing problems of the community. Antique democracy based itself on the principle of equality of all citizens in front of the law, the right to free opinion but also that of access to the public functions. During Solon, in the citadel of Athens we can speak of a political reform that set the base of democracy in all the spheres of social life – during his time, the citizens of Athens were divided in four classes, each class having its well determined role in the political system of the citadel, fact which determined the instauration of censitary democracy.

In the 5th century B.C. an antithesis made the object of ample debates because it regarded different concepts referring democracy and its fundaments, the juridical aspect on one side and the ethical one on the other side. Thus, forms of government are conceived by Platon, according to the character of those that take the power. Depending of the characters in the citadel Platon highlights the following forms of governing: timocracy or timarchy, constitution amateur of honors, then, oligarchy or the oligarchic, in the third place, democracy as well as the democratic individual, and in the fourth place, tyranny or the tyrannical soul. The changing of a certain political regime with another is due to the excesses manifested by those who
own the power. “I think – says Platon – that democracy appears when the poor, winning, kill some of the rich, banish others, the rest being given as equal pray in citizen rights and dignities, and then, when, usually the dignities are given by random odds.”

Democracy is an order without master, pleasant, distributing equality among all individuals – and the democratic individual is the man that that orders his own way of life, that which he chooses and likes. That is why Platon claims that citadels must be led by philosophers, because they posess the art of bringing wellness in the citadel. If the leader is prudent in everything he does, so will be the citadel that he leads – by prudency, justice is imposed, and the Gods will bless the citadel. Justice is at the base of democracy for R. Neibuhr also, who claims: “Only the man’s sense of justice makes democracy possible, and its tendencies towards injustice makes democracy be as needed as it is.”

In the history of humanity, antique Greece has a special place in the cultural heritage, and it is unanimously acknowledged and accepted. Concepts as: democracy, secret vote, majority, referendum, as well as retribution of functions, are encountered even today in a readapted form of a new reality. Middle Ages is marked by the philosophical ideas about the state and rights of Thoma D’Aquino. The state develops in a close correlation with the perfecting members of society, not against them. According to this goal, by Toma, the forms of governing are: monarchy, aristocracy, and the republic that degenerates in tyranny, oligarchy and democracy. Preoccupied as his predecessors of finding an ideal form of governing, Montesquieu claims that there are three forms of governing: the republican, the monarchic and the despotic, the republican governing is the most well known of these types: democratic, when the supreme power is held by the people and aristocratic, when the power is held by a part of the people. “When speaking of democracy,” says Montesquieu, “data about how, to whom, by who and about what must be clearly specified regarding the votes, because, if not, there can be confusions that can endanger such governing.”

Democracy can be seen as a form of governing that has proved in centuries, a big capacity of adaptation in different conditions imposed by history, a great capacity of learning, as well as an important potential of transformation in time, according to certain factors.
The characteristics of democracy in our age

History has proved that the forms which democracy took along the time have varied, each state receiving differently, in its own constitutional regime, the democratic ideal. If at the beginning of the 20th century politicians still believed that the state of rights could still exist even without democracy, the democracy of our days is insolubly tied to the state of rights, as an institutionalized form of a human collectivity, capable of guarantying rights and liberties to its own citizens and in the same time assuring internal and external security for the citizens, through democratic institutions and a coherent legislative system, to assure free and correct polls, to assure pluri-party – a sine-qua-non condition of democracy because only it can ask and grant that those who lead have more responsibility, each disputing in a democratic and free manner the votes of the poll and participating in conditions of juridical equality to the political competition in gaining power. The state of rights phrase is used more and more frequently in our days, in different fields (political, mass-media), through it, trying to designate, generically speaking, the state in which is assured the sovereignty of the law. Although, currently, this way of expressing is mostly used to designate an issue of form, and less of content, the state of rights has constituted a preoccupation for philosophical approaches, political and scientific, even since the times of antique philosophers. In the modern doctrine, the state is defined as a juridical and political concept that defines a form of the democratic regime of government from the relation between power and law’s point of view, and through assuring the supremacy of the law and respecting the fundamental rights and liberties of man, in exercising power.

Thus, a few characteristics of democracy are:
- The existence of a legislative frame, the constitution, as a fundamental law, adopted by a representative collective that contains fundamental regulations regarding the organization of the state as well as the limits of its power. Clarity and predictability norms are considerably assured for the case in which the written law is conferred a juridical force superior to any norm be it written or customary.
- Exercising the sovereign power of the people based on the universal vote, equal, direct and secret, in free polls, choosing governors and exercising their authority based on and in according to the constitution.
- The consecration in constitutions and respecting the principle of power separations in the state, which assures the distribution of the power in order to be exercised, to different organisms, to whom they are distributed certain leading prerogatives. None of these organisms can exercise power in its own name or interest and beyond the control of the sovereign and legitimate beholder of the power. According to this principle, none of the three powers (legislative, executive or justice) does not prevail over another and cannot assume prerogatives that are for the others. An advantage of the separation of powers is the fact that it indicates exactly the manner in which are organized the authorities that will exercise one of the three powers, the manner in which they function, as well as their mechanism of interference.\(^8\)

- Respecting the fundamental rights and liberties according to the international regulations as well as the protection of the minorities, often considered a main characteristic of democracy. Its diverse sides, protecting existence, participating in the wellbeing of the community and creating bases for the change of power and opinions, show that the fundamental rights are in democracy more than simple defensive rights, becoming constitutive elements of it. The fundamental rights are nothing but democracy itself, they are not in any kind of “relation” with it, they are part of it.

- Guarantying free access to justice, equality in front of the law, respecting the market economy freedom and social protection of disadvantaged categories, the freedom of media, guarantying the right to association as well as the freedom to an opinion, because without it, democracy could not exist. Theoreticians consider the freedom of opinion criteria with which can be measured the degree of democratic development – being easy to check with the “young democracies.” It makes possible to criticize the decisions considered injustice, it transports the wishes of the society to the field of political decision, and demands justification for the taken decisions.

- The rule of law – the citizens of a democratic society, are submitted to laws, because these are elaborated even if indirectly, by them. In a democratic society, no one is above the law, and the control of power is made on norms of rights. The laws must be known and have stability in time.

These characteristics are simultaneous in the stable and developed democratic societies. They are, logically correlated, but they can also
be separated, which makes it possible that in fragile democracies, some to be presented in their totality, and some, partially, and some, not at all – depend on the degree of civilization and instruction of people, its cultural tradition and respect towards the law.

In Tocqueville’s conception, democracy imposes the creation of an institutional frame in which it functions, as well as instituting a system of political education through which people will be familiarized with the principles, the norms, and the values of democracy. “To teach democracy, to revive, if it’s possible, its beliefs, to purify its vices, to regulate its movements, to replace, little by little its lack of experience with the science of public business, its blind instincts with the knowledge of its interests, to adapt its governing to the right times and places, to modify this governing according to the circumstances and people: this is the first task imposed these days.”

Factors that determine the efficiency of a democratic governing:

- Assuring the principle of representation, according to which its people exercise its sovereignty through organisms that give them the right to act in its name and represent them on internal and external plan – empowering a common will, a majority and a representative government.

- The constitution of a political class made of political parties, whose political platforms and ideologies are capable of offering viable alternatives. Among the principles and norms on which is based on the political pluralism are juridical equality among parties, the dialogue and juridical consent.

- Respecting the rules of the political game, imposed by the constitutional demands, of the electorate law as well as other juridical norms, in such a manner in which the political activity to avoid as much as possible the costs and the unfair group confrontations.

The achievement or not of favorable circumstances for promoting and assuring the normal functioning of democracy are tied to the level of economical and social development, taking into consideration the fact that, unlike the poor developed societies, an advanced society is capable of satisfying, most often, the people’s asserts, and letting the masses, at least the impression that in time and with a reform, their faith will improve, and the “reign” of justice will be capable of being set.
Legitimacy, actuality and democratic future

The connection between legitimacy and democracy was highlighted by the modern conceptions on the state’s legitimacy, which considers that legitimacy has its origins in the principles of democracy and of majority. If we could relate to the principle of democracy, the state power would be justified by the idea that the nation is the titular of this institutionalized state power, freely choosing its representatives to exercise it. Thus, in the contemporary democratic societies, the electorate process holds the justification of the origin of a legitimate state power. The legitimacy can be considered the general acceptance or quasi general of the constitutional rules, by parties and citizens, which offer the governors the force that results from the popular adhesion.

We are in a period of democratic recession, period in which democracy is again situated in dark times—theoreticians of liberal democracies admit that liberal democracies have failed in their promise of institutional construction made, based on generous principles, known being the fact that the institutions of democracy have been conceived to correct the great abuses, injustices, aberrations or immoralities from the past. The economical recession isn’t the only danger for democracy and not the only generating cause of populism, the greatest danger for democracy, still remains the improper governing.

In general, we cannot consider democracy as a political regime that satisfies the needs of any society. As proof, the attempts of states trying to set democratic political regimes, in the 70’s, 80’s, 90’s, in countries like some from Asia, failed, the democracy not being able to satisfy some problems, referring to culture, mentality, tradition. The future of democratization will depend on, in the context of the conditions and situations that will occur, the different constellations from one country to another, from a region to another, from a culture to another. The chances of democracy are as many as the uncertainties regarding its future.
REFERENCES

10. The American president W. Wilson used the concept of democratic legitimacy based on the idea of public support a political regime should gain.
ABSTRACT. The paper states that public administration is crucial to the achievement of developmental aims and that it is substantially inextricable from its wider governance and societal structures and social milieus. The paper relates that an important unit of analysis is the nature of institutions and the “inherently” perceived phenomenon of power dynamics. The concept of power is important in understanding the intra- and inter-organizational political dynamics and reality of public institutions. The paper further states that it is crucial to understand the nature and role of public administration in society in light of globalization and changing role of the state. Lastly, the paper looks at the evolving role of public administration as an instrument of the state in “serving” citizens.

Keywords: public, power dynamics, institutions, administration, globalization

After the fall of communism in December 1989, Romania underwent a number of drastic economic and accounting reforms that more reflected western business principles. In a European and international context with growing political, economic and social challenges, it is essential to improve the responsiveness of Public Administration. Public Administration will increasingly have to deal with other Administrations and decision-making and problem-solving will be a major influence on the progress of the nation and its prestige in the international community.

The reformation and the modernization of the public administration represent an important problem in the life of any state. Therefore all the countries during their development tried in one way or another to modernize and satisfy the needs and the necessities of the
society, setting up the way of function, the relations between the public administration and the civil society. An efficient, responsive, transparent and responsible public administration is of a major importance for an adequate function of a state and at the same time it is a fundamental instrument with the help of which the strategies of the Government can be implemented. In such a way the public administration is one of the main mechanisms with the help of which the link between the state, civil society and the private sphere is realized.

In all countries, central government is one conducting political affairs and administration of general interests, for ensemble of national community (Alexandru Ioan, 1999). Public administrations vary from country to country, as do their reform processes. They reflect different circumstances, different needs and different philosophies about the role of government in society. Public administration can be conceptualized as an organizational structure, a system, a function, an institutional construct, procedures and processes or just a set of practices in the exercise of public authority. There has been considerable mutation of the concept of public administration moving from its traditional centralized neutral and controlled expert application of laws, rules and regulations to promote the general interest, to public management following the dictates of efficiency as practiced in the management of private enterprises, and recently to governance with emphasis on the participation of the governed in the exercise of public authority. However, even within these mutations there remains a core concept of Public Administration as an instrument of State action, which must be sharp for effectiveness in overall development and public service delivery. Whether its sharpness can be strengthened by adopting management practices similar to those of private enterprises or through strong partnerships with stakeholders, involvement of service users, participation of the governed, or a combination of all of these, the fact will remain that so far no country can coherently and prosperously survive and develop without an effective public administration. The United Nations General Assembly emphasized this in its resolution 50/225 of 1996 by recognizing that: “there is a need for public administration systems to be sound, efficient and well equipped with the appropriate capacities and capabilities through, interalia, capacity building, promotion of transfer, access and utilization of technology, establishment or improvement of training programs for public services, strengthening of partnership of the public
sector with the private sector and civil society, as well as providing an enabling environment for private sector activities…”

Public administration is being reformed in order to provide better, faster and sometimes more services. However, quality, quantity and speed are not the only competencies that society asks from its government. Since the pace of societal change has been accelerating, the government should likewise be able to respond to changing demands with new solutions. Reform is thus the process of preparing or adapting governments towards a new role in a changing society. Starting with the ’90s, when Romania took the pathway towards democracy, it also became part of the transitional and developing countries group. In 2007, after 17 years of continuous efforts, Romania entered the European Union. At this point one would normally imagine Romania has managed to overcome its transition period and at least join the “intermediate developed countries” group. In the early ’90s, the government’s strategy focused very much on the economy. Only later on it became evident that economic reform was not possible without a proper public administration reform, which explains both the lags and distortions that resulted during the economic reform implementation process.

The reform of public administration in Romania lacked a coherent vision regarding its content, the direction toward which it was headed and concrete implementation tools. The administrative environment was not extremely motivating mainly due to the existing organizational culture, a lack of experience on the behalf of administrative institutions with the reform of public management, the lack of a strategic vision, influence of politics, and the legacy of a centralized administration system. The path of reforms has not been a smooth ride for Romania (Hîntea, 2006). The 1991 Romanian Constitution, revised in 2003, institutes the three fundamental principles on which the public administration is grounded: decentralization, local autonomy, and the deconcentration of public services (Profiroiu, 2006). In Romania, territorial administrative decentralization is based on a community of “public interests” of the citizens belonging to a territorial-administrative unit, “recognizing the local community and the right to solve its problems’ and technical and financial decentralization of the public services, namely transferring the services from the “center” to local communities, aimed to meet social needs” (Matei, 2009).
In 2004, the Romanian Government updated the strategy for the public administration reform and one of its objectives is to strengthen the institutional capacity of the structures within the local and central public administration. This objective is important in the process of reaching the economic convergence with the European Union, notably through the implementation of the Lisbon strategy. It is widely recognized that a successful implementation of this strategy cannot be envisaged without the support of an efficient public administration sector. In order to achieve our objective in public administration reform area, a series of tools were developed and introduced in the public sector and several projects were initiated, essentially for limiting the gaps between the private sector practices and the public sector ones.

One of most important factors that influence the success of the Romanian public administration reform is related to the capacity of the public institutions to use the principles of strategic planning in their modernization process and the improvement of the local actor’s implication in formulating and implementing the reform initiatives. Due to differentiated needs expressed by the clients of the public administration, the modernization of the public administration is a real challenge for each public institution.

According to the priorities of the Government Program for the period 2005-2008, the strategic planning of the central and local public administrations modernization process has been defined and implemented using the Multi-Annual Modernization Program. This modernization instrument started to be implemented from 2004 in the ministries, Prefect’s Institutions and County Councils. The aim of this instrument is the proper prioritization of the reform initiatives at the level of the implementing institutions. The main advantage of the bottom-up approach of the public administration modernization process consists in the fact that only those modernization initiatives which are relevant at the level of the implementing institutions will be implemented.

This approach represents the basis for continuous innovation and modernization process of the public administration. The methodology of the Multi-Annual Modernization Program was developed by the Central Unit for Public Administration Reform in order to satisfy the needs of the central and local public institutions to promote and implement reform initiatives in the areas where the national or sectorial legislation does not cover all the aspects of the activities.
This instrument, based on the principles of strategic management, represents a multi-annual approach of the following key areas of the public institutions: internal organization, human resource management, ITC, the simplification of administrative procedures and the quality of public services.

In 2004, the first year of its existence, the Multi-Annual Modernization Program implementation was rather formalized, but in 2005 we could note that the quality of the implemented local initiatives has improved. Central Unit for Public Administration Reform, that is the monitoring unit of the implementation, continues to provide consultancy and training not only at the top-management level of the ministries, Prefect’s Institutions and County Councils, but also for the civil servants who are in charge with the implementation of the Multi-Annual Modernization Program and for the members of the National Modernization Network.

In August 2005 was posted on the Central Unit for Public Administration Reform website a database with all the institutional strategies, action plans and monitoring reports of the ministries, prefectures and county councils.

In 2006, a new Law on Decentralization has been adopted. Its positive impact is given, mainly, by the clarification with regard to local revenue resources for the fulfillment of new local tasks; the classification of territorial-administrative units depending on their administrative capacity; the clear delimitation between central, county and local authorities’ competences; and its stipulation that the transfer of competencies shall be made simultaneously with the transfer of financial resources and instruments, and the new competencies shall be exercised only after the necessary financial resources have been given to county and local public authorities. The decentralization process in Romania can be briefed as follows: there is a considerable gap between the policy framework and its implementation. Theoretically, Romania is already a decentralized state; the decentralized effects at local level did not manifest in a consistent manner until the present time; there is genuine lack of bookkeeping and financial accountability at local levels; the state services lack the visibility concerning the local needs (Profiroiu et. al., 2006, 6).

The new phase of the administrative reform (2001-2006) was aimed at promoting values and principles such as: separation between political and administrative functions; creating and strengthening of a new corps of professional and neutral career civil servants; bring-
ing the decision-making processes closer to the citizen, decision-making autonomy, transparency, administrative simplification and respect for citizens; competence delegation and service deconcentration; protection of citizens’ rights. At the beginning of 2006, as a complement to the theoretical and online support provided on the Multi-Annual Modernization Program, Central Unit for Public Administration Reform, in collaboration with the Regional Training Centers of the National Institute for Administration, had organized a series of training sessions dedicated to civil servants from county Prefect’s Institutions and County Councils. Since the first implementation period ends in December 2006, and on the basis of the first implementation experiences, we plan to extend the implementation of this instrument to all the public institutions from central and local public administration. (Ministry of Administration and Interior, 2006).

When Romania gained full EU membership in 2007 everybody expected transition to be over and so the ‘developing country’ label. Nonetheless, almost all statistics place Romania towards the bottom of the list. There is no doubt that the EU adhesion process helped us speed-up and even burn some stages of the transitions’ travails. However, despite the efforts made in the pre-accession period, there is still a long way to reach the Western European developed countries.

The main weak points of the Romanian Public Administration human resources management were related to the selection, recruitment, motivations, evaluation and salary system. Thus, the recruitment and selection processes are not as transparent and correct, as they should. People working in the Public Administration human resources management departments are not capable of selecting the best candidates, because they limit the selection procedures to the conditions set by laws. Also there are few intermediaries used in order to promote vacancies (the most important intermediary, the National Agency for Public Servants did not manage to centralize on its website all the vacancies available in all 41 counties) and public institutions rarely have proper updated websites. As for the motivation of civil servants, there is lack of alternative motivation instruments, compensations are not sufficient in order to assure a decent standard of living and newcomers into the system are not at all well paid. All these elements lead to an increased number of corruption cases and a negative image surrounding public servants. (Profiroiu M., Romania - New EU Member State, A New Phase of Its Transition)
A concept at the heart of the health policy process is power. (Walt, 1994). Organizational processes are influenced both by mutual harmonization of parts of the system, and by the way power is structured and used. In organizations, the distribution of power is characterized by stability. This stability results from a commitment to decisions concerning the realization of the business strategy, the structuring of the organization, and the distribution of power that emerged from the past (Pfeffer, 1981). The existing structure and the distribution of power are believed to be natural and unquestionable. In organizations there is a balance of power between the interests of individuals and of the interdependent groups.

There is a lot of confusion concerning the definition of power (e.g. Hardy, 1995). We prefer a broad definition and see power as a dynamical social process affecting opinions, emotions, and behavior of interest groups in which inequalities are involved with respect to the realization of wishes and interests. In studying power dynamics there are many divergent approaches (Hardy & Clegg, 1996).

Power is pervasive in politics, as the practice of the latter entails the exercise of the former. In the praxis of the political, policy-making is the central activity where power is utilized in the process as well as in shaping the outcome. As the principal political institution in society, the Government assumes the mandate of undertaking such activity. The Government makes public policies that go through the lawmaking process. The process entails the exercise of influence and power, as the institutional policy actors contend with vested interests in crafting policies.

In the era of financial globalization where financial transactions are instantaneous and interconnected, the power dynamics in law-making has been refashioned. One effect of financial globalization is the reorientation of the power relations among policy actors in some areas, such as financial regulations. International organizations are added to the policy equation, as the external actor becomes an influential policy actor. In effect, the encroachment of international organizations on lawmaking is reshaping the power relation to their advantage.

The traditional role of government was to provide public goods such as education, defense, maintenance of order and an engine for economic growth. But globalization expanded the government role into other areas such as playing a pivotal role in economic integration, financial capital flows, and productivity growth. Economics
became a powerful force in governance. Currently, fiscal liberalism is replaced with fiscal conservatism and government plays the role of facilitator for individual entrepreneurship. State owned companies have been privatized and the welfare state is no longer a viable political option. In most developing countries, the extended family and the community played the primary paternalistic role of providing welfare rather than the state. Ohmae (1995) argued that nation states used to be a means to create wealth in the past but a means to destroy wealth currently.

Globalization made the economic responsibilities of the government very different than before. The government has to reduce volatility, minimize potential financial crisis, deal effectively with the consequences of economic crisis, and create effective and sound regulatory bodies in the financial sector and financial capital flows. The government in the new era of globalization acts as a coordinator for negotiation and decision-making by different governments, regions, occupations, and governmental organizations. Also governments establish social safety nets, democratic institutions, maintain justice departments to mediate conflicts, protect the weakest groups of society such as the women, elderly, the sick, children, and minorities, and ensure that the benefits of globalization are fairly distributed across different groups of society, reducing the negative impact of globalization on a given segment of society and establishing a fair tax system, safety nets in the form of programs for the unemployed, the poor, health, education to combat poverty and invest in human capital and public infrastructure. Government in the new era of globalization should not reduce the size of government without taking into account the secondary effect. Lack of proper study of the secondary effect led to terrible consequences for some developing countries.

One of the most distinctive features of the globalization process has been a marked change in the role of the state, with a dramatic scaling back of state involvement in the productive sectors in most countries and some shift in the direction and scope of social programs. The process of decentralization, characteristic to the subsidiary state, allows the achievement in optimum conditions of social justice, develops solidarity, ensures the nearness of decision to the place where it produces its effects, facilitating the citizen’s involvement in the local decisional process and, therefore, in solving the public interest problems.
The existence of an efficient and democratic administration is one of the main criteria of defining the modernity of a country. At this moment, Romania has not such an administration. That is why a major priority of Romania is to achieve, in a few years, a real reform through which the public administration in our country to achieve the European standards and to be defined by transparency, predictability, responsibility, adaptability and effectiveness. As a fact, this is a profound reform. It is obvious that, in order to be successful, this reform cannot be performed exclusively through the effort and political will of more Governments. A joint and structural effort at the level of the entire society is necessary.

In general, a modern public administration should be endowed (at the level of institutions, structures, mechanisms, procedures, networks, relationships, work procedures and hierarchical rules) with a series of attributes that allow it to be efficient, effective, economic, transparent, responsible, equitable, capable of adapting to the public needs and to allow the participation of various actors from all the sectors and levels.

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ABSTRACT. This paper aims to analyze, starting from the case of Romania, the degree to which public administration reform contributes to the reduction of corruption. The research focuses also on mass media, which plays a significant positive influence on the reduction of corruption, while the behaviour of the central-level political class does not encourage the reduction of corruption. The reforming process of the central and local public administration Romania is analyzed with regard to the civil service reform, the decentralization process and fight against corruption in the public administration. A special attention is given to the studies related to the measuring of corruption and its impact on economy as a whole or as activity sectors in particular. Nevertheless, the analysis shows that the intensification of the reform process at civil service level leads to the reduction of the level of corruption.

Keywords: reform process, economy, lack of transparency, decentralization

The Romanian political system suffered profound changes from the initiation of the reform process, in 1990. The economy continues to be in a transition period through the market economy, transition that has as a result severe constraints on the activities from the whole public sector and on the central administrative system. Starting with 1990, the setting up of a modern and efficient system for the public administration was considered as a priority for the Romanian Government.

The Romania’s accession to the European Union required a significant reforming process of the public administration system. In order to sustain the reform process a Strategy for the Reform in
Public Administration was adopted in 2004. According to this strategy, the reform of public administration is seen as a process of transformation of central and local administration to address the needs of beneficiaries and of the accession to the European Union.

The 1991 Romanian Constitution, revised in 2003, institutes the three fundamental principles on which the public administration is grounded: decentralization, local autonomy, and the deconcentration of public services (Art. 120). Since 1991, several laws have been adopted in order to apply the principles of public administration. The first Law on Local Elections was adopted in 1991 and modified in 2004. The first law of public administration was adopted in 1991 (Law No. 69), and it has been abrogated by the 2001 Law of Local Public Administration.

Like most countries that are undergoing a period of transition from a centralized system characterized by a quasitotalitarian influence of the state to a decentralized system, Romania has been and is still affected by corruption. During the time of preaccession to the European Union, corruption was monitored by EU special structures, nongovernmental local and foreign organizations. The effects of corruption were directly related to low levels of economic performance during this transitional period. Numerous national and international organizations noted that corruption affected Romania’s economic performance on a large scale. According to Transparency International, Romania had a high level of corruption during the period following the 1989 revolution.

The Romanian public administration reform aimed at decentralization and deconcentration includes three major elements: the continuation of the decentralization process through the transfer of financial and administrative competences and responsibilities from the level of central public administration authorities to the level of local authorities; the continuation of the deconcentration process through the delegation of responsibilities locally, focusing on the local level necessities within the same administrative structure (the ministry who delegated the responsibilities is accountable for the deconcentrated services), and; the conversion of the local deconcentrated services in decentralized ones in the responsibility of the local authorities for improving their efficiency and with respect to the citizens’ needs.

But, with all these, it was not possible to mobilize the resources required for the creation of the needed legislative and institutional
framework for the local and central public administration and, especially, for the efficient implementing of the reform measures. The reasons that had determined the impossibility of applying a real administration reform were: severe financial constraints, missing the political determination, reduced experience regarding the alternative administrative structures, lack of training for the politicians and civil servants in responding to the request and exigency which are derived from the environmental fast change, absence of clear regulations regarding the administrative personnel and structure, inadequate definition of the jobs and unsuitable payment system.

When crisis is deep, when reform is urgent, change should be gauged by how new is its approach, not how many new ministers involved are, or how young they are. The reform stages known by the Romanian public administration after the 1989 Revolution reflected the modifications occurred in the economic and social-political context of the state, by passing from communism to capitalism, from the planned, centralized economy, to the market economy. Today, the running of the administrative reform process is strongly made more difficult, the situation being determined, beyond the influence of the internal factors, mainly, by the repercussions of the world economic crisis, fully and directly felt at the national level, as well.

Among the major strategies to bring about good governance is to reform the public sector. Reforms can be operationalized in three major areas: administrative reform including the reorganization of the bureaucracy, its institutions and its processes; decentralization, including the transfer of powers, authorities, responsibilities and accountabilities to lower level institutions; and citizen participation, including opening up more avenues to enable access of citizens to participate and influence the processes of decision-making, and enable ownership of the reform processes. Administrative reforms, that include reforms in the civil service, will foster economic growth and sustained poverty reduction by reducing obstacles to private sector development that the poorly performing public sector now creates.

The reduction of poverty should continue to occupy highest priority in the agenda of the government. Strategies have been designed at various levels – local and national regional with the ultimate objective of contributing towards the reduction of poverty in the society. Many such strategies have been formulated with the general objective of attaining good governance.
Such reforms increase the resources for priority spending by containing personnel expenditures. These will also contribute to good governance through increased accountability by addressing the serious problems of governance and corruption.

Corruption is a problem that can be studied, at least in part, in objective and systematic ways, which can facilitate the design of effective policy responses and remedies. From the perspective of the specialized literature, corruption may not be so much the result of a predetermined absence of ethics and morals in the public sector or society at large, but rather the result of conscious and rational decisions by agents responding to incentives and opportunities offered by a particular institutional framework.

Corruption has usually been defined as “the abuse of public office for private gain.” This definition has been widened recently, as attention has turned to corruption within the private sector, to cover “giving or receiving undue advantage in the course of business activities leading to acts in breach of a person's duties” (Transparency, 1999). However it can be argued that the role of the public sector is more significant, since it is here that the opportunities for corruption are most extensive and the public administration creates the opportunities for corruption in the private sector by creating the necessary institutional and market conditions. In both cases corruption can be viewed as an example of the Principle-Agent problem, where the core difficulty lies in the mechanism of monitoring the actions of those to whom authority is delegated but where the information is possessed asymmetrically by the agent. Corruption is costly to development: it undermines the rule of law, wastes resources, discourages investment and raises the cost of doing business. It is particularly injurious to the poor. And it undermines development assistance.

For many years the issue of corruption has, to some extent, been downplayed by governments, international organizations and policy experts. This happened because, first, corruption was considered a cultural and political issue; and second, because measuring corruption, much less eradicating it, was perceived as nearly impossible. Thus, elimination of corruption was not usually an economic objective of development agendas. Instead, it was taken as part of a country’s nature, as exogenous perhaps as its geography. However, times have changed. Frustration with the lack of effectiveness of traditional approaches to development and the recognition that institutional development and good governance practices play a fundamental role
in economic development have led to increased attention given to corruption.

A nation, where black money nurtures corruption through politics and bureaucracy, subverts democratic values to undemocratic governance. Klitgaard (1997: 492) commented, “when government agencies suffer from systematic corruption and inefficiency, most citizens lose, even though corrupt politicians, business and officials may gain.”

Cartier-Bresson has suggested five economic conditions, which appear to encourage the flourishing of corruption within a society. The existence of an exploitable natural resource (e.g. oil) providing the opportunity for State authorities, both administrative and political, to obtain payments. Secondly, the general scarcity of public assets relative to demand, accompanied by policies of fixed official prices, which creates opportunities for informal rationing through bribery. Thirdly, low wages in the public sector are also likely to be associated with extensive low-level corrupt payments. Fourthly, high levels of State intervention/planning (i.e. protectionism, State-owned enterprises, price controls, exchange controls, import licenses, etc.) which has characterised many developing countries. Finally, economies in transition are likely to have particular problems as they undertake privatisation and establish the relevant legal framework of company and contract law, etc.

The fight against corruption can begin with the administrative apparatus and government institutions and agencies, where the reduction of corruption could curb the increasing public deficit. Such endeavor can start with the formation of a higher committee to audit the accounts and budgets of government institutions and agencies. The country’s existing foresight agencies should represent only a part of that committee, for these agencies have proved particularly inept in stemming corruption, even in its simplest forms, so far. There is much in the accounts and budgets of government agencies that can be set straight and much that can be saved if corruption is terminated.

A number of authors have developed theoretical models to examine the economic consequences of such situations where protection against predation is incomplete (Ljungqvist & Sargent 1995, Acemoglu 1995, Murphy 1991). They suggested the possible existence of multiple equilibria, some involving low production where diversion (i.e. theft) offers a high pay-off. The government has two roles in the prevention of predation - control is more effective if provided col-
lectively and the government itself, in that it determines law creation and enforcement, can be a major source of diversion. Rent-seeking is the major expression of government diversion (Krueger 1974) and the principal component of what we understand by corruption.

According to the Romanian Journal of Economic Forecasting, there are several ways to reduce corruption at local public administration. Some of the most important ones include: 1) intensifying the reform process at the local public administration level focused on three important components: (i) civil service reform with all its aspects – civil servants pay system, human resources management, etc.; (ii) continuation of the decentralization and deconcentration process to strengthen the local autonomy and increase the fiscal capacity of local authorities through a better generation and management of their own revenues; (iii) improving the public policy formulation process in a close relation with the budgeting process. All these objectives are also in accordance with the requirements for Romania’s accession to the European Union structures. 2) a clearer assignment of responsibilities at the local level, especially at the city hall level, should be necessary, also including here specific tasks related to the reform process. By creating modernizing groups at the county council and prefecture level, the reform actions were perceived in a clearer and more coherent manner. 3) designing and implementing a sustainable strategy regarding the application of a unitary pay system for civil servants; 4) organizing specialized training sessions for local elected people on different topics of the reform; 5) reducing the fluctuations in the technical apparatus within city halls as result of political changes etc.

Political will and political capacity of governing are required to control administrative corruption. In many liberal democratic countries, administrative corruption has been curbed through legislation and institutional reforms. Political corruption may also be addressed by reforming, strengthening and vitalizing the existing political, judicial and administrative institutions of accountability. The experience of different countries informs us that broad social changes, supported by specific anti-corruption efforts, can make a difference to the fight against corruption. But the threat of exposure or exemplary punishment of corrupt officials is not enough to stop the abuse of power. All institutional incentives and disincentives for abuse of public office for private gain should be confronted. However, if the public officials do not have incentives to change, they would not
stop abusing public power as they profit from the ‘status quo’ (Brinkerhoff, 2000). Brinkerhoff suggested the following when designing an anti-corruption programme:

Corruption is a complex issue with intricate linkages to other political and economic factors, both within a country and internationally; tackling corruption is not a one-shot endeavor, but a challenging, long-term undertaking; successful anti-corruption efforts depend upon political will to initiate the fight against corruption in the first place, and subsequently, the will to sustain the battle over time until results are achieved (Brinkerhoff, 2000).

A decentralized governance as a replacement to centralistic government style has been widespread all over the world to be one of the main features of governance reform. When the centralized government everywhere has been recognized as a failure, decentralization is widely believed by its proponents to bring promising benefits. It is often suggested as a way of reducing the role of the state in general, by dispersing central authority and introducing more intergovernmental competition and checks and balances. It is viewed as a way to improve the responsiveness and efficiency of a government by taking the decision making process closer to the citizens.

A wrongly applied decentralization process is a factor that could lead to an increased level of the corruption in a country that undergoes a transitional process. In this situation, corruption could shift from central to local level. To reduce the corruption level, the decentralization process should be accompanied by a series of policies that ensure transparency and participation of citizens in the decision making process at the local level.

Decentralization must also be seen as a process that may contribute to the reduction of poverty. Decentralization and devolution strategies for poverty reduction must be accompanied by serious capacity building efforts. Depending on design and implementation, it may or may not improve the poverty situation in a country. The process of decentralization may transfer powers, resources and accountabilities to lower level institutions. As such, the implementation of poverty reduction programs, projects and activities will be more responsive to the actual and real needs of the local populace, considering that they are, substantially and figuratively, closer to the people. On the other hand, depending on the distribution and con-
centration of power both at the local and national level, decentralization may contribute to the exacerbation of the problem by further concentrating powers at the level of local economic and political elite. This is where the dimension of accountabilities and answerabilities should be underscored in the process of decentralization.

Indeed, there can be no such thing as a “universal model” of public sector reform for poverty reduction, where a one-size fits all formula can be applied to similar situations around the world. What can be done is to facilitate the sharing of experiences among the various countries, and where appropriate approaches to public sector reform and poverty reduction adapted, and adopted, by others within the context of an enriched learning environment. It is likewise important to recognize that the experiences of the different countries are unique and have to be placed and appreciated within the proper historical, social, cultural, political and administrative contexts.

A supporting strategy for more general decentralization in government operations or service delivery is usually Civil service reform. One does not decentralize the civil service as an end in itself - one does so in order to provide services better, manage resources more efficiently, or support other general outcome goals. The civil service as a whole can be seen as one of the main instruments with which the government fulfills its obligations. In the context of decentralization, this tool must often be reshaped in order to perform a new set of duties efficiently, equitably, and effectively. Reform of the civil service, therefore, is the process of modifying rules and incentives to obtain a more efficient, dedicated and performing government labor-force in newly decentralized environment.

There has recently been a consideration that mass media contributes a way to combat corruption. International organizations, such as the World Bank and Transparency International, regard media as one of the major solutions to curb corruption (Stapenhurst, 2000). They call for plurality of media, media freedom and competition. Nonetheless, the knowledge as to how effective media actually perform to combat corruption is still very limited, albeit growing. The idea that a key role of mass media is to inform the electorate is central to theoretical literature on mass media.

Free and independent media are important development tools. They have a positive influence on economic and social practices, good government, the fight against corruption and access to the essential social services....
Giving a voice to the poor entails increasing the economic and political opportunities available to them in order to ensure that their opinions and preoccupations are taken seriously by governments – but also so that the poor people themselves can take the initiatives that are indispensable to overcoming their problems (Luc-Joel, 2005).

Media may have an influence on government policymaking, both by producing political accountability and policy bias. The media may have a positive influence by informing voters, thus helping them hold politicians accountable. However, they may also have a negative effect, as biased reporting may bias policymaking. The mass media may finally affect purely political outcomes such as participation in elections.

Independent media reporting on corruption can play an important role in pressuring the government to act in the public interest. By drawing the attention to behaviour that is generally perceived as acceptable and exposing such behaviour as corrupt, media can raise public awareness; activate anticorruption values; and generate outside pressure from the public against corruption (Rose-Ackerman, 1999). The impact of media reporting on corruption can be “tangible” and “intangible” (Stapenhurst, 2000). It is tangible when some sort of visible outcome can be attributed to a particular news story or series of stories, for instance, the launching of investigation by authorities, the scrapping of a law or policy promoting opportunities for corruption, the impeachment or forced resignation of a crooked politician, the firing of an official, the launching of judicial proceedings, the issuing of public recommendations by a watchdog body, and so on. It is intangible when checks on corruption arise from the broader social climate of enhanced political pluralism, enlivened public debate and a heightened sense of accountability among politicians, public bodies and institutions that are inevitably the by-product of a hard-hitting, independent news media. How well media can perform the role of a watchdog on corruption, however, depends on a number of factors defined by the political, economic and legal environment in which media operate: media freedom of expression, access to information, ownership, competition, credibility and outreach are some of the key factors that have been identified as affecting the quality and effectiveness of media performance on corruption (Vogl, 1999,
Djankov, 2000; Stapenhurst, 2000; Ahrend, 2002; Brunetti and Weder, 2003; Suphachalasai, 2005).

We live in a society that depends on information and communication to keep moving in the right direction and do our daily activities like work, entertainment, health care, education, personal relationships, traveling and anything else that we have to do.

What we need to be aware is that most of our decisions, beliefs and values are based on what we know for a fact, our assumptions and our own experience. In our work we usually know what we have to do based on our experience and studies, however on our daily lives we rely on the media to get the current news and facts about what is important and what we should be aware of.

At its heart and put simplistically, unless the media is able to play the role of guardian of the public interest, unless that public is seen as the whole population of developing countries and not just those who constitute a market for advertisers; and unless those who have most to win or lose from development debates – close to half of mankind; unless these things happen, people will die. They will die, as they are dying now, not in their hundreds or thousands but in their hundreds of millions (James Deane, 2005).

NOTE

A general non-technical review of the issues involved in the debate about corruption can be found in a series of articles in The ACP-EU Courier, No 177, October 1999. It is also available at http://www.europa.eu.int/comm/development/publicat/courier/index_177_en.htm

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ABSTRACT. The paper proposes a jovial and partly subjective path of the Romanian political atmosphere in the early decades of the twentieth century. Wit, mockery, incisiveness, hard words have a history strongly rooted in the customary clothing of the Romanian political levels, so that the current political circus has nothing surprising. Maybe that Romanians are conservative in this regard. Prominent figures of the political life in Romania develop around them, not just landmarks of their ideology, but they also leave transparent here and there the lacy and savory props of the backstage.

Keywords: gossip, scandal, politician, political circus, wit

For this paper, we choose to present in some significant contours, the personality of the politician Take Ionescu (1858-1922) as well as the effervescent atmosphere created around him. Born under the name Dumitru Ioan Ghita, from simple parents, Take Ionescu completed baccalaureate in Ploiesti, Romania. He was sent to Paris to study law, where he finished his doctorate in law, where has Raymond Poincaré as a colleague, the future president of France. He soon became a lawyer known for his famous speeches and eloquence. He was appointed Minister for Religious Affairs in the Conservative cabinet of Lascăr Catargiu (November 1891-October 1895). Merits in the early years of proven ministry quickly imposed him at the forefront of the Romanian political life. In 1908, he founded the Conservative Democratic Party which, thanks to a clever propaganda, won significant electoral success. Take Ionescu was supported by the playwright I. L.
Caragiale, who excited about the party program, accompanied him in three tournaments election. He was Foreign Affairs Minister between 1917 and 1918 and between 1920 and 1922, promoting Romania's entry into World War I against Germany. At the end of the war, Take Ionescu was the head of the National Committee at Paris Peace Conference that ended World War I. On 18 December 1921, he becomes Prime Minister, but only for a month until January 19, 1922.

About Take Ionescu, Nicolae Iorga states: “the liberal at the age of 20, conservative at the age of 40 and democrat at age of 50, because at the age of 60 to remain alone in a lonely country” (People Who Have Existed, 200), but maybe liability political and serene passage through all the political parties is nothing but intense search for truth and, ultimately, its non-disclosure ... Not infrequently, the Romanians were asked which is the mystery which “great men of small countries have an ungrateful fate.” The lawyer and journalist Constantin Xenid dedicates to Take Ionescu a documented an interesting monography where we discover the finding:

Representing the largest forces in the game of trivial units, they (the personalities belonging to small countries n.n) cannot have leading roles on the world stage, however brilliant their personality would be. Their voice does not fall decisively in the balance of major decisions, and over their actions, no matter how wonderful they would be, does not ever plan the living light of universal interest. (apud Ion Bitoleanu, (2006) Heads of Political Parties..., Constantza: Ex Ponto).

To submit his resignation from party because your wife was not invited to a major event is not just a natural step. At the beginning of last century there was a social event, coveted by the entire aristocracy of Bucharest: Jockey-Club’s annual ball. Alexandru Marghiloman notes that at the ball in 1904, the king and the queen remained until 3 o’clock, and Prince Ferdinand and Princess Maria till daybreak. For Take Ionescu - Conservative Party leader and chief minister in the then government – there had been hardly found a place, but not for his wife, who was essentially a discourtesy. This fact determines the prominent lawyer and minister to resign from the party, gesture on which returned with great difficulty and only after the organizing committee apologies...

Take Ionescu (Dimitrie G. Ionescu his real name, ‘Take’ is a nickname for fellow students and family name used, but which
imposed itself) was admired for his aristocratic charm, delicacy, and how to behave with women, so they were attracted to his company where they discovered joy, kindness, wit and discretion; he was equally admired by men – “his partisans attributed him the image of a Master,” notes Ion Bitoleanu (231). His speeches were “winged,” that even those without political passions remained in ecstasy at hearing his words. In Memoirs of Tangerine Vlach, Petre Pandrea writes about love taken to the idolatry of friends from the party for Take Ionescu. They would have offered their wealth, energy and dedication, but “they were compensated by their rapacity of government. Chief closed his eyes.” It was spoken, however, of the lability of its principles, of the ease with which passed from one belief to another, of a note of superficiality and opportunism overshadowing his charm. (Ion Bitoleanu, 232) I.G. Duca, who was hostile to the party, complained: “He talked a lot, what should and should not, and in this mixture the interest is lost too often in platitudes and even in unnecessary trivialities.” By contrast, he showed great kindness and a great understanding of others. He was not addicted to money, but rather a prodigal - was the lawyer who won, before World War I, more than one million lei gold, but he used to spend it with the same ease with which he had gathered. (see Pamfil Şeicaru) At home, at the government as in opposition – noticed the liberal I.G. Duca - was all day with his hand in his pocket paying the rent of the conservative clubs, the treatment of ill partisans, and when he had no money any more he was underwriting policies right and left, administer insolvent for those who ultimately had to pay the debt. “This man who won as a lawyer more than all his contemporaries, managed to bring the eternal lack of money and to be indebted even to ordinary pawnbrokers.” (apud Ion Bitoleanu, 234) Even tolerance and indulgence manifested as a statesman to partisan obvious mistakes and subordinates did not come from lack of moral sense, but from goodness pushed to weakness. Alexandru Marghiloman saw in Take Ionescu an overly sensitive man, shy and impressionable.

Admired for the charm of his speeches, Take Ionescu was appointed by the people ‘Chrysostom.’ He belonged to a generation of outstanding speakers, grown and trained, perfect masters of the subtleties of parliamentary discourse, kept strictly within the limits of urbanity, no matter how sharp political duels were. (I.G. Duca). Sextil Puscariu captured a suggestive dialogue between I. G. Duca and Nicolae Titulescu where they nostalgically evoked the days when
the Romanian Parliament “was not a madhouse like today (was in 1925 n.n.) and a bunch of incapable people,” but was dominated by the distinguished figures of P.P. Carp, Maiorescu, N. Filipescu, Ionel Brătianu, Take Ionescu and Delavrancea, “knights incapable of trivialities.” At the Board meeting of 18 December 1915, P.P. Carp presents Take Ionescu as a man without convictions, a lifetime defending the contradictory beliefs, concluding with words that made history: “Talent does not justify all incarnations, nor does justify all prostitutions.” (apud Ion Bitoleanu, p. 235)

Take Ionescu was also the most beloved of politicians (he was said a ‘new Messiah’), and the cursed (adversaries consider him ‘an incarnation of Beelzebub’), praise and attacks revealed, moreover, the human scale of a personality depicted in light and shadow. Ştefan Antim observes, however, justly: “If only a small part of the accusations were true he would have no place in public life, being doomed to civil death.” “What seems more fun and also confusing is that the same people who praised him, also criticized him in other contexts and at other times ... It is known that in general, as the growing popularity and success, adversaries tend to hit more. That happened in the case of Take Ionescu. Attacks he has received have focused on its vulnerable points, including among them his modest background. Constantin Xeni relates that during the elections, on the wall were inscribed exhortation to voters not to vote “a natural son of a Jew banker!,” which was certainly a disgrace, but he could not come to certify an illustrious descent with a name Cantacuzino, Sturdza or Ghica.

About wandering from one party to another, much ink has flowed. Al. Papacostea explains Take Ionescu’s ‘Dilemma’: “During his whole life he was looking for a party.” If he started by choosing the radical liberalism becoming assiduous collaborator of the newspaper Romanian run by C. A. Rosetti for 26 years, in 1884, enters the Chamber lists of the powerful Liberal Party led by Ion C. Bratianu. But soon the first deception that staggered him came. Liberal Party appears to dominate the spirit of caste, the ruling of the traditional hierarchy Bratianus and their relatives. At 31, he was facing a major crossroad. “Then - appreciates Al. Papacostea - made the great mistake of his life, who threw in a final clear: to have entered into the Conservative Party” feudal mentality still indebted. (apud Ion Bitoleanu, 240) That was a misstep, he admitted later to I. G. Duca: “I bear the burden of my mistake to the grave, because the then (when
he joined the Conservative Party – n.n.) to this day my life is a tragedy. You do not know what it means to be condemned to defend an ideal that, in fact, is not yours.” But he comes out and finds a solution to this impasse: creating a new political party, the Conservative Party Democratic - a hybrid of liberal and conservative groups. Take Ionescu gathered unexpected electoral success for a young party. During 1908-1911, he even became the strongest political force. However, the expectations have proved in vain; the new party had only a fleeting existence – “hybrid in composition, vague in concepts and opportunistic in goals,” marked Sterie Diamandi. “Bad reputation, moral unscrupulous party, resulted from the inclination to turn a blind eye to the affairs of his close relatives, at the expense of public money.” (Ion Bitoleanu, 243)

Eugen Lovinescu explains the phenomenon called ‘Takism’ by the existence of a heterogeneous group of supporters gathered only through a term interest. About Conservative Democratic Party members - the party without a unified theory – it is said that they are deprived of moral principles, that they have remained in the consciousness of time as corrupt profiteers, bent on moneymaking at any cost. Gh. Panu wrote ruthless lampoon satire against them. Equally ironic was the Petre Pandrea: Take Ionescu’s supporters “you get them in two carriages,” future followers were “received mercy” with portfolios. Having the burning desire to attract other supporters he has used not only his personal charm, but he continuously shaken the promise of “overflowing the Nile” metaphor for the political perspective, which he tolerated and covered. (Ion Bitoleanu, op.cit., 243). The legend ‘Takism’ inspired by his opponents has come to symbolize the old feud Romanian public life. At a century difference, nowadays, attitudes, habits and incisive language of politicians apparently not changed at all. Games backstage, “collegial” sarcasm, pamphlets in the press. An extensive collection of political folklore or, why not, a “syncretism of the arts” in the service of power. But many years have pass and yet ... same customs. Is politics to blame?

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SEVERAL THEORETICAL AND PRACTICAL ASPECTS
OF THE TRANSPORTATION CONTRACT:
THE REGLEMENTATION WITHIN THE NEW CIVIL CODE

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ABSTRACT. The Civil Code obviously represents an important source for the transportation law. The common law insures the general principles of law applicable within this special area. The transportation law is using general notions from all types of law but there are also existing derogatory regulations of interest for this area. According to the dispositions of the New Civil Code, the transportation contract is a special civil contract, granting the legal basis which is common to other contracts of the private law area also, but with its specific particularities and autonomy.

Keywords: transportation contract, transporter/carrier, sender, recipient

Introduction

The general provisions that embody the rules of the common law for the transportation contract are provided for in the Romanian Commercial Code, Title XII “On the transportation contract;” they are completed under article 1 by the provisions of the Civil Code, which is the civil source of the transportation contract. These regulations, which have the nature of general law, are applicable regardless of the means of transportation, provided that there is no specific provision derogating from the general rules imposed by the specificity of each type of transport.¹

At present, each type of transportation contract is governed by specific rules, which are determined in time by the particularities of each means of transportation; however, these contracts are basically civil contracts with certain specific “common characters, with certain
principles induced by the autonomous and specific nature of this legal institution that allows such a separate scientific analysis in a general theoretical approach.” Moreover, even the new regulation of the transportation contract, which we intend to examine in what follows, underlines, once again, the civil nature of the transportation contract.

The need for a uniform regulation of the legal relations of private law and the elimination of the dualism between the Civil Code and the Commercial Code determined the inclusion in the New Civil Code of as many contracts as possible, including those reserved exclusively for traders. Thus, in relation to the new regulation, the transportation contract is considered a special civil contract, being regulated in the Chapter reserved to special contracts, together with the currently regulated civil contracts and with the newly inserted commercial contracts.

Unlike the currently existing texts in the Civil Code, which refer to the transportation contract only in isolated articles, the New Civil Code reserves it a major section, outlining a general regulation, able to provide solutions not only to the aspects which are not regulated by means of the special legislation incident to the different modes of transportation, but also to the interpretation of the contractual terms, when necessary. In addition, the new provisions will be applied “to the extent not otherwise provided by special laws, or if there are no applicable usage or practice established between parties.”

**Defining the Transportation Contract**

Art. 413 of the Commercial Code provides that “the legal operation of the transportation contract takes place between the sender or the one who gives the assignment of the transportation of an item and the entrepreneur who undertakes to make it on his own behalf and on the expense of another or between one of them and the carrier who takes upon himself the task of doing it. The carrier is the person who takes the assignment to transport or to arrange the transportation of a certain object, in any means.”

This definition of the transportation contract has not been without criticism in the literature, being seen as “an amalgamated text, which refers into a single and ambiguously, worded sentence both to the transportation contract and to the dispatch agreement.” It was also considered that the definition of the Commercial Code is “vague in
defining the parties to the transportation contract and the transport operation in general.”

The new definition of the transportation contract is trying to eliminate the identified confusions. Thus, according to article 1955 of the New Civil Code, “by the transportation contract, a party called transporter primarily seeks to carry a person or an object from one place to another, in exchange for a price which the passenger, the sender or the recipient is obliged to pay at the agreed time and place.” By comparing the two definitions, we primarily see the changes that occur regarding the parties to the transportation contract.

The legal relationship in question is established between the transporter and the passenger or sender. The legislator abandons the old name of “carrier” and does not take over the name of “transportation operator” used in the special regulations of the various modes of transportation, by adopting, in our view, the one used in the uniform regulations in the field. It also clearly mentions the obligation of the transporter to move the person or the property on its own and by its own means, eliminating the confusing provisions of the Commercial Code which took into account the fact that this obligation could also belong to those who interceded this activity. The Co-contracting party is the sender or the passenger.

In freight transportation, the transportation contract is concluded with the sender. The Romanian Commercial Code considers as party to the freight transportation contracts not only the sender, but also the person acting for it. However, in reality, the person working on behalf of the sender is only a representative, respectively, a trustee or a commissioner. Under the new regulation, the person concluding the transportation contract is party to the contract even if the goods belong to another person. Therefore, the sender is the co-contracting party of the transporter, whether he/she is or is not the owner of the transported goods.

As a novelty in the transportation of goods, the definition of the New Civil Code refers also to the recipient. Moreover, the originality of the transportation contract also results from the effects which it creates towards the third person, i.e. the recipient, who, though not party to the transportation contract, acquires certain rights directly resulted in his/her favor from the transportation contract, and so, through the will of the parties and of the legislator he/she may become the holder of certain obligations, although he/she is not party to the contract in the traditional sense of the term party.
Perfecting the Contract for the Transportation of Goods

The transportation contract is usually concluded by the mere agreement between the parties, but the proof of its conclusion is made in writing, and it is called “transportation document.” Under the provisions of article 414, paragraph 1 of the Commercial Code, the transportation document is called “transportation letter.” The new regulation is made in the same direction. In addition, article 1956 of the New Civil Code makes an illustrative list of the transportation documents used in practice. Regarding the content of the transportation document, the new provisions are aimed at and keep the essential elements and also make specific reference to the primary applicability of special regulations.\(^\text{16}\) Regarding the nature of the transportation document, article 414, paragraph 2 of the Commercial Code, provides that “the transportation letter may be at call or to bearer.” In the New Civil Code, the legislator, taking into consideration the practice and the special legislation applicable to the different means of transportation, establishes the rule according to which the transportation document is non-negotiable.

With the exception of shipping, this rule is applicable to all other modes of transportation, road, railway and air letters being non-negotiable documents. In contrast, in shipping, the bills of lading are often negotiable documents “at call,” transferable by the simplified procedure of endorsement. The exception is explained by the function of commercial security, representative of the goods, function, which is fulfilled by the bill of lading in relation to other documents used in terrestrial or air transportation. Thus, if any transportation document is an instrument of proof, meaning that it proves the conclusion, the existence of the agreement between the parties and of the goods delivered to the transporter for movement, the bill of lading is, moreover, a security for the transported goods.

The transmission of the bills of lading “at call” follows the rules applicable to other commercial securities at call (bills of exchange), being governed by the principle according to which the one who obtains the title also obtains the rights deriving therefrom, provided they identify themselves through an unbroken string of endorsements.

The conclusion of a contract for the transportation of goods gives rise to reciprocal obligations of the contracting parties. The main obligation of the transporter, regardless the transportation type is to transport the goods to destination. This obligation is expressly provided
for in article 1968 of the New Civil Code, under which “the transporter is required to carry the goods delivered for transportation to destination.” The execution by the transporter of this main obligation gives him/her the right to claim to the other party the performance of the correlative obligation, the main obligation of the co-contracting party being the one of paying the price. The execution of the claims arising from the transportation contract is facilitated by the guarantees granted by the law to the transporter. Thus, in accordance with current regulations, the transporter has a lien and a special privilege on the goods transported. The law also allows the transporter to request the establishment of precautionary measures and to require the sale of goods at destination.

A first possibility of accomplishing the claim granted by the law to the transporter, arising from the completion of the transport, is the exercise of the lien on the goods transported until the payment of the price. The literature\textsuperscript{17} describes this right as an imperfect security right pursuant to which the holder of goods, movable or immovable property of another, has the possibility to refuse to return it, until the owner debtor of the goods pays the amount of money spent on the conservation, maintenance or improvement of those goods. As legal nature, this right which the law grants to the carrier is an opposable exception both to the debtor and to third parties, as a means of defense\textsuperscript{18} of the debtee against them, being limited to the underwriting of the debtor’s obligations arising from the detention of the item (as \textit{debitum cum re iuctum}).

Currently, the lien does not enjoy general regulation, only some applications in various fields being stipulated in the Civil Code\textsuperscript{19}. In contrast, the Commercial Code regulates this right of the carrier, both in terms of land (art. 433) and maritime (art. 590) transportation. As a novelty in the New Civil Code, the lien enjoys a special regulation. Thus, according to article 2495 of the New Civil Code “the one who is obliged to remit or to render a good can retain it as long as the debtee does not compensate him for the necessary and useful expenses that he/she made for that good or for the damage that the good has caused him/her.”

In transportation, the lien is reflected in the possibility of the transporter to refuse the release of the goods, as long as his/her claim resulting from transport execution is not accomplished. In this regard, article 433, paragraph 1 of the Commercial Code provides that the transporter is not obliged to deliver the transported goods
until the person who shall receive them fulfills his/her obligations. A similar solution results from the provisions of article 1980, paragraph 1 of the New Civil Code according to which “the recipient can not take possession of the transported goods unless he/she pays the transporter the amounts due under the contract and the eventual reimbursement wherewith the transport has been encumbered.” There is an exception from this general rule, in the sense that the parties may determine by contract or by applying special provisions governing the various modes of transportation that the payment be made at destination. Therefore, if this obligation under the law or the contract is incumbent on the recipient and the latter refuses the execution, the transporter may exercise his/her lien on the transported goods, implicitly regulated by the mentioned provisions.

The possibility to exercise this right is limited only to the situation where the recipient acknowledges the claim and yet he/she does not honor it. Thus, if the recipient also deposits the amount claimed by the transporter, the latter has no longer the option of refusing the release of goods. In this regard, article 433, paragraph 2 of the Commercial Code provides that “in case of disagreement, if the recipient pays the amount believed due, and, at the same time, consigns the difference to the amount claimed by the carrier, the latter has the responsibility of delivering the transported items.”

In the literature this provision is considered likely to satisfy both the interests of the recipient to receive his/her goods and the ones of the transporter to recover the costs of transport from the amounts consigned by the recipient, to the extent that its claims will be proven. This rule is also provided for in the new legislation, meaning that the transporter may not refuse the delivery of goods if the recipient pays only the amount which he/she deems due and consigns the claimed difference in a bank (article 1980, paragraph 2 of the New Civil Code).

This provision is nothing more than an application of the new general provisions in the field set out in article 2499, paragraph 1 of the new Civil Code according to which “the lien terminates if the person concerned consigns the amount claimed or offers a sufficient guarantee to the person benefiting of a lien.”

Failure to exercise the lien, in other words, the delivery of goods without the payment of the amounts due, is punishable by the transporter’s loss of the right to sue for compensation. The issue is important especially in the case of successive or combined transpor-
Thus, if the transporter delivers the goods without receiving from the recipient the amounts owed to him/her, to the previous transporters or to the sender, or without claiming the consignment of the amount on which there are disagreements, he/she loses the right to sue for compensation and responds to the latter for all the amounts due to them (article 1983, paragraph 1 of the new Civil Code). From the interpretation of this provision it results that the legislator recognizes to the last transporter the possibility to also exercise the rights of the previous transporters, solution which can be explained by the fact that the goods are in his/her possession, so that only him/her satisfies the condition of invoking this guarantee in his/her favor. In all cases, however, the right of action against the recipient remains unaltered (art. 1983, paragraph 2 of the New Civil Code).

Alternatively, the transporter is currently granted by law a new possibility in order to recover the claim, i.e. the special privilege on the cargo. In this sense, article 437, paragraph 1 of the Commercial Code provides that “for all claims resulting from the transportation contract, the carrier has the privilege on the transported items until their delivery to the recipient.”

In accordance with these provisions, the transporter’s privilege appears as a special movable privilege recognized in order to cover the claims resulting from the achievement of the transportation based on a tacit right of pledge that the sender-debtor establishes in favor of the debtee – transporter, once with the conclusion of the transportation contract and the rendering of the cargo to be moved. The legal basis of the privilege recognized by the law to the transporter is confirmed by the new regulation. Thus, according to article 1982, paragraph 1 of the New Civil Code “in order to ensure his/her claims, the transporter shall enjoy, regarding the transported goods, the rights of a debtee - pledgee as long as he holds those goods.”

The right of pledge belonging to the transporter acts on the transported goods and guarantees the claim arising from the transportation contract, provided that the goods belong to the debtor and provided that they are in the transporter’s detention. Therefore, the transporter has the rights of a debtee - pledgee as long as the goods are not delivered to the recipient. This condition imposed by article 1982, paragraph 1 of the new Civil Code is no more than an application in the field of the general provisions regarding the pledge. Thus, according to article 2485, paragraph 1 of the New Civil Code, “the pledge exists only as long as the debtee holds the goods.”
transportation, special provisions provide for one exception from this rule, in the sense that the transporter may exercise the rights of the debtee - pledgee, even if the goods have been delivered, but only for 24 hours and only if the goods are still in the recipient’s detention (article 1982, paragraph 2 of the New Civil Code).

The Transporter’s Liability in Freight Transportation

Domestic and international regulations, regardless of the type of transport, refer to the obligation of the transporter to move the entrusted goods in the best conditions.

In domestic transport, the legal regime of liability is governed by special legal provisions governing various modes of transportation. Of course, these provisions are supplemented, where appropriate, with common law provisions, i.e. articles 1073-1090 of the Civil Code relating to contractual liability and articles 998-1000 of the Civil Code on liability in tort or the specific rules of commercial law (articles 420, 423, 425 et seq. of the Commercial Code). In international transportation, the transporter’s liability is assessed in accordance with specific provisions contained in uniform regulations. Regardless of the type of transport (land, air, sea), failure or improper fulfillment of the obligations deriving from the transportation contract implies the contractual liability of the transporter.

The liability of the international transporter covers the period in which the goods are in his guard, respectively, it starts when he/she takes delivery of the goods from the sender or from another person acting on his/her behalf, and ends when the goods arrive at their destination and are delivered to the person entitled (the recipient).

Domestic and uniform regulations provide, without exception, that the transporter is liable for the quantitative and qualitative loss of goods, and for exceeding the agreed period. Differences can be seen, in particular, in what regards the due compensation, the conditions for granting compensation, the possibilities for exemption and the liability engagement procedure.

Regardless of the type of transport, uniform and domestic rules establish the principle of liability limitation. Thus, if in common law the one who causes injury to another is obliged to cover not only the actual damage (*damnum emergens*), but also the lost profits (*lucrum cessans*), in transport, the damage is limited to the value of the actual damage. The provisions of the New Civil Code are in the same pur-
pose. In case of loss or damage, the transporter will be required to cover the real value of the lost items, without the compensation exceeding the limits established by the special law. Moreover, the uniform regulations set a maximum limit of compensation that can be given to the person entitled.

There are exceptions from the rule according to which the liability of the international transporter is limited; this means that, in some cases expressly provided by the law, his/her liability for the caused damage is complete. The limits established by special regulations can be exceeded if it is proved that the damage is the result of an act or omission committed either with the intent of causing such loss, or being aware that such damage might occur. The new provisions are likewise; they exclude the exoneration or the liability limitation of the transporter who acted with intent or gross negligence. Also, in international transport, special legislation allows parties, by inserting several appropriate clauses in the contract for international transportation, to aggravate the transporter’s liability. The transporter shall also be liable for damage caused by delay. Since the New Civil Code does not establish rules or conditions with regard to the compensation due in case of delay, the provisions of the special legislation will be applied.

Conclusions

The freight transportation contract is concluded and implemented in accordance to special regulations concerning the various modes of transport. However, the transportation contract can not be separated from the common basis of the entire private law, even if, by special regulations, derogations are also allowed, imposed by the specificity of this operation. Thus, the new regulation appears as a common right of the transportation contract, which will complement the special legislation, providing solutions to the participants at the transportation activity.
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1. specialia generalibus derogant
4. See the Presentation of reasons to the Project of the New Civil Code
5. In the current Civil Code
6. Agent’s contract, Current account agreement etc.
7. Article 1470, paragraph 2 of the Civil Code, which makes a classification of the transportation contract; Articles 1473-1475 of the Civil Code which regulate the transporter liability; Article 1476 of the Civil Code regarding the obligation of keeping records; Article 1477 of the Civil Code which refers to the specific regulations applicable to the different means of transportation
12. Unlike the provisions of the Commercial Code which refer only to freight transportation, the New Civil Code also regulates, in a distinct section, the transport of persons.
13. See the special provisions applicable to different means of transportation.
14. See the international Conventions adopted in this field.
15. In order to outline the legal position of the recipient in the transportation contract, many theories have been formulated in the literature, theories based either on the thesis of business management or on the thesis of the conveyance of rights or of the stipulation for another. For these theories see Căpățână, O. (1995), Contractul comercial de transport. Bucharest: Lumina Lex, 43-44
16. See the provisions of article 1961 paragraph 2, The New Civil Code
19. For instance, in sale and purchase matters (art.1322-1323 Civil Code)
20. Article 1987, paragraph 1 of the New Civil Code
21. T. Ciobanu, op.cit. p. 75
22. According to article 1957 of the New Civil Code, “Transportation may be accomplished by one or more transporters, in the latter case it may be sequentially or combined (1). Sequential transportation is carried out successively by two or more transporters using the same means of transport
and the combined transport is the one in which successive transporters use different modes of transportation (2).”

23. See Căpățănă, O. *op.cit.* p. 179
24. Article 1985 corroborated with article 1989, the New Civil Code
25. Article 1990, the New Civil Code – liability aggravation
26. For instance, in international transport, the level of the compensation awarded in case of delay differs in relation to the transportation type: in international carriage by rail, the amount of compensation awarded for the delay may not exceed four times the price of transport (article 33, paragraph 1 of the CIM - Appendix B dedicated to the Uniform Rules concerning the contract for international carriage of goods by rail (CIM) of the Convention on International Carriage by Rail (COTIF), Bern, 1980, ratified by Decree nr. 100/1983); in international road transport, the delay compensation is limited to the price of the transport (article 23, paragraph 5 of CMR - the Convention on International Carriage of Goods by Road, Geneva, 1956, ratified by Decree nr.451/1972); in air transport, the compensation limit is the same whether for the loss of goods or delay in this issue (Article 22 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Montreal, ratified by Government Ordinance nr.109/2000); in maritime transport, the carrier liability is limited to an amount equivalent to two and a half times the value of the freight payable for the delayed goods (the Convention on the Carriage of Goods by Sea, Hamburg, 1978, ratified by Decree nr. 343/1981).
THE SHIP OWNER’S OBLIGATION TO ENSURE SEAWORTHINESS OF THE SHIP – IMPLICIT OBLIGATION OF THE SHIP OWNER IN THE CHARTER PARTY

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ABSTRACT. The seaworthiness issue is a very much discussed topic in maritime law. The fact that a ship is not seaworthy is of fundamental importance for all aspects of a possible dispute, starting from claims for goods up to complaints of possible body injuries, from disputes relating to collisions and rescue operations up to disputes on the lay and demurrage days, from claims on insurances as “body and machinery of the ship” to relations between the ship owner and P&I Association of which he is part. The present paper put into discussion all these characteristics.

Keywords: seaworthiness, body injuries, ship owner, law

1. The Regulation Manner

The seaworthiness issue is a very much discussed topic in maritime law. The fact that a ship is not seaworthy is of fundamental importance for all aspects of a possible dispute, starting from claims for goods up to complaints of possible body injuries, from disputes relating to collisions and rescue operations up to disputes on the lay and demurrage days, from claims on insurances as “body and machinery of the ship” to relations between the ship owner and P&I Association of which he is part.

The clause requiring the ship owner to have a seaworthy ship is expressed in all laws and is usually referred to in all contracts of chartering. Also, it is contained in the Hague Rules\(^1\) and Hague-Visby Rules\(^2\) (Article 3, Rule 1 and Article 4, Rule 1). In this respect, we can speak of legal seaworthiness and of contractual seaworthi-
ness. The ship meets the conditions of legal seaworthiness if it fulfils certain requirements set by national law (requirements which usually are set in accordance with international regulations) concerning its construction and equipment and which, if fulfilled, would give the right to consider a ship seaworthy, taking into account both its normal use during the voyage, as well as inherent risks that such a voyage involves. For sea transport safety, laws of all states provide certain rules that need to be respected in the construction of ships.

Notwithstanding these internal rules and those imposed by the international conventions to which the state has acceded, such as, for example, the International Convention for the Safety of Life at Sea, has the effect of national authorities’ refusal to register the ship that does not comply with these rules. If the ship meets the requirements noted above, she obtains the role of crew, the nationality act and all certificates pointing out her seaworthiness. At predetermined intervals, each state’s authorities control the ships approaching its flag, to make sure if they still have the qualities required by law to appropriately deal with a voyage at sea.

With regard to contractual seaworthiness, we mention that it is not sufficient for a ship to fulfil only the legal requirements for seaworthiness, she must also satisfy the requirements of seaworthiness imposed by the contract, i.e. to be able to sail to the harbour of destination, with the charge provided in the charter contract. The Hague Rules and Hague-Visby Rules establish a uniform system for bills of lading that are issued at the cargo loading and a minimum limit of ship owners’ liability for damage caused to goods transported. As for the seaworthiness of the vessel, according to article 3 of these Rules, the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: a) Make the ship seaworthy; b) Properly man, equip and supply the ship; c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

This rule is interpreted within the meaning that the owner must exercise due diligence in order to have a seaworthy ship before the voyage beginning, at the beginning of the voyage and of any stage (stops) of that voyage. The rule is not derogating. To the extent that this obligation is not expressly provided in the charter contract, it becomes effective as an implicit clause, being deducted by way of interpretation of the existing provisions in the International Conven-
tion for the Unification of Certain Rules relating to Bill of Lading, Brussels, August 28, 1924. Thus, under the provisions of article 3, paragraph 1 of the Convention, before and at the beginning of the voyage, the carrier must reasonably take care of putting the vessel in a state of seaworthiness. The carrier shall not be responsible for loss or damage arising or resulting from unseaworthiness of the ship concerned, if that state is not due to a lack of reasonable care on the part of the transporter to make the ship seaworthy, to properly man, equip and supply the ship, to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article 4, paragraph 2 of the Convention presents situations where the carrier is not responsible for loss or damage caused to goods loaded on board, expressly providing that the proof for the existence of one of those situations needs to be found by the person taking advantage of that exemption. As stated above, related to the Hague Rules regarding the ship seaworthiness, as an obligation of the ship owner, there are two situations. The first situation is one in which the Hague Rules are applicable, when the absolute obligation to ensure seaworthiness of the ship is strictly qualified, and the carrier is bound to exercise due diligence. The situation in which the charter contract stipulates a clause incorporating the Hague Rules or Hague-Visby Rules is assimilated by the previous situation.

Many standard charter contracts have no clause incorporating the Hague Rules or Hague-Visby Rules; however by an additional clause, known as the Paramount Clause, the Hague Rules or Hague-Visby Rules are still being incorporated into charter contracts. Because of the fact that this is an additional clause belonging to Rider, its interpretation takes precedence in the case where there might be contradictions between this clause and the ship owner’s clause of liability. Besides this aspect, under Article III, rule 8 of the Hague Rules, any clause of the charter contract that relieves the ship owner from liability or that reduces his liability under the level mentioned by the Hague Rules is regarded as invalid.

The Hamburg Rules do not expressly provide the carrier’s obligation, both before the beginning of the voyage and at its beginning, to exercise due diligence in order to make the ship seaworthy, to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. As a result, the concepts of seaworthiness
and due diligence are no longer provided. The carrier is under this new regulation, liable for goods damage produced during the voyage, unless it is proved that he and his servants or agents have taken all measures that could be considered reasonable in order to avoid the occurrence of such events and their implicit consequences. Obviously, the content and scope of the notion of “reasonable” will be determined by courts in the context of the Hamburg Rules.

Consequently, the Hamburg Rules contain no more a system of provisions relating to the rights, obligations and immunities of the carrier, as they were contained in art. 3 and 4 of the Hague Rules in 1924, considering in this regard that the system established by the Hamburg Rules is more disadvantageous for the carrier, which led to the non ratification of the Convention by world’s greatest maritime powers, including Great Britain. In essence, the Hague Rules or Hague-Visby Rules require from the ship owner an obligation that can not be delegated, and that is to exercise due diligence in order to make the ship seaworthy, able to carry a cargo and to take due care of goods loaded.

The second situation is the one in which the Hague Rules are not applicable, and the contract of carriage is considered as containing an implicit clause that establishes the carrier’s obligation to deliver a seaworthy ship, in order to start the loading of goods. Therefore, as mentioned in the specialized literature, there are two different regimes concerning the ship owner’s responsibility for fulfilling the obligation of ensuring seaworthiness of the ship: a system based on bill of lading and a system for transports based on charter party, without bill of lading. These differences in procedure are found in countries that have adopted the “Hague Rules” or the “Hague-Visby Rules.” As shown above, in the latter situation, it is likely to agree on the exclusion of such obligation, but in the absence of an express provision to that effect, the obligation is absolute.

2. Definitions

Regarding the notion of seaworthiness, English law and doctrine provide various definitions for this concept. A first category of definitions are those referring to dangers of the sea. The Law on marine insurance, 1906, section 39 (4) - adopted in England- provided that: “A ship is considered seaworthy when it is prepared, in a reasonable manner and under all respects, to face usual sea dangers that might
occurs in the expedition for which she was insured." In the same respect, Ivamy, Marine Insurance, provided that: “There is no positive requirement concerning a ship recognized by law as complying with security regulations on seaworthiness. The term is relative, and seaworthiness is that state in which a ship should be, in order to be prepared to face any sea danger that a vessel of same type and with the same load might encounter, while making that voyage” (Ivamy, Marine Insurance, 317). In another category of definitions, seaworthiness is reported to the ship nature and particularities of the voyage. This shows that:

The required seaworthiness depends on the ship nature, particularities of the voyage for which the ship is engaged and on the various stages of that voyage, being different for voyages in summer than for those in winter or for the rivers or lakes navigation than from the navigation at sea or during the period of wares loading in the harbour from the period when she sails; that concept varies also depending on features of the goods that are, under agreement, to be transported.

In the same respect, it is showed that: “The ship must be adequate in terms of design, structure, fitting and equipment to face the usual risks of the voyage.” Given that the specialized literature has not reached yet a unitary definition for seaworthiness, the analysis of this concept and hence of the implicit obligation of the ship owner must be done in concrete terms, in each case. Even if the obligation of seaworthiness has a relative content, it is still very large, finding application not only in matters concerning the ship safety, but also in regard to certain matters of detail, in the situation where neglecting them turns out to be significant and harmful. We have to mention that the implicit obligation of ensuring the ship seaworthiness is a complex obligation.

Thus, we must distinguish between personal fulfilment of the owner, concerning the obligation to provide the ship seaworthiness – in that case, we speak about a personal obligation of the ship owner, and the fulfilment of this obligation through the ship’s captain, which is a non personal obligation of the ship owner. This distinction between personal and non-personal obligations of the ship owner is very important, both reported to the content of each of them, which is different, and to the responsibility for failure of this obligation.
Thus, the failure of the ship owner’s personal obligation to ensure seaworthiness of the ship draws his personal liability which is unlimited, meaning that the ship owner responds with all his wealth, on water and land.

In case of failure of the non-personal obligation, exercised through the captain, by abandoning the ship and freight, the ship owner is released and will not respond with all his wealth from water and land or even with his property consisting in another ship, obviously if he is the owner of several ships. Regarding the time extension of the ship owner’s obligation, we must mention that voyages can be divided into several stages: the nearby voyage, the loading period, the possible crossing of a river, the voyage to the harbour of discharge and the discharge. For each of these steps, there are specific requirements and as a result of this fact, a ship is considered seaworthy if she is ready to upload goods even if she is not prepared to immediately perform a voyage.

When the ship is prepared to load, but it is not ready to leave in a voyage, at the end of the voyage, once the loading is finished, then it is considered that it was not seaworthy to her arrival at the loading berth. The obligation to provide seaworthiness of a ship is for the beginning of the voyage and also for the beginning of each phase. The obligation of providing seaworthiness of a ship is continuous. This obligation must be fulfilled before the beginning and at the beginning of the voyage and by extension, also at the beginning of each stage of the voyage, if the carriage is done in phases. In this sense, the ship owner is required to make the ship seaworthy whenever the nature of obligations that he must fulfil changes.

When the ship loses its seaworthiness, following some risks exempted by clauses of bill of lading or of charter party, the ship owner is guilty of breaching the seaworthiness warranty, if the ship begins a new phase of the voyage without having assured the remedy of flaws. The ship owner’s liability subsists even if he was not able to remedy those flaws and no matter if at the beginning of the preceding phase, the ship was seaworthy. If, for example, during the first stage, the ship was so damaged that it could no longer continue its voyage, the owner shall be bound to take necessary measures to repair the ship in the first harbour of the first stage. In each phase, the ship must be seaworthy in order to continue the voyage.
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E-LEARNING PERSPECTIVES – WEB 2.0 TECHNOLOGIES

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ABSTRACT. Web 2.0 has been, during the last years, one of the most fashionable words for a whole range of evolutions regarding the Internet. Although it has been identified by the analysts as the key technology for the next decade, the actors from the educational field do not really know what Web 2.0 means. Since the authors started to explore and use Web 2.0 technologies in their own development/improvement, they have been intrigued by their potential and, especially, by the possibility of integrating them in education and in particular in the teaching activity. The purpose of this paper is both to promote scholarly inquiry about the need of a new type a pedagogy (Web 2.0 based) and the development / adoption of best practice in teaching and learning with web 2.0 in higher education (HE). The article main objectives are: to introduce theoretical aspects of using Web 2.0 technologies in higher education; to present models of integrating Web 2.0 technologies in teaching, learning and assessment; to identify the potential benefits of these technologies as well as to highlight some of the problematic issues /barriers encountered, surrounding the pedagogical use of Web 2.0 in higher education; to propose an agenda for future research, and to develop pedagogy 2.0 scenarios for HE sector.

Keywords: Web 2.0 technologies, e-learning, higher education

1. Insight into Web 2.0 technologies in Higher Education

In the last four years Web 2.0 was defined from different perspectives (O’Reilly, 2008) and by different authors (Zimmer, 2007; Alexander, 2006). Even the definitions of Web 2.0 terms are highly debatable, however, they don’t exclude each other because Web 2.0...
refers to the social use of the Web which allow people to collaborate, to get actively involved in creating content, to generate knowledge and to share information online. Beneath all the hype, Web 2.0 platforms are seen to have an emerging role to transform teaching and learning. Specific technologies and services contributing in higher education include blogs, microblogs, wikis, syndication of content through RSS, tag-based folksonomies, social bookmarking, media-sharing, social networking sites and other social software artifacts.

There are already a growing number of actors from higher education sector who are exploring Web 2.0 technologies in their activities with students or as part of their PLE. It is important to realize that Web 2.0 has to share something new with higher education - the development of a clear picture of the features that might constitute a new ICT pedagogy in the 21st century: pedagogy 2.0. Table 1 renders some possibilities and examples of using Web 2.0 technologies by the authors of this article as a support for preparing and collecting didactic materials, evaluating and analyzing the progress made by students, putting together informative and formative presentations, time management, planning the timetable and the calendar of activities, developing projects in collaboration, digital storytelling, students e-portfolios etc.

Table 1. Models of integrating Web 2.0 technologies

<table>
<thead>
<tr>
<th>Technology 2.0</th>
<th>Educational applications</th>
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</thead>
</table>
| Blogging      | -use blogs for real-world writing experiences  
                 -pull class blogs together into one area for easy tracking  
                 -quickly give feedback to students, and students to each other  
                 -students use peer networks to develop their own knowledge  
                 -update new information such as homework and assignments  
                 -using comments in blogs can encourage students to help each other with their writing, and get responses to a question without getting the same answer twenty times etc.  
                 -classroom community, exploring collaborative writing, reader response, collaboration across schools, countries, project management, assessing opinion, platform for metacognition, conference or... |
| Microblogging | as part of a presentation or workshop, for reference or research, facilitating virtual classroom discussion, creating a learning experience, a Personal Learning Network -use for dissemination of teachers’ publications and materials, locating original sources of ideas, quotes, allows for very focused and concrete feedback to students to refine their thinking and improve their skills, fostering professional connections, informal research, for storytelling, follow a professional, get feedback on ideas, event updates, live coverage of events, build trust, build a community etc. |
|Wikis | -use for student projects; use for collaborating on ideas and organizing documents and resources from individuals and groups of students -use as a presentation tool (as e-portfolios); as a group research project for a specific idea; manage school and classroom documents; use as a collaborative handout for students; writing: student created books and journaling -create and maintain a classroom FAQ; as a classroom discussion and debate area; a place to aggregate web resources; supporting committees, working parties and university projects etc. |
|Photo / Slides Sharing | -share, comment, and add notes to photos or images to be used in the classroom -inspire writing and creativity; create a presentation using the photos -use tags to find photos of areas and events around the world for use in the classroom. -post student presentations to an authentic audience and get feedback from around the world; share professional development materials and have it available anywhere, anytime, to anyone; post presentations of special events |
|Video Sharing | -video professional development on own terms; create an own subject specific videos with students; use video sharing sites to find videos on current issues etc |
|Syndication of content through RSS | -professional development, time saving; updated information in teaching area -information coming from constraining sources; sharing work with other educators -RSS feeds can potentially replace traditional email |
| Social Bookmarking | -create a set of resources that can be accessed on any computer connected to the internet; conduct research and share that research with peers -track author and book updates; groups of students doing a classroom project sharing their bookmarks; rate and review bookmarks to help with students decide on usefulness of resources; setup a group tag in order to share educational resources -share one del.icio.us account between a number of different subject specific educators in order to share resources with each other etc. |
| Social Networking | -event support and continuation, team and community support, aggregation of social media applications, personal learning environments etc. |
| Other tools | -instant messaging increase the sense of community and accessibility which is required for collaborative learning; VoIP can promote international collaborations and understanding; calendars make calendar events, homework, anything you want available on mobile devices connected to the Internet; -survey and polls, online diagrams and web-based word processor, on-line spreadsheet, social search, mind mapping; virtual worlds - virtual conferences and seminars, team meetings and collaboration spaces, simulations etc. |

2. Web 2.0 – Opportunities and Challenges for Higher Education

Obviously, there are both pros and cons to using Web 2.0. We shall mention some of them briefly below:

**2.1. Advantages:** reduction of costs; flexibility, as far as the possibility of choosing technologies is concerned; easier and faster access to information, when and where it is needed; the integration of a variety of Web 2.0 technologies in the teaching-learning activities; extensive opportunities of information and collaboration by the agency of social bookmarking services; possibility to control access to resources by authenticating users; sharing accumulated experiences (blogs, microblogs, wikis, flickr, youtube) and resources;
independence from the platform (a computer, with browser and Internet connection is enough); compatibility with the elements of the educational field and the existing contextual dynamics; the low level of complexity needed for use (minimum skills in using the Internet); reliability in continuous usage, over an extended period of time; redistribution of effort, so that less and less time and energy are spent during search and information management (del.icio.us, RSS); the increase in number of modalities of use and the heterogeneity of didactic practices and of types of formation, due to the diversity of the new technologies; the possibility to test the existing didactic practices, without great changes in the current modus operandi; the major focus on didactic innovation, and not on the technology per se; creating digital content (especially media, podcasting, videocasting).

2.2. Disadvantages: an Internet connection is required (especially a broadband connection); it hides behind a sum of technologies and concepts which are still insufficiently defined; it is based on Ajax, which depends on JavaScript and, therefore, a user without activated JavaScript, will not be able to use the respective page; it determines variations of interpretation between types of browsers; it offers free things, in open-source structures, with a rather vague significance; it leads to a low quality of the actual content, with sites which struggle in deep informational mediocrity; it promotes amateurishness by in- valuable contents generated by users; it gives everyone the opportunity to complain, thus creating a community without rules; it has monetary quantification (the Internet as a business - Google); it is a kind of second-hand Web, a medium for persons with low digital abilities; it has limited security; the speed of programs is incomparably lower than the one of desktop programs; it does not mean anything per se, it is just electronic junk; the extremely diversified offer of technologies which can be used and which exist on the market at the moment, make the actual selection process difficult; time and knowledge invested in the Web 2.0 technologies.

3. Critical perspectives on using web 2.0 in HE

We need to interpret Web 2.0 technologies from a pedagogical perspective, so that students can become digitally fluent and ready for the challenges of the knowledge society. Thus, we as educators are firstly forced to follow neither a demanding curriculum, full of
theoretical concepts, nor one which claims intellectual flexibility, but programs which involve those competencies which are useful to the future graduate in finding a job. Secondly, we must ask our students, when they use Web 2.0 technologies, to prove initiative and responsibility, curiosity and imagination, the ability to explore, creativity, to work cooperatively and constructively, to communicate and collaborate distinctly with each other, to be open towards identifying and solving problems. Most importantly, we should ask them to carry a fruitful dialogue, on both educational and social issues. Only in this way can we make students face knowledge experiences, by giving up frontal teaching and adopting a form of activity based both on group and individual work. It is also important to remember that changing the teaching method is closely connected to the attributes of Web 2.0 technologies, which allow students to collaborate, to get involved actively in creating content, and to share (exchange) online information.

On the other hand, the alliance between the technological context and the teaching-learning process poses a series of problems. Hence, the new technologies must be introduced in the curriculum properly and not randomly (for instance the teacher must prove that the technologies work before using them with the students). Then, as educators, we have the duty to uncover the mass of technologies, to make a selection suitable to our educational purposes because, the more things we could teach, the greater the need to make our students responsible in order to become effective and efficient partners in the teaching/learning act, active factors of their own (in)formation (we are referring to the production and diffusion of info-knowledge by exercising its most important competence - creating online content). We should not forget that abusing Web 2.0 can block or annihilate information processing, and can decrease the quality of learning. In this context, all educational actors (teachers, administrators of learning institutions, persons responsible of policies or librarians) must be initiated by means of special programs or special topic training sessions.

Although there is a general consensus on the positive aspects of Web 2.0 in teaching, there is still an ignorance of educators as far as its adoption is concerned. This ignorance materializes in: producing a short circuit in the reflection and debate on the impact this new technological trend has on education; rejecting the new by saying that we should not tolerate “the vassalage to American culture;”
technological immaturity, wreaked by indifference and by the absence of openness towards new ideas and didactic experiences; intellectual and academic dogmatism; the sclerosis of scientific thought; the erosion of creativity; taking up an opportunistic attitude and acquiring the ambiguous identity of “information dandy;” limiting oneself to the periphery of intellectual work methodologies (in the context of proliferating Web 2.0 without being sufficiently informed, we risk offering the students a precarious training); annoyed reactions from “basement communities” which can, many times, be tempted to consider introducing Web 2.0 technologies in their institutions as mere whims; tensioning work relations and creating notoriety complexes as far as the colleagues who have adopted the new wave of the Web are concerned, etc. under these circumstances, we believe it is necessary to reconsider the role of educators. Thus, we need to: assume a new attitude (without going to extremes); set ourselves up as innovators in education, by promoting new pedagogical objects: courses under an audio/video form (podcasts, videocasts), books/manuals in the shape of a wiki, communicating with our students through blogs etc.; try to bring arguments in favor of a taking a correct stand when faced with these realities; plead in favor of renewing our psychopedagogical tools; enjoy the pleasure offered by the act of knowledge; assume responsibility for our own formation and, last but not least, work a lot, spend a great amount of time for self-training, sometimes to the detriment of spending time with the family or of relaxing.

4. Conclusions

The latest generation of Web 2.0 technologies (blogs, wikis, RSS etc.) has quickly become ubiquitous, offering a lot of unique and powerful information, sharing and collaboration features. In most cases, the innovations are led by enthusiasts – whether in administration, IT, e-learning or libraries, or in academic departments. So why teachers should look up from their textbooks and take note of Web 2.0 tools? The reason these social technologies work is because teachers can foster collaborative work not only among their own students, but with colleagues, students, and community members from around the world. It is quite clear that the Universities need to act to ensure that it makes best use of such tools. Still, careful thinking and research are needed in order to find the best way to leverage these emerging tools to boost our teaching and learning activity.
The authors of this article hope, however, that all the actors from the educational field (teachers, tutors, trainers, administrators, or those responsible for policies) will find the Web 2.0 technologies efficient and promising both for the educational process and for self development. We are sure that, once engaged in using the Web 2.0 technologies they will discover it is worth the effort and they will enjoy its benefits. As Steve Hargadon (2008) said: “Web 2.0 is the future of education.”

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LEGAL TRANSLATION: PRINCIPLES OF SUCCESS

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ABSTRACT. The article covers the fundamental characteristics of legal language at large and those of legal English in particular, including specific syntax, lexis – both general and special, polysdisciplinarity, and ambiguity. While analyzing the specificity of legalese, the author pays special attention to its lexical and syntactic challenges and the problem of its obscurity expressed both in terminological inconsistency and structural indeterminacy. Characterizing the principles of legal translation, the author emphasizes the importance of translators’ competence in at least two legal systems and cultures, proficiency in comparative law, and research skills. The issues of permissible clarification and purpose-oriented adaptation are scrutinized closely as the plain legal language movement gains more advocates and proponents round the world.

Keywords: legalese, lexical and syntactic challenges, translation competence, comparative law, permissible clarification

1. Introduction

It is hard to agree with the self-evident truth of the definition given to legal translation in Wikipedia: “Legal translation is the translation of texts within the field of law.”

In most cases legal translation is translation of texts both inside and beyond the field of law, as the field of law proper has a composite, multi-aspect, and multidisciplinary character. In the small world of today, legal texts are mostly intertwined systems of multidisciplinary nature, where legal terms are mixed with political terms (constitutional law, public law, administrative law, etc.), economic and financial terms (financial law, budget law, tax law, customs law, commercial law, corporate law, patent law, copyright law), military
and technical terms (military law, maritime law), social and cultural terms (labour law, marriage law) and even medical terms (criminal law, administrative law, etc.).

As is stated by Mattila (2006), the lexicon of the language of law is closely intertwined with the social functions of the law evolving along with the evolution of the law. Numerous social functions of the law and its interconnections with economy, insurance, education, medicine, defence, human rights, etc, so the language of law has a polyfunctional and polydisciplinary character.

The literature on legal translation principles is not so extensive. And such literature as exists relates largely to particular translation problems and to a lesser extent to the methodology of legal translation at large.

Mellinkoff (1963) observing the state of written legal language in America, concludes that “in a vast literature the portion devoted to the language of the law is a single grain of sand at the bottom of a great sea. The profession is properly more concerned with rights, obligations, and wrongs, and the incidental procedures... At this writing, the subject of “language” is absent from most law indexes and only in capsule form in the rest. It is certainly not too early, nor is it too late, to commence examination of the language lawyers’ use.”

Much has been done since 1963, yet, there is a long way ahead.

Speaking about legal language, we cannot do without analyzing legal texts, and when discussing legal texts we cannot speak about them in general. So, generalizing as much as we can, we cannot avoid distinguishing legal texts into at least three types of legal writing as is suggested by Hiltunen (1990) (1) academic texts which consist of academic research journals and legal textbooks, (2) juridical texts covering court judgements or law reports, and (3) legislative or statutory writings consisting of Acts of Parliament, contracts, treaties, etc.

It seems reasonable to add one more type of legal writings – d) highly formalised juridical texts where form determines the content – a type uniting wills, powers of attorney, certificates, bylaws, etc.

2. Fundamentals of Legal Language

Legal English theorists (Solan 1993, Macdonald 2006, Mattila 2006 et al) almost unanimously admit that legalese is replete with superfluous archaic words, Latin expressions, and pompous syntax con-
structions. This is true for almost every legalese – be it legal English, legal Spanish, legal Polish, legal Russian or legal Arabic. There are, however, different academic views on fundamentals of particular legal languages and approaches to distinguishing them.

2.1 (Dis)Advantages of Analytic and Synthetic Languages

Thus, Mellinkoff (1993) states that legal language has inherent mannerisms and often enough lacks clarity. To the researcher’s mind, it is wordy, unclear, pompous, and dull.5

Baker (1992) argues that word order is of particular importance in translation because it plays a major role in maintaining the coherence and comprehensibility of the text as each language has its own word order: “Languages vary in the extent to which they rely on word order to demonstrate the relationships in the clause.”6 This statement, however, is not universally correct – it is very true for purely analytic languages, e.g. English, Swedish, French, Persian, Chinese and Vietnamese, etc. where the meaning of a sentence (a legal sentence in particular) largely depends on the order in which the elements are placed. As for synthetic languages (most Slavic languages, Baltic, most Caucasian and other languages) with their looser dependence on the word order, the meaning of a sentence is not so strongly influenced by the word order, but the allegedly flexible word order implies undercurrents of subtle deviations in the meanings of sentences owing to the seemingly insignificant syntactic changes. Analytic languages have stricter and more elaborated syntactic rules – word order carries a lot of importance, showing subject-object relationships.

As is known, analytic languages tend to rely heavily on context and pragmatic considerations for the interpretation of sentences, since they don’t specify as much as synthetic languages in terms of agreement and cross-reference between different parts of the sentence.7 However, some synthetic languages (e.g. Russian) use the word order to express definiteness (where English uses the Definite and Indefinite Articles).

In the sense of translation, dealing with analytic languages has both advantages and disadvantages. As for advantages, when translating into analytic languages translators can use various TM tools, such as TRADOS, MemoQ, OmegaT, which facilitate the translation process and make it faster. However, when translating into synthetic languages, automatic substitution of roots without endings or affixes
seems to hamper the work very much, not to mention the variant when nouns in the nominative case substitute the same nouns in the other five cases – correction of affixes and endings seems to take more time than printing the whole words.

As is indicated by Kaplan (1993), the rules of semantic interpretation depend on syntactic structure. Since the incomprehensibility of legal language depends on syntax as well as lexicon, the researcher finds the label “language of the law” to be more than metaphorical.8

Popovič (1977) states that in legal texts “there is a tendency towards rationality and stereotype in syntax.”9

And indeed, the syntax of legal texts, English legal texts in particular, is noteworthy for its archaic inclusions, long sentences devoid of punctuation, abundant use of some grammar phenomena – passive voice, conditionals, and syntactic freezers (politeness formulae, etc), which accounts for supremacy of tradition both in the common law legal systems and legal languages.

As is argued by Goodrich (1990), the language of law is a language of traditions, i.e. a language whose function is primarily to transmit a set of immemorial traditions.10 This is very true for all well-established legal languages regardless of their being analytic or synthetic.

2.2 The Whirl of Legal Lexis

According to Popovič (1977), three levels of lexis can be distinguished in legal discourse: (a) the level of general language, including grammar and syntactical structures common to both fictional and non-fictional writing; (b) the level of terminology which includes specialised vocabulary and phrases of the branch, (c) the level of formal or scientific language including syntactical structures used principally in non-fictional writing.11 Many researchers find the level of terminology most striking.

2.2.1 Terminology

It is doubtless that legal concepts are usually the product of a national legal system (Šarčević 1997),12 and so legal terminology is rooted in the legislative, executive and court systems developed in the country.
Sager (1998) defines terms as depositories of knowledge, as well as units with specific reference as terms “refer to discrete conceptual entities, properties, activities or relations which constitute the knowledge space of a particular subject field.”

According to the dictionary, the word ‘term’ is a polysemous word combining so many not even close meanings (such as a period of time, duration, semester, imprisonment period, notion, condition, relationship, etc.) that it seems to have been chosen purposefully to warn translators and linguists what kind of challenge they are to face each time they have to deal with terms.

Chiesa (2003) distinguishes the reasons for which the connotative and collocation meaning of a number of legal terms commonly used in different areas of law pose translation problems, including their being polysemous, not univocal, their signifying both genus and species, their being total or partial false cognates of their apparent target-language equivalent, their revealing the existence of lexical gaps in the target language, their having a broader or narrower range of meaning than their traditionally accepted equivalents, their having led to dictionary-fossilized translation mistakes, their varying in meaning according to collocation.

The list of terms bearing the mentioned characteristics includes, but is not limited to, the Latin terms: affidavit, crimen falsi, sub specie, ex professo, ex aequo et bono, subpoena, etc.; the English terms: affiliation, credit, discretion, duty, interest, licence, libel, merger, privilege, security, trust, etc.; the Spanish terms: afrimar, competencia, concurso, deberes, derechohabiente, obligación, oficio, prelación, etc.

Another vice of legal terminologies is terminological synonymy. As there are few complete synonyms (as a rule, they are territorial synonyms, denoting the same phenomenon called differently in different variants of the same language like ‘heredero’ in continental Spanish and ‘asignatario’ in Latin American (although strictly speaking, even they do not completely coincide). Yet, the lists of ‘not-quite-identical’ terms denoting the same phenomenon but implying subtle or important nuances (often stylistic, not conceptual) are long both in legal English (devisee, legatee, successor, legal representative, heir, legal successor, inheritor, alienee, assign, assignee, grantee, subsequent proprietor, transferee, descendant) and legal Spanish (derechohabiente, descendiente, heredado, heredatario, heredero, sucesor). The Russian list of synonyms is much shorter in
Terminological homonyms (‘annoy’),\textsuperscript{15} terminological paronyms, polysemous terms aggravate the situation with English legalese.

Apart from terminology, legal language is replete with terminalised words borrowed from general language. The legal translator, particularly a beginner, should be aware of the fact that many ‘non-terms’ change their meanings to a great extent in legal contexts and thus, acquire meanings, which sometimes are not even fixed in dictionaries. E.g. the new meaning of the Russian words ‘oborot’ and ‘znak’ in the terminalised word combination ‘grazhdanski oborot’ and the semantic freezer ‘kollektivny znak’ have not been fixed so far even in Russian glossaries, not to mention bilingual legal dictionaries.

It is noteworthy that in 1976 the General Conference of the United Nations Educational, Scientific and Cultural Organization on the Legal Protection of Translators and Translations and the Practical Means to improve the Status of Translators adopted a recommendation according to which Member States should consider organizing terminology centres, which might be encouraged to undertake the following activities: (a) communicating to translators current information concerning terminology required by them in the general course of their work; (b) collaborating closely with terminology centres throughout the world with a view to standardizing and developing the internationalization of scientific and technical terminology so as to facilitate the task of translators.\textsuperscript{16} Thus, the need for the mentioned activity was recognised 35 years ago, but there is still much to be done.

\subsection*{2.2.2 Beyond Terminology}

The complexity of legalese is not limited to legal and other terminologies. The complexity of legal English is aggravated with Latinisms, Norman / French terms, the use of adverbs (hereinafter, thereto, hereunto, hereunder, thereof, hereby, therewith, whereof, etc.), old-fashioned participles (aforementioned, aforesaid, foregoing, foregoing, etc.), euphemisms (both old: detained at her majesty’s pleasure, act of God, and contemporary ones: abortion, execute, euthanasia, etc.), and modern colloquialisms (insider dealing, hacking, etc.).
In legal discourse, Latinisms play a number of roles (besides the primary — sense-bearing role) including that of style-elevating, tradition-preserving, professional coding, sacred-knowledge sharing, etc. However, as George Orwell (1946) put it in his Politics and the English Language: “Bad writers, and especially scientific, political, and sociological writers, are nearly always haunted by the notion that Latin or Greek words are grander than Saxon ones, and unnecessary words like expedite, ameliorate, predict, extraneous, deracinated, clandestine, subaqueous, and hundreds of others constantly gain ground.”

Mellinkoff argues that legal English is filled with self-righteous expressions (clearly pointed out, dispose of the argument). He adds that legal language use assumes specialised meaning (action for ‘law suit,’ instrument for legal document). It has rare words from old and middle English (witnesseth); French words which are not in the general vocabulary (demurrer, fee simple); terms of art (contributory negligence, eminent domain); professional argot (inferior court, issue of fact); formal expressions (approach the bench, the deceased, Your Honour); words with flexible meanings (adequate, approximately, reasonable, flexible); and attempts at extreme precision (irrecoverable, never, and no other purpose).

In addition to technical terms, so called ‘absolutes’ are used attempting to achieve precision and exactness. These are, according to Hiltunen (1990) such words as “all, never, whoever, uniform,” and the use of synonymic terms in a row: last will and testament; give, devise and bequeath; rest, residue and remainder; make oath or affirm; abandoned, deserted or neglected, etc.

Legal language is also known for its tautology (e.g. ‘said agreement,’ ‘party of the first part’), redundancy (e.g. ‘null and void’) and semantic absurdity (e.g. ‘dangerous abuse,’ ‘dangerous weapon,’ ‘dangerous criminal,’ ‘dangerous felony rule,’ for felony being a ‘serious crime’ — another semantic absurdity, as can a crime be not serious? — cannot avoid being dangerous).

2.3 (Un)Intended Ambiguity

According to Holland and Webb (2003), “the extent to which the law relies upon its own language is a very basic indication of the closed nature of legal argument.” Holland and Webb (2003) believe that the purpose of ‘legalese’ is to conceal rather than to enhance one’s understanding of a legal system.
We agree with Wagner and Cacciaguidi-Fahy (2006) that both obscurity and clarity are multifaceted concepts. The term ‘obscurity’ is used to denote a number of lexical, syntactic and stylistic phenomena including semantic, lexical, syntactic ambiguity, vagueness, indeterminacy, and fuzziness. This proves Solan’s (1993) idea that legal language contains many devices, which de jure serve to create the appearance of precision while de facto they decrease clarity via terminological inconsistency, structural indeterminacy and general obscurity.

Here are the principal rules to be observed in the construction of contracts, however, they are proper rules to be observed in the construction of any legal texts as well:
1. When words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected.
2. The plain, ordinary, and popular sense of the words is to be preferred to more unusual, etymological, and recondite meaning or even to the literal and strictly grammatical construction of the words, where these last would lead to any inefficacy or inconsistency.
3. When a peculiar meaning has been stamped upon the words by the usage of a particular trade or place in which the contract occurs, such technical or peculiar meaning will prevail.
6. All contracts made in general terms, in the ordinary course of trade, are presumed to incorporate the usage and custom of the trade to which they relate.

3. Principles of Success

The principal challenge facing legal translators is transforming the source text content into comprehensible input and, on processing it, generating comprehensible output in the target language.

M. Batteux, Professor of Rhetoric in the Royal College of Navarre at Paris (1760) analysing the problems of translation the works of ancients, derived “Principles of Translation written originally in French”. He writes, “It is agreed, that a translation ought exactly to express the original; that it should neither be too free nor too servile; that it should neither deviate into long circumlocutions, which weaken the ideas, nor adhere too strictly to the letter, which debates the sentiment…” These general principles are well-known
and widely professed, yet seldom used when one comes to translation practice.

It is important to study each translation principle in interaction with other translation fundamentals, not in isolation, so as not to distort legal translation as both an integrating process and an integrated result of the legal translator’s interacting competences. For this paper, however, we will just confine our analysis to some outlines of the matter.

3.1 Legal Translator’s Professional Competence

As is known, language teaching is aimed at forming students’ communicative competence. The structure of communicative competence (as “a dynamic combination of knowledge, understanding, skills and abilities”) differs from monograph to monograph. We understand it as a dynamic scope of knowledge, skills and capabilities within linguistic, discourse, sociolinguistic, country-specific, sociocultural and subject competences. Yet, translation teaching is aimed at forming students’ translation competence as a dynamic scope of knowledge, skills and capabilities within communicative, extralinguistic, instrumental-translation, psycho-physiological, transfer and strategic competences. Thus, communicative competence is an integral part of professional translation competence and not vice versa. Translation competence is formed in students’ minds basing on high-level communicative competence (but not at the initial stage of its formation). Despite the widely used homonymic terms ‘strategic competence,’ we have to specify that strategic competence within communicative competence is not identical to strategic competence within professional translation competence – they do not coincide even partly because strategic competence as a component of communicative competence depends on the communicative goal regardless of the quality of communication and often prodded into action by an interlocutor unconsciously, while strategic competence as an integral part of professional translation competence implies translators’ conscious activity in elaborating a strategy for each act of translation for the purpose of high-quality mediated communication. And the chosen strategy determines the choice of tactics, methods and translation tools – tuning the whole chain to needs and purposes of a certain translation act under particular circumstances.
3.2 Competence in Two Legal Languages and Cultures

As is stated by Batteux (1760), the first thing necessary to one who intends to translate, is, thoroughly to know the genius of the two languages which he proposes to handle. Yet, for the professional legal translator it is not enough to understand the spoken or written language, his/her domain is the vital specifics of the two languages. There is so much history and tradition beneath the marble-like and often marble-minded legal terminology that the legal translator cannot consider him/herself a professional without a specific competence – that is in the antecedents of the daily used terms and the great past of the legal systems rooted in antiquity, still functioning like clockwork.

So, mastering legal terms is not enough – it is unreasonable without mastering legal concepts. The primary concern of every professional legal translator is the number of concepts behind the Common Law system, the Continental Law system and the Islamic Law system, or at least any two of them.

The variety of discrepancies in the Spanish language and its Central and South American variants (not to mention Equatorial Guinea or the Philippines) is another special concern of legal translators from/into Spanish.

Meilij-Romero raises the problem of socio-economic environment as a generator of legal concepts and differences in socio-economic environments stipulate the world picture – the world reflection in human minds. Thus, U.S. anti-discrimination and sexual harassment laws were drafted for the Anglo-American legal system with its accompanying socio-economic environment. Many immigrants from Central and Latin American countries find the laws hard to understand, since they have not experienced similar opportunities to complain about offensive and discriminator behaviour within their own local legal systems. Often, the complaint can be based on words that are considered offensive and demeaning by the plaintiff when used in Spanish. Meilij-Romero wonders if the translator has to convey the offensive meaning in the way it is understood by English-speaking managers, attorneys, investigators, and judges, or just translate its literal meaning. Sometimes, even in Spanish, a word may be offensive to some cultural groups but not to others. And again, is the translator expected to research the various meanings of one Spanish word, according to region specifications?
Biel (2008) argues, that “it is not so much a problem when translating from English into a language with one standard variety, such as Polish, but vice versa, i.e. legal translation into English.” The researcher emphasizes the point of the legal translator’s work depending much on variants and sub-variants of the English language having its specificity due to the culture, both general and legal, and legal system of a particular English-speaking country. “Is the target text intended for the UK, US, Australian or Canadian audience? If for the UK audience, is it England or Scotland with its distinct legal system?” – asks Biel. Another problem arises when “the translation is intended for some undefined European audience, for which English is not a native language but is a lingua franca used to access texts written in languages of limited diffusion.”

Another serious linguistic and mental problem is to challenge the legal translator when s/he has to specialise in translating from / into certain languages that haven’t developed their legal terminologies as well as English or other ‘big’ languages have, and thus, do not contain even close equivalents of many English terms as the concept behind them are not part of the nations’ mentalities. The situation described is that of many nations of India, some Caucasian nations and those of the Russian North. Many of the mentioned national languages try to cope with the challenge by borrowing missing terms from English and Russian correspondingly. However, ‘shallow borrowings’ without concepts behind them are not viable.

The professional legal translator cannot stay beyond the legal systems of the countries s/he connects via his / her effort, thus s/he has to master their legal systems in general and court systems in particular, as well as their operational principles. Some of the courts in the countries with developed legal cultures have made it a written rule that the translator must be an expert in their language, systems and proceedings, which is a clever move indeed, as few professional legal translators (if any) can work successfully at a high quality level without understanding the construction and ways of at last two court systems.

As is stated on the website of the University of Minnesota (Minneapolis, USA), the legal translator (one specialising in corporate legal translations in particular) “must have a deep and accurate understanding of both the company’s and the court country’s languages. A lack of complete understanding of the fine points will cause a bad
translation, which can be deeply harmful to the company’s legal business.”

Sager (1998) notes that “we understand passively when we have only a vague idea of the place of a concept in the knowledge space. We understand fully when we know the precise place of a concept in relation to other concepts.” Understanding concepts behind source language terms, the legal translator is more capable of finding proper equivalents from the target law and language system. And here arises the problem of the translator’s other competence – that of comparative law analysis, on acquiring which a legal translator deepens his/her expertise.

3.3 Proficiency in Comparative Law

Legal systems differ in their construction and functioning principles and patterns, history, aspirations as they are intended to serve the needs of a particular, regime, government and nation. The mentioned differences lead to incongruity of legal systems, legal notions and legal concepts behind them.

Comparative law in the strict sense is the theoretical study of legal systems by comparison with each other. Norman (2006) identifies two reasons for which it has gained in practical importance in recent years. The first is the increased globalization of world trade, involving the need to ‘do business’ in unfamiliar legal systems. The second is the move towards harmonization of laws, and more recently towards codification within the European Union, where several legal traditions coexist. It seems necessary to identify one more reason for which the significance of comparative law has been growing recently – i.e. the recent boost in the development of legal translation.

The differences both in systems developed and stipulated by common law vs. equity law, by national laws vs. EU law do play a role, which is impossible to overestimate in understanding the structure and historical background of the legal systems, and eliminating terminological discrepancies as many terminologies that have emerged in the context of developed countries are inadequate to meet the contexts of developing countries.

It is a part of our reality, however, that most translators work under time and often under peer pressure facing and in reality have little time to carry out in-depth comparative-law analyses. Neverthe-
less, everyday comparative-law researches, minor or major, and deepening the translator’s proficiency in comparative law and his/her expertise.

Eberle (2009) views legal translation on the basis of comparative law as “translating one worldview into another,” as most ideas and words do not translate perfectly from one culture to another. Eberle proceeds stating that “we must recognize the meaning of the idea or word in its own culture, explain its underlying cultural context, and then translate that meaning as best as we can to another legal culture, whether our own or a different, foreign culture.

Translation calls upon us to explain the underlying context of the culture in which the idea or word is found. It requires understanding the multiple semiotic systems and linguistic contexts that situate ideas, and then determining how to adjust and transfer over that particular worldview into that of another.”

We share Eberle’s opinion that illuminating either connection or disjunction among legal cultures can yield valuable insights. These tools will help us to learn and appreciate that law is not just the words on the page or the chant by the sage. Employing these skills can lead us to new insight and new perspectives on foreign law.

3.4 Translator’s Research Skills

As there are, in most cases, variations in the concepts behind legal terms and thus, there are discrepancies between source language terms and their target language equivalents, the professional legal translator often faces a need for a more or less profound research into terminological equivalence and terms fit.

Every time facing a problem of equivalents selection, the legal translator turns to dictionaries, and the first intuitive move is to use bilingual dictionaries. As is known, however, most bilingual dictionaries are far from being professional and even trust in them, not to mention overreliance sometimes results in grave translation mistakes.

As is wisely noted by Šarčević (1989: 279), “if a dictionary is to be reliable, the burden of the choice cannot be placed entirely on the user.” However, it is the legal translator who is to blame for the terminological mistakes that may cause serious problems, and this responsibility is not to be shared with lexicologists or publishers. So, it is a good idea, when using a bilingual dictionary, to check equivalents
in monolingual glossaries or to check their usage and contexts in legal texts placed in the Internet.

On analyzing translators’ Internet fora, Biel (2008) deduces that askers want to find out how other members solved a similar problem, without compromising either functionality or accuracy, and whether the solution is standardised (established equivalents). It is important in conclusion to emphasise the need of more research into questions posted by translators on discussion forums. Such questions provide an abundance of researchable material and insight into problems encountered by professional translators, an insight which is otherwise difficult to obtain.

3.5 Purpose-oriented Adaptation

No doubt, precision in the legal translation is essential. Yet, precision does not mean verbatim translation and one cannot speak about legal translation as a solid marble piece regardless of the text type and the type of recipient. Following Hammel’s (2008) classification, legal translation recipients can be divided into at least four major groups: legal practitioners whose background is known, clients whose identity is not known, a non-specialist audience (an executive who needs a rental contract translated, for instance), and a publication audience (translating foreign legal judgments or texts for publication). For a native-speaking translator, the situation is easiest when the audience is known to be native speakers of English with legal training.

It is important, however, to remember about comparative-law competence and certain research skills as even in the case of the legal translator being a bilingual having expertise both in translation and the two legal systems in question (which is a very rare case), s/he has to deal with at least three different kinds of audience: native speakers of the target language with legal training, non-specialist native-speaking recipients, and non-specialist non-speaking recipients of English translations with English as a Lingua Franca.

According to Williams (2005: 176), “a number of major law firms are now committed to Plain Language and have rewritten their precedents in Plain Language and trained their lawyers in Plain Language skills.”

Basing on Richard Wydick’s classic text “Plain English for Lawyers”, Adams (2005) attacks the “muddled and archaic language that abounds in legal documents.” To the translator’s mind, “not only
are phrases such as ‘hereinafter’ and ‘notwithstanding the fact that’ ugly, translating them into another language – or translating their source-language equivalents into English – can sow unintentional confusion.”

However, advocates of unchanging legalese, with Hazelton (2006) among them, believe that complex legal language plays an important role and is to preserved as it is: “The use of historical expressions creates an aura of seriousness, authority, and respect for the law. It is for this same reason that ‘archaic’ terminology is still used in many of our cultural rites of passage, such as weddings, baptisms, and funeral services.”

As is reasonably noted by Gibbons (2003), the most fundamental reason for making legal language intelligible is that the Common Law presumes that ‘ignorance of the law is no defence’. However, if the law is presented in language that cannot be understood by the people to whom it applies, this presumption can lead to grave injustice as well as logical absurdity. It is obvious, that more intelligible legal language would help non-lawyers to understand and appreciate the way the legal system works, to understand basic legal concepts, to understand and protect their own legal and contract rights, and to understand and participate more meaningfully in legal proceedings.

Hammel (2008) pinpoints the core of the problem discussing the difficulties of translation for a non-specialist audience: “Take, for instance, the translation of a German rental contract into English, for a visiting businessperson or artist. Here, the premium is on clarity and jargon reduction, and the translator’s freedom to trim and transpose at its zenith. These clients need to know what’s expected of them, and have little interest in a faithful reproduction of the source-language’s grammatical structure or vocabulary.” In Hammel’s opinion, the translator should feel free to split the sentence up, make it active, and ‘unpack’ the German compound words and legalese, i.e. to use the translations transformations discussed in 3.5.2.

3.5.1 Style Changes

The style of legal texts differs from genre to genre, i.e. the style of an affidavit differs considerably from the style of a birth certificate or a sales contract.

However, in translation Joseph (1995) argues, the style of the original, may be changed, and sometimes must be changed, to faith-
fully convey the ‘sense’ of the original: “I cannot imagine an instance in which a legal translator would be concerned to preserve the style and manner of the original, unless that style and manner were somehow directly implicated in a question of the interpretation of the meaning of the original.”

Necessary and, sometimes inevitable, minor or major style changes can be made for the following reasons: due to stylistic discrepancies of similar legal documents used in different national legal systems (e.g. English and Russian last wills and testaments); due to terminological or conceptual lacunae and the arising need for the translator’s explanations or comments that can change (or even ‘lower’) the elevated style of legal documents (e.g. acts or statutes); due to discrepancies in grammar and stylistic rules (though the use of translation transformations – making the style of the translation less turgid or convoluted); due to pragmatic reasons including legal translation for native-speaking laymen; due to pragmatic reasons including legal translation into English for non-native-speaking laymen; and others.

In order to convey the various shades of meaning a legal term can have in one language, Hammel (2008) emphasizes the necessity to include additional explicit information about the context in which the source-language term is found, and the additional overtones of meaning that may have in the source language that are absent in the target language. Thus, the legal translator, to fulfil the overriding goal of communicating the entire meaning of the original, may have to intervene in the text to provide additional elaboration, in the form of footnotes or in-text commentary.

Following Hammel’s idea of the translator’s commentary or inserts of additional explicit information, we come to the next component of the legal translator’s expertise – translation tools.

3.5.2 Translation Tools

In translating legal documents, it is important to ensure precision and clarity to avoid discrepancies and contradictions to the best of the legal translator’s ability. It does not verbatim translation, which is both elusive and needless. In many cases transcreation to a minor or major extent instead of translation is a proper remedy to meet the challenge.
Almost every translation school seems to have developed its own set of translation tools or translation transformations, with the Russian translation school being among the leaders.

According to one of the latest Russian classifications (Burukina 2007), translation transformations are divided into 5 groups – syntactic, lexical-syntactic, lexical, stylistic, and connotative tools.50 The limitations of this article do not allow considering every transformation in detail, so we confine our analysis of translation tools in this sub-subsection to listing them with short explanations.

The group of syntactic translation transformations includes sentence division (both inner and outer) and sentence merge. This type of transformation is stipulated by non-identical mental models of presenting information in a sentence in different mentalities and thus, in different languages and different grammar rules governing syntax.

The group of lexical-syntactic transformations includes transposition, antonymic translation, periphrasis, sense development and compensation. Lexical-syntactic tools are based on partial transformation of sentence structure at the level of clauses, isolated and non-isolated participial and other constructions and word combinations.

The group of lexical transformations encompasses 10 translation tools – contextual substitution, generalization, concretization, addition, omission, enlargement, compression, redistribution of semantic components, explicating, and implicating. Lexical transformations are mainly used for both sense and pragmatic reasons.

The group of stylistic transformations unites translation tools based on particular stylistic phenomena – metonymy, metaphor, and alliteration. The stylistic transformations are metonymic transfer, metaphorization, re-metaphorization, and alliterating used for both sense and stylistic reasons.

The group of connotative tools includes connotative substitution, connotative addition, connotative omission, and gender slide used for both sense and stylistic reasons.

All kinds of transformation are used in abundance in translations of fiction and even scientific texts. As for legal translation, the first three types of transformation are used there much more frequently than the others.
4. Conclusion

The holistic approach to legal translation benefits translators, academics and legal translation students in terms of intellectual flexibility and professional competence. This approach also leads to a better understanding of the specific field of legal translation as well as translation in general.

The famous English jurist and philosopher of law Jeremy Bentham, as early as in 1776, declared that laws ought to be codified in such clear language that the ordinary man could understand his legal rights (quoted in Hager 1959). This task has not been fulfilled yet and the opportunity to be involved in the process, to make our own contribution is most thrilling.

We share Hammel’s proposition that translators can use some of the tenets of the Plain English movement – most importantly, controlling sentence length – to produce clearer and more useful translations. Especially in view of the growing importance of non-native speakers as a market for legal translation into English, plain-English legal translation is not just a good idea, it may be the wave of the future.

The influences on legal translation procedure are many and varied, and the basic principles offered here are not necessarily so easily applied in all working environments. Nevertheless, I hypothesise that developing and improving the above-mentioned principles as fundamentals of one’s professional translation competence can improve legal translation practice and may help to foster a new interconnection of research and practice in translation teachers’ and students’ everyday experiences.

Our evolving vision is that the holistic approach to legal translation should enhance the teaching, learning and primarily, translating experience and where possible extend that experience in a seamless way.

Indeed, translators can increase the functionality and pragmatic qualities of translation using plainer – more natural and modern language: shorter sentences, simpler constructions and up-to-date words; which is particularly important for those target languages that do not stick to traditionalism for the sake of traditionalism, i.e. most languages of the world. As for His Majesty Legal English, He has started changing, too – turning into a kind of European English, and we are witnessing the gradual birth of a totally new linguistic phenomenon – European legal English, which is sure to resemble its
parents – Legalese and the British tradition, yet will differ from them considerably in its strive to meet common people’s expectations. We only have to wait and contribute, as its birth is time and effort consuming like the birth of most great and long-awaited ones, which makes them even more welcome.

The challenge we face as educators (whether we are practicing translators or theorists, translation researchers or academics) is how to make the process less painful and more natural – organic and well-balanced, so as to facilitate the birth of an advanced, healthy and viable phenomenon, and not a Frankenstein destructive to all that has been preserved for centuries by legal writers, including legal translators.

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DEALING WITH ‘TERMINOLOGICAL INCONGRUENCY’ 
IN LEGAL LANGUAGE

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ABSTRACT. The paper focuses on the concept of ‘terminological incongruency’ in legal language that has been largely debated by jurists, translation theorists, legal translators and drafters. It is meant both as a theoretical and practical study in legal translation. Its purpose is to briefly present and illustrate effective translation strategies that may compensate for and help legal translators deal with this peculiarity of legal texts, namely ‘terminological incongruency’ which is actually the overt linguistic projection of an inherent ‘conceptual incongruency’ specific to legal language. The practical examples provided and the comparative linguistic analysis associated are based on English-Romanian and respectively Romanian-English legal terms and expressions.

Keywords: terminological incongruency, conceptual incongruency, functional equivalent

1. Introduction

The legal language is subject to continuos change, in all its diverse linguistic subdivisions – the language of laws, regulations and treaties, the contractual language, the language of the court or that of scholarly writings. It is the responsibility of legal translators and drafters to permanently update their translation strategies according to the most recent legal translation theories. Apart from being well-informed as regards the latest approaches to legal translations, they may also use these theoretical sources of information to improve the quality of their practical work.
Our study undertakes this particular challenge – to extract from the speciality literature covered new translation strategies and test their practicability and effectiveness in the practical field of legal translations. Due to the limited extent of our paper we are to focus primarily on the aspect of ‘terminological incongruency’ and its associated concepts, as well as on specific translation strategies meant to compensate for it.

1.1 ‘Terminological incongruency’ in legal language

Author of bilingual and plurilingual legal dictionaries, of comprehensive studies on legal lexicography and legal translation theories, Susan Šarčević addresses the concept of ‘terminological incongruency’ in legal language, in one of her latest books, New Approach to Legal Translation.¹ Making reference to the fact that each legal system is the product of a particular history, culture, socio-economic principles and has its own conceptual system, the author concludes that “legal terminology of different legal systems is, for the most part, conceptually incongruent.”² Since legal terms are the only signs expressing legal concepts that make reference to particular objects in the legal realia, one cannot practically address the issue of ‘terminological incongruency’ without implicitly consider the underlying concept of ‘conceptual incongruency.’ Unlike the complex class of exact sciences (mathematics, physics, chemistry, biology, medicine etc.) where the systems of concepts is the same in all languages, universal, independent of national and cultural boundaries and therefore the process of translating special-purpose texts is practically reduced to finding the most appropriate linguistic equivalent in the target language, the ‘language of the law’ seems to defy this principle of the universality of concepts. Metaphorically speaking, the legal language of all states today appears to have been struck by the biblical Tower of Babel effect. Should we dare to presume that the heterogenity of legal systems throughout the world is a living proof that man-made justice can never become a universal concept and that only God’s justice embodies this principle? What we can say without any shred of doubt is that the diversity and incongruency of different languages of the law are deeply rooted in the conceptual incongruency of the legal systems in question.
1.2 Dealing with conceptual incongruency

Though many legal translators, especially those who lacked proper legal knowledge complained about the difficulty of legal translations due to the inherent incongruency of legal terminology, legal texts have been translated for centuries. And how exactly have they been translated? An elaborate answer to this question and many other is provided by Susan Šarčević in a chapter regarding the history of legal translation, starting from the Middle Ages until today; her view focuses on pointing out the main reasons why literal translations remained a constant legal translation strategy throughout the centuries. One of these reasons was to maintain the so called ‘authoritative status’ of legal translations. There is a clear distinction that the author makes between ‘authoritative’ vs. ‘non-authoritative’ legal translations: “Legal instruments translated exclusively for information purposes are non-authoritative: they are not vested with the force of law and are not-binding. […] Authoritative translations such as translations of constitutions, statues, codes, treaties, conventions, contracts are legally binding instruments which are also referred to as ‘authentic texts’; such texts are not mere translations of the law, they are the law itself.”

In early legal translation theories it was believed that literal or ‘word-for-word’ translation of the source text (Latin) into the target language (English, French, German, etc.) was meant to preserve the authoritative force of the law. Great progress has been made in legal translations nowadays, when the concept of authoritative legal texts has remained valid but it is no longer dependent on literal translation. The best example is the translation of European law, the treaties establishing the European Communities, the Single European Act and the Maastricht Treaty which are all authentic in all languages of the Member States. The principles that govern their translation are ‘terminological equivalence’ and ‘legal equivalence’: “the equivalence between individual lexical items of the source and target texts is known as terminological equivalence […] legal equivalence is achieved if the parallel texts of a single instrument lead to the same legal effects.”

1.2.1 Linguistic equivalents or natural equivalents?

According to translation theorists, the term of ‘absolute equivalence’ in its technical sense cannot be achieved in translations; it has the
same sematic destiny as the term ‘perfect synonymy’ and its non-ineistence is due to the fact that it’s almost impossible to find lingusistic terms that would express perfect identical concepts in many languages. This is why there has been a silent agreement among translators to use the term ‘equivalent’ in a more common sense to signify that “x can be used to translate y and vice versa, without implying that they are identical at conceptual level.”

In her attempt to find solutions to terminological incongruency, Šarčević brought up the old debate among legal translators on whether to choose ‘linguistic equivalents’ or ‘natural equivalents’ as the best translation solution. She defines the former category as “terms created to designate concepts foreign to the target legal system” and the latter as “terms that actually exist in the target legal system.” In other words, a translator may either produce a linguistic equivalent, a term that does not exist as such in the target legal system or intuitively choose a natural equivalent that already exists in the target language. Šarčević votes in favour of “using the closest natural equivalent of the target legal system, i.e., the equivalent that most accurately conveys the legal sense of the source term and leads to the desired results.”

Though a newly created linguistic equivalent may be easily comprehended in the target language, since it transparently conveys the meaning of the source term, it has a major disadvantage – it simply does not exist in the legal dictionaries of the target language or in its legal jargon. Therefore, the legal experts are likely to dismiss the linguistic equivalents as non-legal. On the other hand, though a natural equivalent in the target language may not entirely match the meaning of the source legal concept, yet, it has legal force and may always be employed to produce legal effect, since it is part of the functional legal jargon.

1.2.2 Searching for a functional legal equivalent

We have come to the point where we understand that it’s highly recommendable for legal translators to make use of the already existing ‘natural equivalents’ of the target language instead of producing new ‘linguistic equivalents.’ Another important step taken further on the translation road is searching for a ‘functional legal equivalent,’ a term defined as “designating a concept or institution of the target legal system having the same function as a particular concept of the source legal system.” As the author is famous for her bilingual and
plurilingual legal translations, she illustrates the concept of ‘functional legal equivalent’ by a French legal term and respectively an English one: hypothèque and mortgage. They both have the same function, namely to show how security is pledged for the payment of a debt on land in both the French and English legal systems.

1.3 Conceptual analysis

Finding the closest natural equivalent in the target language that has the same function as the legal concept of the source legal system is basically an intuitive translation process that needs to be further validated by measuring the degree of equivalence of the functional equivalents selected. At this point, the legal translator should also make use of his/her legal knowledge or ask for the assistance of a lawyer linguist who would be able to make a ‘conceptual analysis’ of the two equivalents. What is a ‘conceptual analysis’ and what steps are involved in conducting one?

First of all, the characteristics of legal concepts are divided into essentialia (vital, necessary) and accidentalia (additional, possible but not inevitable)\(^8\) either of them being active in a certain context of use. The conceptual analysis of the equivalents starts with a comparative process by means of which the translator determines the essential and accidental characteristics of both equivalents. Then, it continues with the process of matching up the characteristics of the source term with those of its functional equivalent in the target language. If all the essential characteristics of the two equivalents match and only a few of the accidental ones do not, the concepts are considered to be ‘identical’ (=). On the other hand, if most of the essential and only some of the accidental characteristics are the same, the concepts are regarded as ‘similar’ (±). And if only a few or none of the essential characteristics coincide, the two concepts are considered ‘non-equivalent’ (≠). The process of establishing these semantic characteristics is usually done by accessing solid sources so as to find reliable definitions of legal terms or, if this does not prove to be enough, by legal analysis, namely by researching all sources of the law available in order to provide accurate semantic correspondences.

Last but not least, there are three important vital criteria for the process of establishing the acceptability of functional equivalents:
(1) the structure/classification of the legal term (namely establishing the branch of law that the term belongs to, such as: contract law, labour law, procedural law, etc.)

(2) the scope of application (the extension to which an area of law is covered by that particular concept; for instance the scope of application of the term mortgage is broader than that of hypothèque, since a mortgage can be pledged for both real and personal property, while a hypothèque applies only to immovables, to realty.)

(3) legal effect (the source term may have a particular legal effect according to the specific laws applicable to the source legal system; the translator should attentively check if the same legal effect is obtained in the target legal system by using the corresponding functional equivalent).  

1.4 Testing the three degrees of conceptual equivalence

With all these theoretical criteria in mind, our last step is to see whether they may actually turn into useful translation tools and what particular effect may be triggered by their application. We are practically going to apply all the stages of a conceptual analysis so as to establish the degree of equivalence between legal terms and expressions from the source language (English) and their correspondents in the target language (Romanian). We have chosen three pairs of legal terms for the three degrees of conceptual equivalence mentioned before: a) ‘identical’ (=), b) ‘similar’ (±) and c) ‘non-equivalent’ (≠).

a) The first pair of terms is: ‘power of attorney’ and ‘împuternicire’. We need to bring all the necessary arguments to show these two legal terms are conceptually identical and implicitly terminologically congruent. As concerns their structure, they are both general legal terms. Regarding their definitions, needless to say that one legal dictionary is never enough; sometimes different dictionaries capture only one particular meaning of the term, thus providing a complete definition implies to compare and sum up definitions from many dictionaries. For instance, Daniel Oran’s Dictionary of the Law provides the following definition for ‘power of attorney’: “A document authorizing a person to act as attorney in fact for the person signing the document.” In P.H. Collin’s Dictionary of Law the definition is: “an official power giving someone the right to act on someone else’s behalf in legal matters.” A third dictionary manages to capture both meanings: “1. legal authority to act for another person in certain
specified matters. 2. the document conferring such authority. Also called letter of attorney.”\textsuperscript{12} In conclusion, the term ‘power of attorney’ has two meanings: one representing a legal authority or an official power and the other making reference to the document enforcing such power. For the second meaning there is also a second term – ‘letter of attorney’, to distinguish it from the first one. The Romanian definition for ‘împuternicire’ and more precisely for ‘împuternicire de reprezentare’ is: “Act juridic unilateral al unei persoane (reprezentata), prin care aceasta abilitează o altă persoană (reprezentant) să încheie cu terții unul sau mai multe contracte, în numele și pe seama sa.”\textsuperscript{13} [Unilateral legal document of a person (that is being represented) by means of which he/she empowers another person (representative) to conclude with a third party one or more agreements on his/her behalf and to his/her benefit.] In one dictionary entry, the Romanian definition covers both meanings present in the English definitions. Both legal concepts have the same legal effects when applied. We are almost close to pronouncing the two legal equivalents ‘identical.’ Yet, doubt arises the moment we realize that there are other close synonymous legal concepts for both terms in both languages, namely those of ‘procuration’ and ‘procură.’ In Romanian there is a close synonymy between ‘împuternicire’ and ‘procură’; still, the scope of application of the term ‘procură’ is broader than that of ‘împuternicire,’ in other words the former has more legal force than the latter and may be used as a legal instrument in more legal circumstances than the latter. On the other hand, the term ‘procuration’ has many different entries\textsuperscript{12} and only one of them: “Making someone else your agent, lawyer, or representative”\textsuperscript{12} makes reference to empowering an official, without mentioning to what particular purpose. Therefore, the scope of application of the term ‘procuration’ is narrower than that of the term ‘power of attorney’ and not identical with the Romanian term ‘împuternicire.’ All things considered, the term ‘power of attorney’ can be considered to be identical with the Romanian term ‘împuternicire’. The concept of ‘terminological incongruence’ arises the moment we step into the land of ‘similar’ concepts. The translation is already shadowed by lack of accuracy, vagueness and the translator’s incertitude instantaneously leaves room for incorrect translation decisions.
The very signs of the translator’s having difficulty in finding an identical equivalent are: doubling the first choice by a second one (providing one or more synonymous terms, without making any distinctions between their use), creating a new linguistic equivalent instead of selecting a natural one, paraphrasing or even defining the source term when there is no conceptual correspondent in the target language to match the one in the source language and so on so forth. The second pair of terms chosen is ‘indictment’ and ‘rechizitoriu.’ We have started our analysis with the final result; the starting point was the attempt to find the most accurate Romanian legal correspondent for the English term ‘indictment’. For this purpose, we extracted from two important English-Romanian legal dictionaries all the Romanian legal terms and phrases presented as entries for the term ‘indictment’:

\[
\text{indictment} = \text{“act de acuzare, incriminare, rechizitoriu, punere sub acuzare”}^{14}
\]

\[
\text{indictment} = \text{“acuzaţie, rechizitoriu, incriminare, inculpare”}^{15}
\]

The first criterion which helped us eliminate a part of the synonymous listed terms was to choose ‘natural equivalents’ instead of ‘linguistic equivalents.’ We did that by verifying which terms had already existed as such in the accepted Romanian legal jargon, namely the ‘natural equivalents’; we used two sources: a Romanian dictionary of legal terms\(^{16}\) and a Romanian criminal law dictionary.\(^{17}\) The terms that could actually be found were: ‘incriminare, rechizitoriu, inculpare.’ Thus, the rest of the terms – the ‘linguistic equivalents’ (act de acuzare, punere sub acuzare, acuzaţie)” – were eliminated from the list of possible options. One does not need to be a legal expert to have a look at the three possible options left ‘incriminare, rechizitoriu, inculpare’ and guess the best one in terms of degree of equivalence with the term ‘indictment.’ The other two versions to leave the scene were: ‘incriminare’ and ‘inculpare’, since their scope of application is by far narrower than that of the term ‘indictment’; in fact they are semantically subordinated to the Romanian term ‘rechizitoriu,’ being stages involved in the process of indicting someone. There was no need to check the definitions of the two terms excluded since the criterion of exclusion used was obvious. The pair of terms left for the final conceptual analysis was ‘indictment’ and ‘rechizitoriu.’ It is at this point that we need to compare definitions and
make the legal analysis of the two concepts. Their *structure* is identical – criminal law.

The definitions:

*indictment* = “A sworn written accusation of a crime, made against a person by a prosecutor to a grand jury. If the grand jury approves it as a *true bill*, the indictment becomes the document used against the person as a defendant in pretrial and trial proceedings.”

*indictment* = “a written statement of the details of the crime with which someone is charged in the Crown Court.”

*rechizitoriu* = “act procedural by means of which the prosecutor issues the criminal procedure against the accused, unless it has already been issued and thus indicts him/her (now referred to as the defendant). The indictment represents both the legal document by means of which a criminal action is brought before the court and also the *bill of indictment*.”

Without mentioning all the details of our legal analysis in the American criminal procedure the term ‘indictment’ refers to the grand jury’s indictment that officially charges a defendant with a criminal offence and not to the prosecutor’s procedural act by means of which a charging document against a person is issued to the court for further approval. The latter meaning mentioned is valid for the British and the Romanian legal systems, in terms of the legal authority that issues the indictment – namely a Crown Prosecutor or a reviewing lawyer in England and a prosecutor in Romania. In the United States the prosecutors also have the right to bring a charging document to the attention of the grand jury, but this document is not called ‘indictment,’ but ‘information,’ ‘accusation’ or ‘complaint.’

Quite surprisingly, the Romanian term ‘rechizitoriu’ covers both the meaning associated to the term ‘indictment’ in the American legal system and in the British one. Consequently, we may say that the *scope of application* of the term ‘rechizitoriu’ is broader than that of the term ‘indictment’ restricted to American English and respectively British English.

To conclude, the Romanian term ‘rechizitoriu’ is a ‘partial equivalent’ for the term ‘indictment,’ since one of its half meanings
matches the meaning expressed by the term ‘bill of indictment’ in American English and the other half fully matches the British term ‘indictment.’ To put it in different words, the terms ‘indictment’ and ‘rechizitoriu’ may be considered ‘identical equivalents’ as long as we restrict our analysis to British English only.

c) Last but not least, the concept of ‘non-equivalent’ terms makes reference to the fact that there is actually no functional equivalent in the target legal system for a particular source concept. These source concepts that are practically untranslatable into the target language are called ‘system-bound term’ by Susan Šarčević. Terms like ‘equity’ and ‘trust’ are included in this category by the author as well as terms that designate institutions peculiar to the legal reality of a specific system and that have no functional equivalent in other legal systems or languages. Such an example would be the terms ‘Probate Court’ (American English) and ‘Probate Registry’ (British English) that have no functional equivalent in Romanian, since the Romanian legal system does not have such a legal institution as a separate court, distinct from other types of courts. Therefore, the English-Romanian legal dictionaries do not register any equivalents for these terms whose meanings can be grasped only by reading the Romanian translation of the verb ‘probate’, the noun ‘probation’ being misleading in this context of use.

Conclusions

Susan Šarčević’s studies and her high level of expertise in the field of legal translations are valuable since they endow the targeted readers with practical translation tools that prove their efficiency when dealing with the terminological incongruency of legal terms. Since the incongruency manifested at terminological level is a projection of an inherent conceptual incongruency of legal terms that belong to different legal systems, one should definitely search for translation solutions by accessing the level of conceptual boundaries. Though any translation process is partly based on linguistic intuition, for each type of special purpose text there is a well-defined class of criteria used to check whether the equivalents provided are accurate, conceptually and terminologically congruent and functional in the particular jargon of the target language.
In the field of legal translation, whenever the legal translator finds difficulty selecting a particular legal equivalent out of a large group of close synonyms, the following steps are to be followed: choosing the ‘closest natural equivalents’ that the dictionaries provide for the source term and eliminating the ‘linguistic ones’ that are not part of the official legal jargon of the target language; establishing the degrees of conceptual equivalence between the source term and the target term by considering the following criteria: structure, scope of application and legal effect. When the comparative conceptual analysis of the legal terms is not enough, one should resort to all legal sources available to clarify the notions involved. The clearer the concept, the more accurate its linguistic representation.

The only question that remains unattended is whether a professional legal translator, well aware of the notions of speed of translation vs. time consumed will ever consider spending a generous amount of time to do extensive legal research on a particular issue regarding his/her translation work. Even if he or she will not actually engage in such a time-consuming process, the very fact of acknowledging the need of founding the translation on the solid ground of legal knowledge in a particular area may prompt him/her either to enhance his/her legal expertise or ask for the assistance of a legal expert to check the accuracy of the translation.

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TEACHING THE ORIGINS OF ENGLISH LEGAL LANGUAGE

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ABSTRACT. This paper examines the potential useful role that teaching the origins of legal English may have in teaching English as a foreign language. On the one hand, by discussing the history of legal English, i.e. mainly its Anglo-Saxon, Latin and French origins, educators can improve the English teaching and learning processes, and get their law students engaged and interested in the English lessons. On the other hand, this approach can explain why the legal profession remains so linguistically conservative even today.

Keywords: ESP, legal English origins, Latin terms

0. From the ESP (English for Specific Purposes) teacher’s perspective, legal language teaching, in English, should rely on a careful analysis of several aspects: students’ legal knowledge in Romanian, metalanguage, knowledge of the Romanian, British and the U.S. legal systems, students’ needs and motivation, teachers’ background and commitment, interdisciplinarity, etc. The legal profession is based on words. Oral language is used by lawyers in communication with the judge, jury and witnesses, in discussions with various customers, and in writing in the form of contracts, wills or other documents. The legal field combines, therefore, legal science with linguistics, applied linguistics and language study, i.e., in our case, language teaching and learning.

Probably few people know how legal English came into being. Even if university programs and curricula cannot allot time to studying the origins of English legal language, teachers and students should get familiar with them. In our opinion, this approach can lead to: upgrading/improving the English legal language teaching/learning processes; an easier and faster way of learning legal terms; increased
interest (motivation) in the material taught; increased understanding of the causes of linguistic conservatism in this area continuing until today; explaining the reasons and factors that led to the formation of a complex, ponderous English legal language; understanding the efforts made to simplify the English legal language.

1. This paper presents, in particular, the origins and evolution of the English legal language (for details, see Tiersma’s *Legal Language*, 1999: 9-47):

a) *the language of the Celts*, probably the first inhabitants of England before the time of Christ. Both the language and the law of the British Celts has had little impact on the legal system. The surviving manuscripts of Celtic law reveal that Britons expressed legal concepts in sayings and maxims, written in semipoetic or rhetorical language, by using alliteration (the use of words, which begin with the same letter or sound). Poets may have acted as judges.

b) *Latin* and *Roman law* during the Roman occupation period, till the Roman legions withdrew from Britain, in the fifth century, did not have a lasting impact on the legal language.

c) *Anglo-Saxon*. Germanic tribes, which initially helped to fend off the Britons’ different enemies, decided to settle and took control of what is now England. Perhaps the Celtic-speaking Britons who survived the fighting were assimilated into the German tribes and adopted their language, forming the Anglo-Saxon or Old English. Political development determined the necessity of drafting written laws. Around the year 600, King Aethelbert of Kent produced written laws in Old English. Although the Anglo-Saxons had no distinct legal profession, legal terms from that period have survived until today: *bequeath* - a lăsa moștenire; *goods* - bunuri, mărfuri; *guilt* - vină; *land* - pământ; *manslaughter* - omor prin imprudență; *murder* - crimă; *right* - drept; *steal* - a fura; *swear* - a jura; *thief* - hoț; *witness* - martor.

Some of the most significant Anglo-Saxon legal terms to have survived are the words (see Tiersma, 1999: 10-16: *writ* (a sealed letter to confirm a grant of land or other legal transaction); the word is related to *write*, and its meaning is *document*); *will* (testament – in Old English *will* expressed *desire*). According to Tiersma (1999: 11), this meaning is preserved in phrases such as if *there’s a will, there’s a way* (în cazul în care există voință, există o cale) and if *you will* (dacă ați dori). Anglo-Saxons felt it prudent to end the will with a
curse; moot (meeting); an open-air meeting of the population to discuss local affairs and to resolve disputes; doom (in Romanian, sentință, verdict, osândă; pieire, Judecata de Apoi, sfârșitul lumii; condamnare, sentință; statut, decret; a condamna la moarte etc.). An old term for judge (judecător) is deemster or deemer; oath (to swear an oath / to promise to tell the truth; a jura că spune adevărul).

The power of words is reflected in their use in verbal formulas, especially in binding legal transactions and in the courtroom. If a word was skipped by the speaker, the case could be lost. Here is an example of a statement, which begins with the defendant’s appealing to the Divine and denying the charge with the following oath. In the English version, we can notice the exact repetition formulaic phrases and the use of synonyms:

\[
\text{In the name of the living God, I owe not to N. scett or shilling,} \\
\text{Or penny, or penny’s worth; but I have discharged to him all} \\
\text{That I owed him, so far as our verbal contracts were at first.}
\]

(Laughlin 1905: 195)

\[
\text{În numele bunului Dumnezeu, nu datorez niciun bănuț lui N.;} \\
\text{am achitat tot ce i-am datorat, așa cum am convenit în contractele verbale, inițial.}
\]

Some phrases rely on alliteration. They are still encountered in wills and contracts even today: any and all (oricare/toți/toate), clear and convincing (clar și convingător), fame and fortune (faimă și avere), rack and ruin (ruină), safe and sound (in condiții bune/nevătămat). Some of them, as explained by Tiersma (1999: 15), are a mnemonic device, or an easier memory retention way, especially during closing arguments to the jury. Alliteration also survived in conjoined phrases (binomial expressions/repetitive word pairs), i.e. parallel elements connected by a conjunction (and, or), for example, to tell the truth, the whole truth and nothing but the truth (a spune adevărul și numai adevărul).

d) Latin (II), promoted by Christian missionaries and the Roman church after 597. Use of Latin introduced terms like: client, conviction (condamnare), admit, mediate (a media), legitimate (a legitima), clerk (funcționar), which meant priest (preot; see also the Romanian word cleric).
**e) Scandinavian origin**

Vikings from Scandinavia began raiding the English coast. They sacked churches and monasteries, and later on they decided to settle down. In the ninth and tenth centuries, Scandinavian law (*Danelaw*) governed parts of England. Scandinavian influence on English language and English legal language reached its height probably when Canute the Dane became king of England in the eleventh century. The basic words *they* (*ei*), *skin* (*piele*), *take* (*a lua*), but also the words *right* (*drept*), *law* (*lege, drept*), *lawyer* (*avocat*), *gift* (*cadou*), *loan* (*împrumut*), *sale* (*vânzare*), *trust* (*încredere*) are of Scandinavian origin.

**f) French** (I). After the Norman Conquest (1066), Norman French became the language of power. Many significant words relating to the English government are French: *authority* (*autoritate*), *chancellor* (*cancelar*), *council* (*consiliu*), *country* (*țară*), *crown* (*coroană*), *minister* (*minister*), *nation* (*națiune*), *people* (*popor*), *power* (*putere*), *state* (*stat*), *govern* (*a guverna*), *government* (*guvern, guvernare*).

**g) Latin** (III), remained an important legal language, especially in written form, and developed into *Law Latin*. Some English words were Latinized (e.g. *murdrum* for *murder*). There are many words and phrases still in common usage (see Săuleanu, Rădulețu 2007; Grecu 2008; Nădrag, Bala 2009; DEX online):

<table>
<thead>
<tr>
<th>Latin and English</th>
<th>Romanian</th>
</tr>
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<tbody>
<tr>
<td>Certiorari</td>
<td>Certiorari/Ordin judecătoresc de revizuire a dosarului</td>
</tr>
<tr>
<td>Subpoena</td>
<td>Citație</td>
</tr>
<tr>
<td>habeas corpus</td>
<td>habeas corpus/Drept care garantează libertatea individuală și protejează împotriva arestării arbitrare, permițând arestatului să ceară prin avocatul său să compară în fața unui magistrat care urmează să decidă asupra legalității arestării.</td>
</tr>
<tr>
<td>versus</td>
<td>versus/contra, împotriva</td>
</tr>
<tr>
<td>et al.</td>
<td>et al./și alții, și alte lucruri</td>
</tr>
<tr>
<td>in personam</td>
<td>in personam/cu privire la persoană</td>
</tr>
<tr>
<td>in rem</td>
<td>in rem/cu privire la lucru/fapt</td>
</tr>
</tbody>
</table>
in propria persona  expresia se referă la infracțiuni cu autor unic
actus reus actus reus/elementul esențial al unei infracțiuni ce trebuie dovedit
corpus delicti corp delict
mens rea intenție criminală

h) French (II). The French used by lawyers and judges became known as Law French. It was a distinct language incomprehensible to English clients and probably to speakers of ordinary French as well. A measure was taken in 1362, with the adoption of the Statute of Pleading). The statute required that all pleas be: “pleaded, shewed, defended, answered, debated, and judged in the English Tongue” (Tiersma 1999: 28). The preservation of Law French underscores the linguistic conservatism of the legal profession. On the other hand, Law French was considered more precise than English. Most words referring to courtrooms, their officers and procedures come from Law French (see: Grecu 2008; Hanga, Calciu 1998; Nădrag, Bala 2009): action (act; acțiune în justiție; proces), attorney (reprezentant; mandatar; avocat), bailiff (portârel; șerif; primar), bar (instanță; impediment juridic; barou), claim (cerere; pretenție; revendicare; creanță; reclamație), complaint (cerere introductivă de instanță în materie civilă; acțiune judiciară; reclamație), counsel (avocat; sfat; aviz), court (judecătorie; tribunal; instanță judecătorească; comisie; curtea regală; consiliu regal), defendant (acuzat, inculpat; pârât), evidence (mărturie; probă orală; depoziție; dovadă), indictment (act de acuzare, incriminare; rechizitoriui), judge (judecător; magistrat), jury (juriu; jurați; curte cu juri), justice (justiție; judecătorie), parol (oral), plaintiff (reclamat), plea (pledoarie; pretext; obiecție) plead (a pleda; a invoca drept scuză; a alege), process (proces), sentence (sentință; judecată), sue (a chema în judecată; a acționa în justiție; a depune o plângere la instanță), suit (acțiune judiciară; proces; urmărire în justiție), verdict (verdict, judecată; decizia juriului în probleme de fapt, din procesele penale sau civile).

In Law French, the doubling often involved the pairing of a native English word with the equivalent French word: devise and bequeath (a lăsa prin testament); breaking and entering (acces ilegal, prin forță, pe o proprietate străină); acknowledge and confess (recunoaștere; mărturisire); goods and chattels (patrimoniu; marfă;
bunuri mobile); had and received (primite; acceptate; încasate); will and testament (testament; act de ultimă voință).

2. For centuries, people have complained about the cumbersome English legal language and required the use of English without Latin and French influence. The modern movement to simplify legal language started in the ‘70s, and it is known as Plain English Movement. The U.S. founding fathers of the Constitution were also aware of the problems related to legal language. John Adams, Thomas Jefferson criticized the traditional style of written laws, the use of many, redundant words, tautologies, parentheses within parentheses, long sentences linked by the conjunctions and, or.

By 1835, Arthur Symonds criticized this type of language and suggested that the simple sentence I give you that orange, would be rendered by lawyers as follows:

I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A.B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinebefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind soever, to the contrary in any wise, notwithstanding.
(Symonds 1835, quoted in Tiersma 1999: 62).

The member states of the U.S. are still trying to define plain English and establish guidelines for the use of legal English. Thus, for example, a law in Pennsylvania states that a contract should only use short words, sentences and paragraphs; active verbs; known, commonly understood legal terms, such as mortgage (ipotecă), warranty (garanție); should not use Latin terms and foreign words unless they express an archaic meaning; the contracts will make reference to parties by using personal pronouns and the terms seller (vânzător), buyer (cumpărător); a statement will not contain more than one condition; the sentences will not have double negatives and exceptions to exceptions (Pa. Stat. Ann. tit. 73, # 2205 (b) (1997)).
3. Conclusions

According to Tiersma (1999: 241), “the language of the legal profession has been criticized as arcane and archaic, complex and convoluted, pompous and ponderous”. Therefore, we do support the idea of studying the origins of English legal language in order for our students to understand its linguistic evolution; to facilitate the teaching and learning of a minimum specialized vocabulary; Romania's entry into NATO and the EU are other incentives for studying this kind of language.

NOTE

The Romanian version of this paper, bearing the title “Câteva argumente, de natură lingvistică si didactică, în favoarea studierii originii limbajului juridic englezesc”/ “Some arguments, didactic and linguistic, in favor of the study of the origins of the English legal language,” was published in The Annals of Spiru Haret University, in 2010.

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ABSTRACT. Creativity manifests itself in many areas of translation. Addressing the concept of creativity in legal language seems to be a real challenge that few translation theorists have taken up. Creativity in legal language has drawn the attention of scholarly research since the profile of the legal translator has also incorporated the role of a text producer and respectively that of a co-drafter. The paper is limited to how creativity can be put to work in a single area of the legal language, namely the syntax. It focuses on the basic alterations in the syntax that a legal translator can operate without affecting the substance of legal texts. The purpose of such a ‘creative intervention’ is to achieve clarity, simplicity, conciseness and emphasis, in a word to honor the principle of ‘language consistency.’ Since the area where legal translators can be creative is limited to the non-standardized legal texts, the practical examples and illustrations chosen belong to persuasive legal language.

Keywords: legal translation, discourse analysis, creativity, parallel structures

Introduction

Persuasive legal English has always been a cornerstone of mental manifestation. Being persuasive and brief at the same time is no easy thing to achieve. Creation and co-creation of text, by translation, implies good knowledge of both source and target language as well as metalanguage. Yet, this paper will focus on the creation of some persuasive proficient legal language viewing to stress the syntactic discourse importance. Momentous concepts will take up brevity and simplicity, clarity and honesty, word order and sentence length. The purpose of the paper is to give supportive ideas to both lawyers and
legal discourse translators in order to avoid regrettable misunderstandings and confusion.

**Simplicity, Brevity, Clarity**

The first level of analysis is the intonation and pitch patterns different languages use. The order of the constituents (such as Subject-Predicator-Complement) or words such as adverbials may also lead to a further structuring of the text. Depending on their position and relation in the sentence with the other elements or constituents, there are different means of focusing certain parts of the sentence. Diller & Kornelius 1978: 58 take up focusing on the complement in English by means of clefting. By analyzing the different aspects of syntax (e.g. theta-role assignment, distribution of main and subordinate clauses and non-finite constructions) the translator may actively co-create the legal text but also, regrettably, if there should be the case, influence the final verdict.

The deviation from syntactic norms and conventions which is used in order to produce a particular stylistic effect becomes manifest by means of figures of speech that must be increasingly attention-raising for the translator. In this case, the translator first has to find out what kind of deviation is used and how it works before he can decide whether or how to "translate" it. It is equally true that figures of speech are not so frequent in legal style but they may be the most important point in a plea or demonstration and thus acquire vital weight. The syntactic characteristics, too, depend on various other intratextual features, especially content and composition (e.g. distribution of informational details both in the text and in the sentences), range of words (e.g. verbal or nominal constructions), and suprasegmental features such as stress or intonation.

The translator gets a first impression of the typical sentence structure of a text by analyzing the length and type of sentences (statements, questions, exclamations, ellipses) and the other constructions which replace sentences (infinitives, past and present participles, gerunds), the distribution of main clauses and subordinate clauses and the connection of sentences by connectives, such as conjunctions, temporal adverbs, substitutions, etc. (cf. Crystal & Davy 1969: 43ff.). On this type of analysis, he is able to find out how information is structured.
Another way of structuring information, this time at the level of the clause, is represented by word order, different in various languages, the pro-drop parameter of the UG which stipulates the possibility of omitting the subject from the S-Structure in some languages as well as the word choice (strength and color of the lexical items, conciseness or structure of the arguments). All factors enumerated belong to the domain of syntax or even discourse analysis and greatly contribute to the likeliness of inducing creativity. The main lines of development of legal discourse should revolve around some major principles namely brevity, simplicity and clarity.

Considering a 300-year-old opinion coming from Voltaire who said that “the adjective is the enemy of the noun” and successfully applying it to legal discourse, text creators should pay extra attention to brevity, eliminating unnecessary or implicit words. Intensifiers may create emphasis in speech but in the written discourse, they soften the impact. We consider useful a list of syntactic modifiers that could be avoided in legal discourse:

absolute(ly), actively, actual(ly), (it) appears that, as far as ~ is concerned, assuredly, basically, certainly, (it is) clear in this case that, clearly, completely, definitely, doubtless(ly), effectively, entire(ly), essential(ly), exactly, extremely, first and foremost, frankly, fundamentally, greatly, highly, historically, hopefully, in that regard, inevitably, inherently, interestingly, it can be stated with certainty that, it goes without saying that, it is important to note (worth noting; should be noted), it would appear that, largely, literally, mainly, more or less, mostly, naturally, nearly, necessarily, no doubt, not only . . . but also, on the one hand, per se, plainly, purely, quite, rather (adj.), relative(ly), reportedly, respective(ly), seriously, (a) significant degree of, situated, somewhat, sort of, suffice it to say, surely, systematically, thoroughly, totally, truly, unfortunately, utterly, various, virtually.

Other hints for achieving simplicity would comprise: redundancy should be eliminated; clauses should be condensed to phrases and phrases to words; introductory clauses should be eliminated; single point simple sentences should be used; compound sentences should be avoided and longer sentences should be divided into two or more; and needless words should be omitted.

Here is a short list where needless words have been crossed out:

testified at trial, said in his testimony, the evidence in the record in, in the instant case, in many cases the engines were defective, at this point in time, check in the amount of, in the majority of instances, in the event that, a large
number of, with the exception of, the question as to whether, despite the fact that, due/owing to the fact that, this case is a difficult one, there is ample evidence to support the fact that, With respect to the, call your attention to the fact that, the fact that he had not succeeded, regarded as being, have knowledge of, in accordance with, did not in any way, The medical expert was of the opinion that, was able to draw conclusions as to, an excessive number of.

Text creators should also aim for 10 to 20 words (one to two lines) because shorter sentences are easier to comprehend. A sentence fragment is permissible: “Not so.” “On the contrary.” “Just the opposite.” “True enough.”

Other syntactic recommendations consist in:

1. “That + verb” can be replaced with “verb + ing.” E.g.: Instead of “authority that decides,” write “authority deciding.” We remind you that, syntactically, “that” is unnecessary: “He knew that the judge was right.” It is only in some cases that it can be kept to avoid ambiguity: “He knew that the defendants’ cost-cutting practices violated industry standards.”

2. “Who” and “Which”, when relative, can be deleted:
   *Incorrect*
   His brother, who is a member of the same firm, got away unpunished.
   *Correct*
   His brother, a member of the same firm, got away unpunished.

3. Possessives should be formed analytically, and nominalizations should be avoided, thus not “decisions of the court,” but “the court’s decisions.” “a study of the statutes of California,” but “a study of California statutes.” “The attorney told the client of the lack of a legal basis for the claim,” but “The attorney told the client the claim lacked a legal basis.” “He worked for the elimination of fraud,” but “He worked to eliminate fraud.”

4. All linguists recommend active voice instead of passive since the latter hides away the actor while the former is stronger in message.
   *Incorrect*
   During shopping around, a promotion was offered for jeans that attracted him.
While shopping around, they offered him an attractive promotion.  
5. Negative constructions should be avoided because they burden the reader.

Incorrect
There is not a single judge in Romania that is not corrupt.

Correct
Every judge in Romania is corrupt.

6. Negative statements should be replaced with positive ones:

<table>
<thead>
<tr>
<th>Negative phrase</th>
<th>Positive phrase</th>
</tr>
</thead>
<tbody>
<tr>
<td>not accept</td>
<td>reject</td>
</tr>
<tr>
<td>not unlike</td>
<td>similar, alike</td>
</tr>
<tr>
<td>does not</td>
<td>fails to</td>
</tr>
<tr>
<td>does not have</td>
<td>lacks</td>
</tr>
<tr>
<td>does not include</td>
<td>excludes, omits</td>
</tr>
<tr>
<td>not many</td>
<td>few</td>
</tr>
<tr>
<td>not often</td>
<td>rarely</td>
</tr>
<tr>
<td>not the same</td>
<td>different</td>
</tr>
<tr>
<td>not . . . unless</td>
<td>only if</td>
</tr>
<tr>
<td>not . . . except</td>
<td>only if</td>
</tr>
<tr>
<td>not . . . until</td>
<td>only when</td>
</tr>
</tbody>
</table>

7. Words with multiple meanings should be used only in one of the meanings consistently.

Example: *Since*: Use it for “from the time when”; for causation, use “because.”

*While*: Use it to mean “during”; to introduce opposites, use “though.”

8. The restrictive/nonrestrictive modifier dilemma should be avoided.

Example: *That v. Which*: For essential modifiers, delete “that” and use the “-ing” form of the verb. For nonessential (nonrestrictive) modifiers, delete them as not essential. Example: The document signed by the employee contradicted him.

9. The phrases should be condensed as much as possible

Example: A subordinate clause (subject-verb-object) can often be shortened: Traian Basescu, who had been formerly Minister of Transport, became President. While he was managing the Ministry… => While/On managing the Ministry… He led the Ministry in a reckless way => recklessly

We think simple language is better for various reasons: most importantly it is more persuasive (Winston Churchill once said: “He
who cannot say what he needs to say in plain English has nothing to say worth listening to.” Simple language is easier to grasp. The very process of understanding then distracts from the real point of the exercise, which is to change the reader’s mind. Second, abstract language has a tendency to be soft and ambiguous. The process of translating it into concrete examples during the drafting process reveals fuzzy thinking. On the other hand, it’s much more difficult to remain immune to an argument that’s made in concrete terms; the contradictions become immediately apparent and the reader has to find some way of reconciling them. This may, of course, result in an adverse decision, but at least the reader must come to grips with the argument on its merits. So simplifying and clarifying is not just a nice thing to do to be kind to the judges. It’s really the essence of persuasive discourse.

From the perspective of the analysis of discourse, yet with a clear emphasis on the syntactic component, coherence is the second important factor after sentence brevity. In translation, the text co-creator has some degree of liberty to maneuver constituents as long as the communicated main ideas do not alter. Clarity can be achieved primarily by structuring the argumentation and the words in the introduction should reappear in the headings. A second important factor is the order of arguments, as the momentous one should always be placed first, immediately after the already familiar information. Key words are always a good idea to use both in headings and in the following part of the argumentation as well as in the conclusion of the written plea. Translators as well should be consistent with such details and should not wave from one term to another. Creativity is not to manifest itself at this point and in this way but rather in the choice of words and the stylistic parallelisms we will deal later in this paper. Good legal translators will find the paraphrases that will not alter the meaning as well as the balance between simplification (that is good) and oversimplification (that is bad). Simple arguments win, complex ones rarely do so.

In order to obtain such organization and clarity, discipline of mind needs to be reflected in the style of writing. Sentences and paragraphs must be connected to each other by means of the so-called “weak connectors” like “Further,” “Accordingly,” “Moreover,” “Thus,” or the simple, efficient “strong connectors” like “But” or “And.” Pointing words - words that inherently refer to a prior statement, e.g., pronouns, demonstratives like this, that, those, provide a
much stronger connection. For example: “John said x.” In context he meant ‘y.’” The use of “he” instead of repeating “John” in the second sentence links the sentences. The second sentence does not stand on its own. Connections can also be made stronger with repetition or parallelism. For example: “John testified ‘x.’ His testimony was critical.” “Testimony” in the second sentence repeats the verb “testified” in the first. It links the two sentences together. Prepositions are always a cornerstone for translators as they rarely correspond from one language to another. Text co-creators should be careful with prepositions. Eliminating prepositions is a good way to shorten sentences. Prepositions such as “of, by, with,” are targets for scrutiny. For example, compare “considerations of public policy” with “public policy considerations”; “as a result of” with “resulting from” (or even just “from”); and “the statement by Johnson” with “Johnson’s statement.” Words ending in “ment” or “tion” can sometimes be problematic in translation. “They often replace active verbs. For example, compare “he gave the matter consideration” with “he considered the matter.”

Other considerations regarding cohesion and internal coherence should also be made. Long introductions are to be avoided and should be limited to three or four words; the subject should be placed at the start and avoid introductory clauses modifying the subject. It burdens the reader, who does not yet know who or what the clause modifies. The subject should be strong, and cleft or pseudo-cleft sentences are to be avoided:

Incorrect
It was the defendant’s vice-president who approved the false press releases.
There is testimony from Dr. Johnson that Dr. Brown should have given steroids.

Correct
Defendant’s vice-president approved the false press releases.
Dr. Johnson said Dr. Brown should have given steroids.

Parallel structures add force to a point the reader might reject and it makes complex information easier to grasp.

Incorrect
Whites and blacks are murdered in about equal numbers. Yet 80 percent of the more than 840 people put to death in the U.S.A. since
1976 were convicted of crimes involving white victims, compared to the 13 percent who were convicted of killing blacks.

Correct

Whites and blacks are murdered in about equal numbers. Yet the execution of their murderers is not racially proportional. Since 1976, killers of whites constitute 80 percent of executions, while killers of blacks constitute 13 percent.

Here is a way to achieve good parallel structures and be creative in translation, too. 1. Repeat the beginning of successive clauses: Defendant waived this defense by failing to allege it in the answer, by failing to prove it, by failing to argue it to the jury, and by failing to include it in the verdict. 2. Repeat the end of successive clauses: “that government of the people, by the people, for the people, shall not perish from the earth.” 3. Repeat the end of one clause and the start of the next: The breach was costly; costly should be the remedy. 4. Repeat in reverse order: “Let us never negotiate out of fear, but let us never fear to negotiate.” 5. Juxtapose opposite ideas: Though slovenly in appearance, he was meticulous in business. [These examples are taken from Bryan Garner, *The Winning Brief*].

Conclusions

The present paper will not claim to be a guide for successful writing, nor for persuasive writing nor a tool for translators but merely a study that puts all of the above-mentioned together and jogs the memory of the less skillful. The aim is to produce better, convincing written texts in a world that so often than not emphasizes oral communication. Creativity is vast but only for experienced translators who can handle syntactic structures and range of words, not to mention colorful language or metaphors.

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ABSTRACT. The purpose of this paper is to explore criminal conversations as set against the background of Medieval Western Europe. During the early Middle Ages, as most noble marriages were little more than business contracts, love had begun to be seen in a very different way: sometimes as a cult with all the trappings of religion, sometimes as a sinful occupation best expunged from the human system, and sometimes as a romantic experience which foreshadows the ideas of the 18th and 19th centuries.

Keywords: criminal conversation, rules, rituals, marriage

1. Introduction

The concept of criminal conversation sugar-couched in the terms of Courtly Love developed among the aristocratic classes of Western Europe, during the late 11th century. Courtly Love is a strange movement of the 12th century Troubadours who made a virtue of love outside the bounds of marriage and raised the service of lover to beloved to an almost religious fervor. In courtly love, a man passionately devoted himself to a woman who was married or engaged to another man. Courtly love required adherence to certain rules, elaborated in the songs of the Troubadours. According to these conventions, a nobleman, usually a knight in love with a married woman of equally high birth, or, often higher rank, had to prove his devotion by heroic deeds and amorous writings presented anonymously to his beloved. Once the lovers had pledged themselves to each others and
consummated their passion, complete secrecy had to be maintained. As most noble marriages in the Middle Ages were little more than business contracts, *Courtly Love* was a form of sanctioned criminal conversation because it threatened neither the contract nor the religious sacrament of marriage. The fact of the matter is, faithlessness of the lovers toward each other was considered more sinful than the adultery of this extramarital relationship. Therefore, we can speak of a religious code, a new attitude to women, who were no longer seen as chattels to be bought and sold on the matrimonial market place of feudal Europe, but as potential goddesses all.

In the legends, Arthur is more than simply a warrior king: he is the symbol and perfect expression of a world of chivalry that is also a world governed by the principles of courtly behavior that new ideology imported from the South of France by the Troubadours who accompanied Eleanor of Aquitaine on the occasion of her two successive marriages. The basic rules of courtly behavior differ little from Christian precepts: a knight must place himself in the service of the widow and the orphan; he must behave honorably at all times, respecting the rights of the individual and, where necessary, ensuring that these rights are respected by others. But the principal emphasis of courtly behavior relates to the conduct to be observed vis-à-vis ladies and young women. If Gawain’s inveterate tendency to flirt with every young woman he meets constitutes a reprehensible attitude in the eyes of the Church, the principles of fin’amor, ‘serious’ courtly love, are downright scandalous, since this perfect love is necessarily adulterous, and the lover is nevertheless obliged to submit entirely to the whims of his lady. *Fin’amor* placed the woman in a superior position with regard to her lover, who received her love only in exchange for total devotion.

From the outset King Arthur is presented as married, in accordance with the traditional image of the good sovereign. Queen Guinevere is probably an adaptation of the mythical figure of Sovereignty, a fact that explains her tendency to be abducted by every pretender to the throne. While Queen Guinevere plays different roles in the different versions of the legend, we can spy the very beginning of Courtly love in the early works, namely in, Geoffrey of Monmouth’s *Historia regum Britanniae*, Lawman, *Brut*, The *Vulgate*, The Alliterative Poem *Morte Arthure*.

In the romances, however, Guinevere undergoes a change of image. In *Le Chevalier de la Charrette*, the prose romance written by Chrétien
de Troyes, Lancelot, Chrétien de Troyes’s invention, appears as the queen’s lover, as well, of course, as the best knight in the world. It is because of this adulterous love that Lancelot is unable to succeed in the quest for the Grail, and ultimately that the Arthurian dream comes to an end. The code of chivalry relies, however, on the defense of Christian virtues and, despite his anger towards Guinevere, Arthur is obliged to take her back when the Church demands it on pain of excommunication.

Courtly Love, as well as possessing an actual court, with all the rules and etiquette which were part of this, was also seen as a semi-religious order, a true église d’amour, with its own laws and rules for worship. Thus a man might look at a woman, might woo her, desire her, and might vocalize that desire in endless panegyric, but he was forbidden to do more. The Courtly Lover thought of himself as acting in a semireligious context, serving the all powerful god of love and worshipping his ‘lady saint.’

1.1. The Social and Literary Influences of Courtly Love

The circumstances which created the new sentiment, and made it an active force in the late 11th century France, are various. However, certain factors in its make-up are easily definable. Feudalism, with its binding obligations of loyal service to a lord upon whom all fortune depended, provided the general background and even, perhaps, some of the poetic vocabulary, the troubadours spoke often of the adored lady as, “my lord” (“midons”). It may also be true that the conditions of life in the castle civilization of southern France at this time were favorable to the development of courtly love. Rich but isolated centers of refinement and culture, the castles contained lots of men but few women; to the lady of the castle the knight and squire may have felt themselves feudally inferior. The adulterous basis of such love is understandable in the light of medieval marriage conventions, and the attitude of the church to marital passion. Marriage was usually a business contract, involving property and military power but little sentiment; no woman had freedom either to choose her husband or to prevent the annulment of the marriage for political or dynastic reasons if, as often happened, it was not a success. The teaching of the church upon the relationship between husband and wife was ambiguous as far as passionate love was concerned; it could have done little to encourage the growth of romantic devotion.
For these reasons the idealization of passion could not be based upon the Marriage State; poets looked beyond it.

However, certain specific literary influences were also at work. The first to be mentioned is the *Ars Amatoria* of the Roman poet Ovid (43 B.C.–A.D. 18), a textbook upon the arts of seduction which was well known in France in the early Middle Ages and provided advice for both men and women. Ovid treats love with an ironic reverence, the lover making exaggerated obeisance to the god Amor and to the lady’s slightest whims in order to achieve the gratification of his desires. The *Ars Amatoria* refers to extramarital intrigues, and it is clear that the troubadours drew upon it. The Ovidian lover is the slave of passion; he is pale, trembles, is unable to sleep or eat, swoons and is even known to die of love. Ovid’s attitude to love, however, is mock-reverent; his adoration of the lady is an assumed pose, calculated to win purely sensual rewards. He is, for instance, willing to recommend force as a legitimate method, if pleading fails, and he becomes, by turn, the servant and the master of the situation, indulging, if he pleases, in more than one liaison at a time. Although his book undoubtedly provided some of the material for the idea of courtly love, it could not have accounted for the wholly serious, idealistic outlook of its first medieval exponents.

Various sorts of explanation have been sought for this outlook. One view is that increasing veneration of the Virgin Mary helped to place the lady of the French poets in such an exalted position. Another view sees the matter as a clear case of the influence of religious heresy. Provence, during the years in question, was certainly a breeding ground for strange heretical beliefs which were not completely rooted out until the Albigensian crusades of the 13th century (1209-1229) and it has been suggested that the earliest troubadours were inspired to write not by love of a real woman but by the mystical doctrines of the Cathars. Its adherents were strong in Provence, and can sometimes be localized in those very castles where troubadours lived.

A rival claim has been made for the origins of courtly love in Arabic mystical philosophy; even if this is judged controversial, it is highly likely that the literature of Muslim Spain had a direct influence upon southern French poets. A treatise, the *Tawq al-Hamana(w)* (*The Dove’s Neck-Ring*), written in 1022 by the Andalusian religious philosopher Ibn Hazm (994-1064), contains, in detail, most of the ideas which recur in all medieval treatments of courtly love from the troubadours onward. The *Tawq al-Hamana*, which draws upon many
earlier eastern textbooks of love, and ultimately upon Platonic philosophy, contrasts strongly with Ovid’s manual in that it seeks to discover spiritual significance in passionate relationships. While never denying the joys of union, Ibn Hazm approaches his themes in a refined, idealizing way, stressing, for instance, that love “is a reunion of souls in the original sphere of their higher world” and that love properly requires the virtues of magnanimity, continence, loyalty and courage. Features of the doctrine which seem familiar after reading some European courtly love literature are: the sovereignty of love, the conception of love as a delightful disease, the association of love with sleeplessness and lamentations, the necessity of secrecy and a faithful service, and the almost blasphemous nature of faithlessness.

Considerable evidence supports the idea that during the late 11th century and the 12th century troubadour poets such as Guilhem VII, count of Poitiers, William IX, duke of Aquitaine, Marcabrun and Jaufre Rudel imitated and adapted Hispano-Arabic poetry written to conform with these principles. Guilhem married Philippa, widow of the king of Aragon, in 1094, and it is very likely that among those she brought with her to Aquitaine were singers knowledgeable in the Arabic ways of making poetry. In spite of the opposition of the Christian and the Muslim in the crusade warfare of those times and later, there is good reason to suppose that the French could read and did learn philosophies, stanza forms and melodies from their enemies.

Courtly Love must, therefore, be regarded as a complex product of a number of factors: social, religious, philosophical, erotic, operating upon the privileged culture of Aquitaine and Provence in the 11th and 12th centuries. The expression given to it by the troubadour poets was varied and intricate; the finest of them, from Guilhem (1071–1127) to the later Bernard de Ventadour (1150–1195) and Arnaut Daniel (c.1180–1210) made their strong personalities felt through extravagant modes of sentiment and meter.

1.2. Courtly Love – A Tradition Developed in France, Italy and England

Courtly Love was not long confined to Languedoc, and as it spread to the north of France, England, Germany, Spain and Italy, it both developed and was modified. By the mid-12th century its themes were certainly in the hands of some northern French poets. One of the decisive influences in this transmission was Eleanor of Aquitaine
(c.1122–1204), granddaughter of the early troubadour duke of Aquitaine. Married first to Louis VII of France, and then to Henry II of England, she inspired some of the best poetry of Bernard de Ventadour; at her courts in France and England she was a patroness of the new love poetry. Her daughter, Marie, countess of Champagne (1164–1198), encouraged the writing of the most famous courtly love romance of the later 12th century: the *Lancelot* of Chrétien de Troyes (1170) and possibly, also, the important textbook on the subject by Andreas Capellanus, the The Art of Courly Love, c. 1200. Chrétien de Troyes tells us at the beginning of *Lancelot* that Marie de Champagne supplied him with both the content and the method of approach for his poem. Exactly how revolutionary her commands were is easily shown by a comparison of Chrétien de Troyes’s earlier poem, *Erec et Enide*, with *Lancelot*. In *Erec et Enide* the older view of women predominates – the heroine is a model of wifely patience and submissiveness in the face of harsh and unprovoked trials. In *Lancelot* we have, in the first place, an adulterous situation. The heroine, Guinevere, dictates imperiously to Lancelot, who obeys her in every unreasonable demand. The absolute sovereignty of love is recognized, and Lancelot approaches his lady’s bed with the solemn reverence of a worshipper at a shrine. Chrétien de Troyes’s importance, in the present context, is that he was, as far as it is known, the first to graft the theory of courtly love on to the old, original Celtic narratives of Arthurian legend. It was a successful graft; other narratives followed not only in France but also in Germany and England. From then on, Arthurian stories, such as those of Lancelot and Guinevere, and Tristan and Iseult, were framed as typical courtly love situations, with the appropriate sentiment.

The contribution of Andreas Capellanus, was a textbook codification of the whole doctrine of courtly love, much on the lines of Ibn Hazm’s *Tawq al-Hamana*. His work, entitled *The Art of Courtly Love*, may be accurately described as the Troubadours’ Bible. It consists of three books, two of which are devoted to such matters as the nature of love, methods of acquiring, retaining and increasing love, the signs of love and procedure to be followed in the event of one lover proving unfaithful. The definition given by Andreas Capellanus could have come from the *Tawq al-Hamana*:

> Love is a certain inborn suffering derived from the sight of and excessive meditation on the beauty of the opposite sex, which causes each one to wish above all
things the embraces of the other and by common desire
to carry out all of love’s precept in the other’s embrace.\textsuperscript{8}

He stresses that love develops nobility, but also that it is the pre-
rogative of the leisured and cultured classes. It would be inappro-
priate for a man to apply the rules of courtly love if he had the
misfortune to fall enamored of a peasant woman. In his specimen
dialogues for lovers and his list of precepts, Andreas Capellanus
sums up the theory of courtly love as the high Middle Ages under-
stood it. The impossibility of love between husband and wife is still
maintained. Devotion to the lady’s wishes and attention to secrecy
are essential; the true lover is still subject to sleeplessness and violent
agitation and is commonly pale through the “inborn suffering” he
endures. The fact that Andreas Capellanus thought it wise to shape
the third book of the treatise as a solemn exhortation to engage in the
service of a higher love, that of God, should not lead us to doubt
either the serious intent of the preceding books or their influence.
Courtly love continued to enlarge its dominions, sometimes retaining
its original character, sometimes changing as it came into contact
with new traditions of thought and literary forms. The long French
allegorical poem of the 13\textsuperscript{th} century, the \textit{Roman de la Rose}, begun in
1237 by Guillaume de Lorris and finished before 1280 by Jean de
Meung, took as its theme the story of the difficult progress of the
courtly lover toward his goal, expressing it as a dream adventure
within a walled garden; the lady’s love is represented as a rosebud,
enclosed by a thick thorn hedge. The dreamer, wounded mortally by
the arrows of the god of love, becomes love’s vassal and is instructed
in his new duties with the familiar detail of the \textit{De Arte Honeste
Amandi}. The rest of the Guillaume de Lorris section of the poem is
taken up with the dreamer’s triumphs and setbacks as he attempts to
gain the lady’s favor; he is in continual suspense, moving between
happiness and despair in the way the Middle Ages had come to think
natural to the lover’s condition.

The 13\textsuperscript{th} and 14\textsuperscript{th} centuries saw Courtly Love pervading European
literature; the romances and minnesinger lyrics of Germany are
witnesses to its power, as are also the vernacular songs of Italy and
England. But it is in the two last mentioned countries that it receives
most interesting handling from great writers. Traditional contacts
and exchanges had helped to make troubadour forms and doctrines
well known to Italian poets, and as early as the 12\textsuperscript{th} century their love
poetry was imbued with courtly ideals. The essence of all the romantic
material considered so far can be found in the lyrical and rhetorical verse addressed to Laura by Petrarch in the 14th century. More important still is Dante’s fusion of courtly love and mystical vision. Beatrice is the idealized lady of his earthly devotion, who was, in fact, the wife of another. But she is also, in the *Divina Commedia* (1307–1321), wisdom, philosophy and spiritual guide to the mysteries of paradise.

The history of courtly love after the medieval period is part of the general history of European sentiment, and as such cannot be treated without reference to innumerable religious and philosophical issues and literary fashions. It is this aspect of its development which has proved courtly love of greater importance to western culture, although the imaginative appeal of the original stories of secret, unlimited passion has never failed to draw poets and musicians, and belief in the eccentric behavior of the lover is a commonplace of popular tradition today.

**Conclusion**

This paper has examined the connections between medieval literature and courtly love, that code of behavior which used to define the relationship between aristocratic lovers in Western Europe during the Middle Ages. We have seen how, influenced by contemporary chivalric ideals and feudalism, courtly love required adherence to certain rules elaborated in the songs of the Troubadours between the 11th and the 13th centuries; however, these rules stemmed originally from the *Ars Amatoria* (The Art of Loving) of the Roman poet Ovid.

Literature, in the tradition of courtly love, includes such works as *Lancelot* by Chrétien de Troyes, *Tristan and Isolt* by Gottfried von Strassbourg, *Le Roman de la Rose* by Guillaume de Lorris and Jean de Meung, and the Arthurian romances. The theme of courtly love was developed in Dante Alighieri’s *La vita nuova* (The New Life) and *La divina commedia* (The Divine Comedy), and in the Sonnets of the Italian poet Petrarch.

In Thomas Malory’s book, we find that chivalry itself is informed by love, just as love is informed by the service required by all who take the vows of chivalry seriously. Love itself thus becomes an initiation, which is why we find so many of the women who feature largely within the Arthurian cycles to be of the Otherworldly stock. We have seen that many of the heroes who court or worship or even
marry them, share this heritage, too. Therefore, in the end, the worlds are brought together at every level, physical, emotional, spiritual.

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7. idem.
DYNAMICS OF LEGAL VOCABULARY IN
THE NEW CODE OF CRIMINAL PROCEDURE

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ABSTRACT. Legal Semiotics includes legal linguistics and pragmatics of
the legal language, reported to the Transmitter and Receiver, subject matter,
acts of language, purpose, situation of communication, etc. Legal Linguistics
studies legal discourse, with its three components: specialized vocabulary,
enunciation structures, and stylistic features. (Legal) specialized vocabulary
manipulates terms that refer to the knowledge in the field. General
vocabulary words turn into legal terms by unique, independent of context
meanings. An important aspect of language is the dynamics of specialized
vocabulary, by derivation, compounding, or by linguistic borrowing of the
neologisms. In the new Code of Criminal Procedure new terms for some old
concepts or for new legal concepts have been assimilated: suspect, house
arrest, warning, plea bargain agreement, preliminary chamber, judge of rights
and freedoms, appeal in cassation, community work.

Keywords: semiotics, legal linguistics, legal discourse, neologisms

1. Language is a “linguistic system more or less specialized in ren-
dering the content of specific ideas of a profession, of one or more
people from socio-cultural life, [...] any language is nothing but the
language to which a particular destination is assigned.”¹ As social
science, the Law uses language as a means of expression, the text
being its prime instrument and object. Legal linguistics or judicial
linguistics studies specialized vocabulary of the legal field, repre-
senting a discipline in the francophone area (Francois Geny, Gerard
Cornu, Jean Claude Gemar) with Legal Terminology and legal dis-
course as object of study.²

2. The strong relationship between linguistic and legal sciences
has been examined since 1981, and also by the Romanian experts in
both fields. Barbu Berceanu has highlighted the distinction between
the activity of the law in the linguistic field, “law which gives words a legal value,” and also the linguistic activity in the legal field; “which refers to words with legal significance.” Adriana Stoichiţoiu-Ichim, having been concerned with text-speech relations in legal and administrative language since 1981, will publish Semiotics of Legal Discourse, in which the current state of research in legal language is presented, a sketch of the history of Romanian legal language, pragmatics of normative legal discourse, semantics of normative legal discourse, and practical implications of research in legal discourse.

Important contributions to the study of legal linguistics have been brought by Teodora Irinescu, Adriana Sferle, Sorin Popescu, Cătălin Ciora, Victoria Țândâreanu and others. The purpose of this research aims at clarity and precision of legal language, obtained by the most appropriate analysis and use of legal terms and expressions.

3. An important means of ensuring accuracy of legal style is to counteract multi-style, a well known fact being that, apart from terms which belong exclusively to specialized language, numerous polysemantic terms are used by developing a legal meaning, besides the meaning or meanings of the common language.

In order to avoid legal imprecision, the legislature intervened by Law no. 24/2000 on rules of legislative techniques for legal drafting, by which it intervenes legislatively to moderate the inconveniences of polysemy, because “the law makes the choice, it excludes. Legal meaning is, as hypothesis, unique. This way the law reduces the use of polysemy making only one meaning appear clearly, the meaning of the law.” The first means, as recommended by Law 24/2000 to control polysemy, is the definition of certain terms and concepts, “in the general regulations or in an annex dedicated to that lexis and it becomes mandatory for the laws of the same subject.” (art.35, par.2).

4. A comprehensive study devoted to the definition of legal terms is made by Adriana Stoichiţoiu-Ichim, in chapter 6 of Semiotics of Legal Discourse, devoted to semantics of normative legal discourse. Based on a systematic analysis of the terms defined in the paragraph devoted to the semantic field of the person involved in a criminal action, we shall illustrate the dynamics of legal vocabulary present in the new Code of Criminal Procedure, undertaken by the government in 2010. If in Adriana Stoichiţoiu-Ichim’s study the following terms are listed: accused, author, accomplice, offender, instigator, defendant, prevented, in the new Code of Criminal Procedure however, the term
suspect appears: Article 33 (1) the main procedural subjects are the suspect and the injured party.\textsuperscript{7}

In the Explanatory Dictionary of Romanian language, the word suspect is defined as: “The person who is suspect, who behaves suspiciously, who does not inspire confidence, whom you must beware, who is dubious, questionable.”\textsuperscript{8} The defining meanings place this word in the semantic range of the term accused, offender, etc.

5. The new Code of Criminal Procedure contains several changes to the current Code of Criminal Procedure, through the terms and expressions which are defined in the normative act in question. In this regard, we note the following structures: house arrest (art. 218 and following), warning (art. 575), plea bargain agreement (art. 478 and following), preliminary chamber (art. 342 and following), judge the rights and freedoms (art. 300, par. 1, letter a), appeal in cassation (art. 433 and following), community work (art. 560).

6. The dynamics of general vocabulary and legal vocabulary is required by the development of human society, by the need to give a precise name to the new realities emerging in every area of human activity. The four codes approved by the Romanian Parliament in 2010: the Civil Code, the Penal Code, the Code of Civil Procedure, and the Code of Criminal Procedure provide a rich material for analysis and research from the legal lexicon; they signify an important moment in the evolution of doctrine and civil and criminal procedure, connected to the requirements of community law.

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FACTORS OF MODELLING THE LEGAL LANGUAGE
FROM THE CURRENT ROMANIAN LEGISLATION

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ABSTRACT. As any specialized language found in the subsidiarity of style, the Romanian legal language has undergone minor changes over time due to the authority of a tradition perceived as a routine factor. The new social headquarters require the reform of justice not only formally, but also its content which regards also the language domain, that the contemporaries can accept without semantic distortion coming from archaize and the aberrant usage of legal terms. The current covered texts are still far from being synchronized with the predictable language plan of a contemporary litigant being accustomed to promoted neologization via various channels.

Keywords: Europeity, spirit of time, new information technologies

1. Introduction

From the diachronic perspective, the language is a product of the social and an effect of the socialization; without a language it is difficult to conceive and articulate a social mechanism able to build a suitable facility (tribal, feudal, state). If the former was guided by the principle of nature, the following ones already involved culture, namely the existence of rules established by a person or group of persons delegated to others, and capable (cognitively and affectively) to generate the laws according to which the state mechanisms operate. In all this, the language plays a significant role, in addition to the function of communication tool, and therefore accumulates a linking
factor of natural or cultural unity. With good reason, the monotheistic religions refer to language as the base to articulate the dogma, and at the level of ethnicity, in most cases, the beginnings of writing in the language of the people in question is an official or administrative act, i.e. a legislative document, an act of communication from a transmitter to a receiver. Thus, the tablets of the law are found in all three monotheistic religions (Hebrew, Christian and Muslim) and they have functioned for centuries as a variant of written and spoken language, from where the ones that drafted the first legal texts were inspired.

From the semiotic perspective, language is a given, a something already existing, an “abstract system of signs and conventions underlying the individual acts of enunciation” [12]. The preexistence of language is synonymous with the coexistence of several languages, which are found in separate areas or in the same territory, for the latter causing problems of multi and interculturalism. Language is like a musical score or a chess game: they both preexist, and they can be acquired at various degrees of personal interpretation. Nobody chooses their native language, religion or legal system. Everyone has them imposed by generation parents, which in turn follow a custom. Once they are assumed, they become personal purchases by which individuals socialize, or interact or communicate with others and they communicate themselves. Styles are subsidiary to language that function according to some well adjudicated rules, this distinction between them is only formal, but also according to the degree of expression which tends to zero in case of scientific style and it becomes maxim in case of belletristic. In the official and administrative style, it detaches a component that tends to assume autonomy: legal language, which, in its form becomes a discursive event or an act of speech, different said it communicates content, it addresses to a recipient, and it expresses something in a scientific way. In terms of language theory [6], the legal discourse involves an act of speech (something is stated), an act of receiving (it implies the other) and a prolocutor act (you pose on the other). Based on these components of speech acts, we propose an analytical and corrective approach to the Romanian legal discourse, analyzing the modelling factors of legal language, able to reduce its particular prolocutor component and thus alleviate the tensions in public space, often generated by the speaker’s limited ability to communicate and the listener to perceive correctly the message of the law. Its letter and the spirit, a phrase
dear to lawyers, mainly aimed at the court of the issuer, namely the legislator and the practitioner, neglecting the connotation effects of the text of the law. Pragmatism requires a shift of interest from the conceptual side on the preventive effects or enforcement of the law, which presupposes a significant adaptation of language to what is the waiting horizon of the justifiable citizen.

The paradigm component also applies to language modelling, according to which choosing the right word from a similar set is a daily operation, but also the syntagmatic one that is the joints and relations from the construction of statement and discourse. The need to change from a law with policy marks specific to socialist system to another, synchronized with the new political realities existing in Romania, had the immediate effect of intense legal activity which either corrected the existing ones or developed new ones according to a completely different philosophy. In drafting the laws in the years after December 1989, there is a noticeable hesitation at syntagmatic level. Drafting the law under imperative time pressure in a climate of permanent political tension, natural in a democratic system, had as an immediate effect the conceptual and discursive intermixture so that changes, additions, repeals and other changing operations exceed, often, quantitatively, the original text. From here it derives the difficulties of judicial convention, including the public perception towards the idea of legislative decline or judicial incoherence. Our analytical approach analyses the necessary legislative text processing language, before it is adopted, promulgated, published and therefore entered into the public domain. In itself, the language processing, as we conceive it here, is a modelling based on several factors, fully aware or not, the legislator and the beneficiary of the legislative act and the justiciable, where the Constitution ensures that “free access to justice”, according to article 21, its conditions are numerous, often taking the form of perceived limitations of the document text and of its discursive act. We understand by perception, the forms that the law takes by the public, by the media, intermediary between the citizen and the legal system and by practitioners and scholars of the judicial act. We summarize the analytical discourse in a single text, Law no. 45/1994 on the National Defence Law of the country, as amended, which we perceive as text and not as legal philosophy. Semiotics and language allow us to identify dysfunctions, to explain their causes and propose correcting solutions to the given text, with general effect on other of this type.
2. Diachronic Factors

Historical, factual and mentality arguments, call for a continuation of the legal act, in a strict area, such as the “national defence”, especially since this part of public life is loaded with emotional-patriotic connotations and it concerns the safety of the citizen. The military, economic, political and intelligence aspects are also covered, so that the traditional factors still play a role in drafting and assuming such texts, thought from the perspective of the law and culture of the place at the same time. We aim at a holistic view of law where the tradition factor plays a significant role: “A complex whole which includes knowledge, belief, art, morals, laws, customs and all other provisions and habits acquired by man as a member of a society” [10]. Therefore, all these components established in the cited definition are traditional and they exercise their modelling function at both paradigmatic and syntagmatic level. At the paradigmatic level, we notice in the text law the persistence in popular and archaic terms, counter to the predictive function of the law which refers to predictable, near or distant future. When a word such as attribution is used twice (articles 7 and 9), assuming that it has its own well-defined meaning, whereas its simple equivalence with “competence” and “prerogative”, neological terms, highlights the inadequacy of the context (“exclusive attribute” and “attributes” of military commander), neologisms, in the shown order, are more appropriate and more specific than the term used by the legislator, “exclusive jurisdiction” and “military commander’s prerogatives”. The same inhibitory function of tradition we find in other words; the legislator chose the popular term needs, instead of neologisms “obligation”, much more specific and more binding than the selected one in article 35 b.

At syntagmatic level, the cultural tradition lies in preserving some word combinations that raise problems of equivalence in another language (“to carry out”, “carrying the concept” or “defence needs”), where the presence of the popular word alongside the neologism is at least strange, if not generating unclear meaning. The practical solution, beneficial to legislators and workers of the defence system would be the choice for neologisms, translatable with minimal loss of meaning in official documents: to complete, instead of “to carry out”; implementation, instead of “carrying out the concept”; requirements, instead of “defence needs/mobilization”. As a public discourse, the National Defence Law favours tradition against modernity, itself
frail since the current trend has surpassed even post-modernity and aims at trans-modernity. Privileging tradition has as outcome the creation of a monologue culture, predominately ethnocentric and its effect is autistic, since it ignores the diversity and prefers customary, hierarchical and impersonal rules. Ethnic superiority can be found at the conceptual level (anachronic discourse) whereas it makes no reference to the supranational text (EU and NATO), which is subject to national legislation. The statement of the principles of sovereignty, independence and integrity (art. 1), although according to the Constitution, favours the Christian ethnic and tradition and puts into question the diversity. While claiming from the democratic and pluralistic principles, the legal text analysis reveals, that is puts it into a form and formalizes at the same time, the principle of hierarchy, similar in many respects to that of caste. The recipient of “national defence”, its formulation being limited and irregular with the facts and law of the current military institution, is the citizen, only that the text privileges, as purpose and meaning, the military caste, lacking explicit reference to state power and ignoring the civil institutions (schools, health, administration). Tradition, as a factor of modelling the language, manifests autarchically as suggesting a kind of “wild thinking”, that others must obey unconditionally to the military caste rules, “in times of war”, ambiguous and irregular phrases with the forms that the conflicts take in modern times.

3. Synchronic Factors

With Romania’s integration into NATO and the European Union the significance of political and military concepts of national defence law have relevant changes. The text of national Defence Law invokes further “the national sovereignty, independence and state unity, territorial integrity and constitutional democracy” (article 1), ignoring contemporary temporary brands. The limitation of sovereignty, dependence on over-state structures, the dilution of borders, territorial regionalization, outside democratic control, these are issues relevant to the facts which the law ignores, they are rather retrospective and little foresight. The only reference to external benchmarks (“generally accepted rules of international law and the provisions of the texts to which Romania is part of”) from article 3 has a generic value and it does not contain any semantic national brand, that is the conative function specific to discourse recipient is not satisfied. The inte-
Gratiation and accession of the country the supranational bodies lead to the relativization of the concept of “national defence”, the presence of Romanian troops in theatre of operations in various parts of the world claiming the denomination completion with the international adjective or renouncing to current democracy in favour of “security”, without other additions. National defence has functioned as such until recently, but is no longer in accordance with the spirit of time and reality itself. National defence was seen after the pugnacious philosophy; nowadays security relates mainly to prevention and is valid inside and outside their borders.

Another factor concerns the contemporary conceptions of time, routine in many aspects and visible opportunities for change in others. The legislator relied on the routine of citizen thinking for whom the army is a safety factor, an institution with a long tradition and prestige who won in our nation great battles. We may add to this fascination the uniform, arms, technique and solemn forms of public expression. The today’s’ pragmatism is that all these components of military halo, defender of the state, statehood and democracy, enter in an area of metamorphosis. Opinion polls in Romania credited army still high, cannot explain other than by routine thinking, a fact which does not account for what happened lately. The text of the law maintains the illusion of the status quo of military institution which can be illustrative for the bardic language function, exercised mainly through the media. Radio and TV shows (mostly public stations), live coverage on military ceremonies, laudatory articles in the press, all tend to start creating myth-generic mechanisms that design the government army and its manifestations in the sublime, sacred and indestructible force of everyday life. Only conflicts of various issues, where involving military, perturb occasionally the pompous solemnity from the level of popular mentality.

The analyzed legal text ignores a reality of today: reducing the social component of the state and as immediate effect the drastic reduction of budget spending, which affects the financial resources available to the military. The tendency to reduce the welfare state is not circumstantial, and a possible exit from the crisis will not mean also a return to previous rates of budgetary allocations. In the current formulations, the articles of the law rely on a financially unrealistic optimism; any restrictive phrase was omitted deliberately. Referring to, the “treaties to which Romania is party” (article 3), is also vague, although the military reality, including the concept of defence has
undergone radical changes in the meantime. Any reference to an integrated defence system, missile shield and the presence of NATO military bases on the national territory and the financial contribution of the Romanian State to the expenditure of North Atlantic structures, is missing, still counting on the traditional concept of defence. While it is in use and it takes effect at the level of “leadership, forces, resources and territorial infrastructure” (article 6), National Defence Law is displaced compared with today’s realities, not just as language, but rather as legal philosophy and defence. The dilution of the welfare state, the perceptible reality in most NATO member states, requires a nuanced terminology and retrieval of text, much too vague and too optimistic in relation to reality. From the synchronic perspective, the current law no longer meets the mission to organize the institutional framework of institution functioning “the national defence”, it has become an “integrated defence.”

The change in the national economy has brought the diminishing of the share role of state and the growth of private sector. In such circumstances the reference to the “financial, material and other” resources, retain the necessary amount of generality in such a text, but it completely ignores the economic reality dominated by the private sector, in its turn controlled by foreign investors more difficult to mobilize financially and materially, if necessary. All the articles of the law prove to be inadequate in terms of semantic meaning and the meaning of the terms selected as a specific paradigm, as is the resulting expressions are inconsistent with the referent (social reality). A formulation such as: “... the resources consist of all the resources...” violates elementary rules of logic and language of a definition, repeating the same word, as a proximate gender, being in contradiction with the stylistic and logic rules. The semantic solution would be replacing the second term with “reserves” more qualified with the expressions that result from appending the “human, financial, material and other.” The initial term has connotations such as “illuminated” “continuum”, “renewability”, while the latter is more limited, suggesting the foresight of the state and the legislator in connection with what is absolutely necessary in case of imminent danger. Desynchronization, according to the ones mentioned above, is manifested in the human resource, phrases such as “the entire population fit for making effort” (article 15) or Romanian citizens “fit for military service” (article 16) is in great contradiction with reality and remember the old philosophy of defence involving “the entire people”. The law
should send a message of order, safety and provision, but, in its present form the law of national defence is obvious in inconsistency with the language in the general context in which it operates.

4. Communication Factors

The “national defence” is an institution with distinctive marks in relation to other state institutions, which are subject to power structures, components of the economy, services, etc. and it is a significant presence in the Supreme Council of National Defence (CSAT). It involves a community of discourse, in subsidiary and one of language, that is a group of people who share a language or a common language variety that interact daily. The act of discursive communication at the level of military group has its natural extension in significant components of the social, but it ultimately involves every citizen interested of his safety and largely the family. As the consignee/receiver of the natural law is the citizen, the language cannot be only a military and legal, claiming a modelling able to transmit message safely, strength and comfort to any man interested in the context in which they live. National Defence Law is an institutional discourse and it establishes a power relationship between the system and national defence, other institutions or structures of the state. That is why the selected words from a paradigm at hand are signs, which are not directly related to the object (reality), understanding the sign by the citizen as a result of the signification produced in the mind of those who use it, to get a “proper significant effect.”

The text of law requires semantic processing, otherwise signs induced in words or the enunciation of the text lead to “aberrant decoding” facilitated by what comes from processing, more or less careful of the old Law or the approximate translations that the Romanian language system rejects them. From the perspective of linguistic semiotics, the analyzed text proves to be inadequate as context and flawed as the discourse of group or mass. Although it has undergone several revisions (changes and additions: G.E.O. 13/2000, Law no 398/2001, Law no 38/2002, E.O. no. 74/2002; Law no 42/2004, etc.), the text law considered here, no longer meets the current requirements of an effective communication. It is tributary to the vision of heroic myth of the Romanian army’s invincibility, with obvious ideological marks, borrowed from the panoply of the old political system. The relationship between sign and object is no longer
working properly and that is why the solution at hand is its re-formulation, taking into account the acquisitions of military and legal doctrine, but also the sciences of language and effective communication. Speech professionalized group (soldiers plus employed on contract) autarkical or caste with obvious semantic distortion (some of them we reported here), wanted by the group members, but with unpredictable effects on the recipient’s communication act; the law of “defence” says nothing other than what the Romanian citizen wants to hear, so the effect of persuading is minimal. Given the fact that daily they hear the word war, associated with determinants such as media, trade, information, cold, etc. what can inspire more the two phrases of the text law, “peacetime” and “war time”. If the time of “peace” is disturbed by “wars”, including the detail that over 3,000 Romanian troops are currently engaged in “theatres of war”, how much security can be induced by a text that summarizes the concept Romania’s state security, considering that even article 1 of the country’s constitution is questioned by the minority groups, or is the National Defence Law drafted according to it!? The numerous changes of the legal text that have undergone in time, coming from military, legal or political, technical initiatives, the inadequacies have been corrected (not completely), but it induced, in the economy of text, factors of semantic tension that question the value of proper functioning in extreme circumstances.

In its current form, the law of National Defence Law is weak considering the forms of articles and the philosophy of ensuring that citizens’ security, which is otherwise almost totally ignored, prevailing the spirit of caste in the frustrating expression. From here the idea of imminence of war for which the “state and people” (improper coordination) must be prepared. As the war itself has lately only interethnic feature, the others are military interventions for correcting breaches from democratic principles or to preserve economic and strategic interests of great powers, the bellicose philosophy of the text is terminologically improper and inappropriate (paradigmatic and syntagmatic) with the spirit of the age (Saeculum). Improper functioning is also because of the interferences of types of discourse, easily noticeable: national(ist), military, historicized, patriotic, emphatically etc. Of all, the most unpredictable effects at the level of the citizen is the first, an expression of an exacerbation of ethnocentrism; by repeated invocation of the term “national” and others in its semantic field, such as, “people” whose signs lead to ethnic field,
it creates the polarization of citizen in aggressors and victims, a situation typical for ethnocentrism.

5. Conclusion

In conclusion, the current law on national defence has at least three major inconsistencies: an inappropriate and dysfunctional processing of previous laws; a mosaic feature of the text, caused by repeated revisions and, finally, a clear lack of semiotic-linguistic analysis, without which the law does not properly transmit messages to citizens, the interferences covering the meaning encoded in terms of military discourse.

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LEGISLATION
THE COMPLEXITY OF LEGAL TRANSLATION:
SOCIAL AND CULTURAL BOUNDS ASPECTS

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ABSTRACT. The development of research in legal terminology translation is strongly related to the comprehension of cultural and social phenomena, as translation leads towards communication between cultures and represents an important link in understanding different legal systems. The translation analysis of any text is based on language culture peculiarities, types and mechanisms of social codes of both native and foreign languages. Above these elements, when legal texts are in question, there is specific juridical knowledge that must be observed, as it is generally accepted that among other disciplines, law is renowned to be interweaving with cultural values and national cultures. Each legal system has its own vocabulary and idioms; so that when transferring legal concepts from one language to another, a translator seeks for analogical legal institutions to obtain the same legal meaning of the translated message in the target language, as it has in the source language.

Keywords: legal language, culture-bound terms, legal equivalents

1. Translation as intercultural experience

It goes without saying that certain fragments of reality, communication and relationships are reflected in language as a social phenomenon. This is the case of legal systems, which represent the distinguishing factor between national cultures. “Legal systems have their own history, organizing principles, patterns of reasoning and have been designed to answer the needs of a particular nation. This inevitably leads to the incongruity of legal concepts between national systems.”

There are countries where legal issues are part of the mass culture, as in United States, where each citizen believes in fairness of
its law enforcement system. This stereotype thinking is deeply enrooted in American history and culture, and in order for a translator to achieve a close and adequate perception of foreign lingua-cultural community, he or she must become a member of the communicative process through original texts, experience of legal translations. The translation process is a form of cultural interaction; it draws certain features about a foreign culture. During the translating process, one replaces culture elements in functional ways and adapts the text to other culture norms. The very notion of cultural interaction implies the presence of both general and peculiar elements, and the mismatch and match culture-bound term, which altogether allow distinguishing one community from another from linguistic and cultural points of view. Any translator, working with legal texts, must take into account the usage requirements-language usage habits of the source language, without violating the legal nature of the juridical perception. The analysis of linguistic and ethnic differences between the nature of the source language and that of the target language is based on cultural-historical and contemporary-every day character.

The most comprehensive communication between foreign cultures is made by creating in the target language an equivalent message, by means of translation. The notion of communicative equivalence of texts is crucial for understanding the mechanism of translation of foreign LSP material. For communicants two texts appear as equal forms of existence of the same message, they are equal in their functional, structural, and semantic identification. During the translation of legal texts to achieve such adequacy is possible only when that translator has legal literacy, both in foreign and native language. Legal knowledge and especially legal terminology contextual synonymy represent the most valuable skills for legal translator. The legal discourse represents the diversity and complexity of the judicial and procedural system of the state. Different countries have their different legal systems. The language of each nation has its own legal terms. For example, the English language serves the legal system of the USA, UK, and German - Germany, Switzerland and Austria. Linguistic equivalence of legal concepts is often not achievable. As Łucja Biel stresses out in the same article “Another obstacle which may limit the applicability of functional equivalents in legal translation is a problem of determining what a target legal system and recipients are. Ideally, a translation brief should provide such details; yet this is rarely the case. It is not so much a problem when translating from
English into a language with one standard variety, [...], but vice versa, i.e. legal translation into English. Is the target text intended for the UK, US, Australian or Canadian audience? If for the UK audience, is it England or Scotland with its distinct legal system? The translation may be also intended for some undefined European audience, for which English is not a native language but is a lingua franca used to access texts written in languages of limited diffusion.” (Biel, 2008: 25). There are some differences between legal English usage in the United States and England arising from various branches of law that need to be highlight. Any Act of Parliament or statute begins life as draft called “bill;” this is the case of United Kingdom, when speaking of primary legislation, as the predominant sources of law. But in American English an “act” is a “bill,” and a “bill” is a “draft of bill or proposal.” Thus, Romanian “lege” is translated in English “act or bill,” while “proiect de lege” – “bill or draft/ proposal.” There are different aspects to discuss within the legal profession and its vocabulary in different legal culture as well. A “barrister” in British English is an “advocate” in Scottish English and a “trial lawyer or appellate attorney” in American English, while in Romanian Legal language all these terms are translated by “avocat.” Legal profession is linked to the legal culture of the country, thus the categories of legal profession actors are represented by different statutes. “Solicitor” in British English is “lawyer who advises clients on matters of law, draws up legal documents, prepares cases for barristers, etc., and who may plead in certain courts,” so that the adequate translation in Romanian legal language must reflect an area of activity similar to a solicitor’s one. The institution of “consilier juridic” in Romanian law means that a “judicial counselor ensures: Legal advice, assistance, and representing authority, public institution or the judicial person on behalf the profession is practiced, defends the rights and the legal interests of them in relationship with the public authorities, institutions of all kinds, as well as with any judicial or civil person either resident or alien. Decides and contra signs judicial documents within the provisions of the law.” There are though little differences regarding cultural comprehension of legal institution in question. A judicial counselor is entitled to plead in all courts of justice, at any jurisdiction level, while a solicitor has the right to representation in court only in lower courts, e.g. magistrate’s court and county court. On the other hand, in Romanian legal culture a judicial counselor has
not the same statute as the lawyer (advocate, attorney-at-law, barrister) while in British English a “solicitor” is a category of lawyers.

Competition law regulates anti-competitive conduct that harms the market. In Great Britain, the Competition Act follows Article 81 and 82 of the European Community Treaty. In United States, the branch is called “antitrust law”. In Romanian the branch is named “dreptul concurenţei”, but when referring to its legislative acts “legislaţie antitrust” is frequently used. It also covers abuse of dominant position, other legal term that differs from the US legal use of English – “abuse of monopoly power” must be used when talking about the American antitrust law. When dealing with anti-competitive practices and agreements one should bear in mind that the US legal term for it is “restraint of trade”.

Employment law usually involves a mixture of contractual provisions and legislation regulating the relationship between employer and employee, and governing labor relations between employers and trade unions. American spelling for labor is “labor” while in British English the correct spelling is “labour law”; British English “trade unions” in US are called “labor unions”. A “compulsory purchase” in United Kingdom is an “eminent domain” in United States, while the Romanian term for it is more or less the same with the term Canadian common law uses for the inherent power of the state to seize, without the owner’s consent, the citizen’s private property – “expropriere”. Legal language is, we can say, a national governing language. The main issue in this regard is the impossibility in some cases to find an accurate, adequate translation from one language to another. This complicates the translator’s work, creates certain difficulties in the use of foreign language legal document.

Carrying out translation of legal texts, the translator deliberately departs from the structural and semantic correspondences between the two sides of communication in favor of their equivalence in terms of impact. Thus, despite the contradictions in views of linguists and lawyers, most are united in the fact that every text has a lexical, grammatical and logical framework, organized in a certain way in order to transfer information. There is no doubt that the legal texts in translation from foreign language into the target language, regardless of their functional purpose and pragmatic roles have the same basis. It is worth recalling that the law is a set of rules of behavior of individuals and groups in society, each prescribing a particular form of action for resolving legal issues. Therefore, language translation
of legal documents should generally meet three conditions: to be precise, clear and reliable. The quality of legal translation in some way affects the effectiveness of enforcement, the degree of regulation of specific relationships.

2. Equivalency issue

There are three types of terms: those that have a semantic equivalent in Romanian, what M. Bážlik calls appropriateness, e.g. “the translated text should have the same informational content as the source text” and, by all means it serve the same legal purpose; those that we can find a functional equivalent for, what specialists call conceptual adequacy, and those that are untranslatable and usually are accompanied in target language with additional description and relevant information. In different cultures, there are totally different, sometimes even divergent approaches to the phenomena and objects.

For example: What will be held to be “just and reasonable” must depend upon the particular facts of each case./ Ceea ce înțelege în temeiul legii diferă de la caz la caz; “Act of God”, by which is understood some unforeseen accident of natural cause which could not have been prevented by any reasonable foresight./ Prin forță majoră se înțelege un fenomen natural de nebiruit și imprevizibil.

In these examples, the adaptive transfer of the legal text fragments is performed by juridical culture means of another language. It is obvious that “sets of facts and sets of consequences will rarely be exactly the same in two legal systems, therefore, concepts belonging to different legal systems are hardly ever identical.”

In carrying out the translation of legal documents, one should focus on legal culture bound lexical items, as “legal translation stands at the crossroads of three areas of inquiry—legal theory, language theory and translation theory.” In the legal context, these factors play a role, since language and law are closely connected and are generated through social practices. Indeed, “language is the essence of the law, since the law is substantially formulated through language.”

There are also cases when the translator overdoes his or her job and burden the text with legal-sounding terms, as in the next example: “a document in Russian issued by a registrar in the Soviet Union certifying the identity of a child’s father. A literal translation of its title is ‘certificate of affiliation’. However, the English translator, who fell into the sin of pomposity, decided that ‘certificate’ was not
a legalistic enough word and decided to call the document an ‘affidavit of paternity’. The error here is that, just as it takes two to tango, it takes two to make an affidavit: the person making the statement and the person who administers the oath to that person to endow the document with the required solemnity.”

3. Conclusions

From these examples we can see that the ways of translating legal documents may vary and be combined, depending on the presence in the source language of culture-bound legal terminology, the discourse structure of phrases. The study of lexical structure of the texts is limited to issues of terminology, as law terms are crucial for the legislator aims at promoting accurate and clear formulation of legal regulations. The most difficult aspect of legal translation is the culture-specific quality of the texts. As Martin Weston suggests, “the basic translation difficulty of overcoming conceptual differences between languages becomes particularly acute due to cultural and more specifically institutional reasons.” The equivalence of an institution, a division, a concept, or a term may not be found in the target language, so that it is the translator task to choose what method of translation is best to use, as to keep the style, lexical structure and the juridical meaning accurate. As both scholars and lay people agree on it, law’s main function is to regulate social relationships. To accomplish this, it has to “communicate legal norms to their addressees.” This is carried out, as any other act of communication solely by language. Legal discourse though, more than other categories of specialized language, is dependent on the source or target language legal systems.

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3. In this respect, we discussed the complexity of legal education and profession specialized vocabulary in the paper “Legal Education Vocab-


ASPECTS JURIDIQUES DANS LE THEATRE COMIQUE DU XIX\textsuperscript{E} SIECLE

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ABSTRACT. In the Romanian comic theatre of the nineteenth century, placed under the direct influence of the French theatre, one of the main themes approached is the marriage. The declaration of love, the cohabitation, the marriage itself, the extramarital love, from the proposal to adultery, or divorce usually avoided, are important elements of the sensational boulevard European theatre life, with great success to the public. The Romanian theatre takes over these elements and adapts them to the local realities, reflecting a former mentality, with accompanying legislative restrictions. The moralizing tendency of the time impose the restrictions on the development of the dramatic action, the definition of the comic theatre impose that the facts be presented as a joke and the types of characters impose to be chosen depending on the success stage. Thus according to the poetics of sensational drama, all sorts of characters introduced in diverse dramas, are taken from a tiny world with a bourgeois social inferior or medium identity: girls to be married, parents who arrange their marriages, adulterous women, dowry hunters, not serious pretenders, parvenus, misers etc. The insufficiency of laws or the temporal and / or social inadequacy regarding cohabitation, marriage, adultery or divorce appears in a very special way of the comic theatre of the time.

Keywords: Romanian comic theatre, cohabitation, marriage, adultery

Le théâtre comique roumain du XIX\textsuperscript{e} siècle, fortement influencé par celui de la France, traite fréquemment le thème du mariage, souvent dans ses dimensions conflictuelles, pour des raisons scéniques, évidemment. Tout de même, il est intéressant à voir les mécanismes qui déterminent les situations comiques et leurs aspects juridiques.
La déclaration d’amour

Jusqu’à présent, la déclaration d’amour peut représenter une première étape pour une relation et elle reste hors des restrictions de la loi ; on parle plutôt de la liberté d’expression. La déclaration d’amour est faite, dans XIXᵉ siècle toujours par l’homme, jeune ou âgé, en vers (il est préférable) ou en prose, presque obligatoirement, en français (langue à la mode en époque), mais aussi en roumain, en grec ou en allemand. La réaction des femmes oscille entre amusement, accord, intérêt.

Le concubinage

En ce qui concerne ce type de relation, le vide juridique de l’époque se maintient jusqu’aux nos jours en Roumanie. Mais, en France, par exemple, depuis 1999, il a été rempli partiellement par un acte législatif, Le Pacte civil de solidarité (PACS) ; « Le pacs est un partenariat contractuel entre deux personnes majeures (les « partenaires »), quel que soit leur sexe ayant pour objet d'organiser leur vie commune » (article 515-1 du Code civil). Les raisons qui ont conduit à ce PACS sont multiples : l’homosexualité (dans les pays où ce type de mariage n’est pas agréé), l’hétérosexualité (partage, adoption, héritage). Ce PACS c’est un compromis législatif comme est le phénomène de concubinage en soi.

Le concubinage a été peu utilisé dans le théâtre à cause de la moralité de l’époque. Mais il y a nombreuses propositions de concubinage, bien qu’elles ne soient pas prises au sérieux ou soient tout simplement refusées. Un exemple : le personnage Cârcei propose à Clara : « un âge de 50 ans, comme j’ai, n’est pas bon à jeter, en considérant que je ne fume pas. Ajoute que je peut lire sans lunettes, que je ne porte pas de perruque, que je n’ai pas de dents faus » (Vasile Alecsandri, Modista şi cinovnicul (La marchande de mode et le fonctionnaire), 1841).

Le mariage

Les Pays Roumains utilisaient dans XIXᵉ siècle le Code Napoléon (de 1807), même si après cet acte avait tombé en désuétude en France. Conformément à ce Code, « La femme doit être soumise à son mari » (art. 195), elle ne peut administrer sa fortune (art. 199) etc.
Aujourd’hui, Le code de la famille roumain prévoit l’égalité entre la femme et l’homme dans leur mariage.

Dans le théâtre du XIXᵉ siècle, le mariage se fait par amour (entre partenaires de même âge, habituellement), pour l’argent (acheter un homme / une femme (situation plus fréquente), donc on parle du mariage comme affaire), pour transgresser la classe sociale (acheter un titre nobiliaire, une fonction publique). Le mariage entre parents pour garder la fortune ou le mariage pour légaliser une situation ou pour former des couples internationaux ou bien le remariage d’une veuve ce sont des cas plus rares dans le théâtre roumain. Les mariages entre partenaires d’âge différent ne résistent pas, le mari très âgé étant choisi comme personnage seulement pour des raisons scéniques.

Le mariage d’amour est rarement présenté dans le théâtre comique parce qu’il n’offre pas de conflits scéniques ; mais plusieurs pièces utilisent le mariage d’amour après un mariage d’affaire, arrangé d’habitude par la famille de la fille.

Un mariage situé entre amour et affaire arrange Hagi Pană, un épicier avare, pour sa fille, Marița, autour de laquelle apparaissent trois prétendants : Jorj, un jeune homme peu sérieux, ayant des préoccupations douteuses et parlant souvent en français, Numa Consule, un professeur qui parle en latin, et Petrică, un garçon de l’épicerie. Après bien des embarras de toutes sortes, le père décide de marier sa fille avec son subalterne, Petrică. (Bogdan Petriceicu Hasdeu, Orthonerozia (La niaiserie), 1871 – 1872).

Le mariage pour l’argent connaît des développements différents avec une fin souvent prévisible. Flutureasca, une provinciale, vient à un bal en Bucarest pour acheter un mari. Mais, elle y a une surprise : la rencontre de Chirilă, son ex-amoureux, lui aussi provincial, qui est maintenant garçon de restaurant. La femme lui témoigne franchement: « Je ne savais pas rien de toi et je suis venue maintenant en carnaval, en sachant que les hommes coûtent peu, je voudrais en acheter un. » Mais, jusqu’à la fin, Flutureasca renonce à son intention et se marie avec Chirilă. (Iorgu Caragiale, Clopoțelul fermecat sau O căsătorie la Otelu Patria (La clochette charmé ou Un mariage à l’hôtel Patria), 1858).

Une situation inverse il y a dans un autre exemple, Prăpăstiile Bucureștilor, une adaptation selon un modèle français (Les enfers de Paris de Lambert Thiboust), où un homme, paysan, sans éducation, vient à Bucarest pour acheter une femme « d’ici, de votre foire au
bestiaux », c’est-à-dire du « salon » où il avait touché, salon fréquenté des putains qui réagissent promptement : « deux milles, exactement que j’ai besoin » ou « que je l’éblouisse le sot, pour qu’il devienne le mien ». (Matei Millo, Prăpăstiile Bucureștilor (Les pièces de Bucarest), 1858).

La fille à marier, vue par sa famille comme une marchandise, donc prête à vendre, c’est-à-dire à faire un mariage sans son consentement, est arrangée de sa mère pour le rendez-vous avec son futur époux : « D’abord, tu dois te parer bellement, puis tu dois lui offrir une raison de parler… mais, en français ! Tu dois le regarder aux yeux langoureux, sourire pour lui et lui chanter la marche du Napoléon et enfin, tu dois faire tout ce que tu sauras pour lui éblouir » (Vasile Alecsandri, Peatra din casă (La pierre de la maison), 1847).

On peut conclure que la principale condition pour un mariage dans la plupart de situations c’est l’argent ou la dot. Le théâtre comique utilise pour personnages nombreux hommes qui cherchent une dot ou un testament. Les coureurs de dots veulent souvent se sauver d’une situation très difficile. La lecture de l’acte dotale met en évidence si bien l’intention réelle, d’habitude bien cachée sous des mots d’amour. Par exemple, la mère Chirița va dans la capitale pour trouver des gendres assortis pour ses deux filles, Aristița et Calipsița, un peu bébêtes et assez laides, pour lesquelles elle choisit deux jeunes hommes, desquels elle pense qu’ils « savent parler, se comporter noblement ». En fait, les deux sont des imposteurs qui mentent qu’ils ont des fonctions importantes dans la société.

« Bondici : Écoute : (Il lis) : « L’acte dotal de mes filles, Aristița et Calipsița »
Pungescu : Hélas ! continue ! Que Dieu nous aide !
Bondici : « Le balluchon : deux châles »
Pungescu : C’est bien ! L’un pour moi, l’autre pour toi !
Bondici : Deux fourrures en martre, deux en renard ».
Pungescu : C’est bien. La martre c’est pour moi…
Bondici : Mai non, le renard c’est pour toi. […]
Bondici : (en chuchotant, à Pungescu) Quelle fille prends tu ?
Pungescu : Calipsița » etc. (Vasile Alecsandri, Chirița în Iași sau Două fete și-o neneacă (Chirița à lassy ou Deux filles et leur maman), 1850).
Le coureur de dots est un type de personnage qui ne pratique aucun travail, mais qui connaît très bien le métier d’obtenir des grosses sommes ou des biens par tromperie. Il est surencrédit par les comédies parce qu’il sa présence crée des situations comiques.

Le mariage peut aussi constituer une solution pour la transgression de la classe sociale. Dans la comédie *Ginerele lui Hagi Petcu*, adaptation selon *Le gendre de Monsieur Poirier* d’Émile Augier, le beau-père Hagi Petcu, très riche, achète, par le mariage de sa fille, un gendre ciblé de dettes, mais descendant d’une famille noble, le prince Radu Movilă ; Petcu pense que grâce au nom de celui-ci, il va faire de la politique. Mais, le prince, continue à mener une vie paresseuse est luxuriante et d’être complètement désintéressé de tout. (Vasile Alecsandri, *Ginerele lui Hagi Petcu (Le gendre de Hagi Petcu)*, 1866).

Dans une autre variante, adaptée selon le même original, le ridicule est donné de la négociation entre le beau-père, Poirier, et le gendre, Gaston, Marquis de Presles :

« Gaston : Tu seras comte.


Gaston : Le baron Poirier ! Il sonne bellement !

Poirier : Oui, le baron Poirier !

Gaston : *(Le regarde et pouffe de rire)* : Excusez-moi, mais ceci sera trop : monsieur Poirier, baron !


Le mariage comme affaire sociale et rien de plus est présenté dans un texte traduit selon un modèle français non-précisé. Eliza Bernard, une bourgeoise riche, veut à tout prix un titre nobiliaire pour pouvoir entrer aux baux de la Cour. Elle signe un contrat de mariage avec un noble ruiné, acte par lequel : « Monsieur le Marquis de Montmoran s’oblige à donner à madame Eliza Bernard son nom, son titre et ses qualités, pour lesquels la nommée dame payera au Marquis une somme annuelle de six milles livres ». Le contrat interdisait au mari (qui aimait cette femme et avait signé l’acte sans le lire) de demander ses droits d’époux. (Alecu Manoli, *Noblesa cumpărătă (La noblesse achetée)*, 1849).

Le problème d’héritage simple (sans compter exactement qui bénéficie moins ou plus des biens : le fils aîné, l’épouse légitime, les
enfants naturels) préoccupe le théâtre comique de cette période, mais d’autres aspects juridiques sont négligés : le problème de tutorat (tuteur légal, tuteur testamentaire) ; le contrat prénuptial, l’avorte (à peine nommé dans la prose de l’époque). Au droit de vote pour les femmes il y a peu de références. La mère adoptive est rarement rencontrée, la mère porteuse est absent au XIXe siècle (fait explicable : le terme désigne une réalité récente).

Le problème d’honneur, qui montre un paradoxe de la mentalité (pour la femme, on exige la pureté sexuelle, pour l’homme, on tolère bien des conquêtes), est présente dans nombreuses pièces, qui ont pour sujet la fidélité de la femme mariée. Des paris, des épreuves de foi font le délice des spectateurs de l’époque. Par exemple, un particulier riche dit à sa femme que « seulement un homme sot peut être trompé de sa femme » et il fait un pari que sa femme ne peut pas faire cette chose. Jusqu’à la fin, après quelques qui pro quo, le mari se reconnaît vaincu. (Vasile Alecsandri, Rămășagul (Le pari), 1844).

Deux hommes vont vérifier si leurs femmes les trompent avec Lionescu, le fils du propriétaire, mais par orgueil, aucun d’eux ne veux croire que sa femme pourrait être coupable et ils font un pari pour cinq agneaux en ce qui concerne l’honnêteté de leurs épouses. Mais celles-ci en apprennent et considèrent qu’elles doivent faire quelque chose pour se venger de leurs maris. Donc, chacune d’elles simule l’acceptation du flirt avec Lionescu. (Costache Negruzzi, Cârlanii (Les agneaux), 1849).

L’amour extraconjugal et l’adultère

La passion des deux amoureux détermine la jeune femme, Eliza, de quitter, immédiatement après les noces, son mari âgé (choisi par la famille), pour le jeune homme qu’elle aimait vraiment, en laissant un billet pour l’explication : « sans votre accord, je suis celui que mon cœur a choisi et avec lequel seulement je pense sûrement que je pourrais être heureuse » (Costache Bălăcescu, O bună educaţiune (Une bonne éducation), 1845). Le texte c’est une adaptation selon un modèle probablement français, parce-que, en réalité, les femmes n’avaient pas de courage de s’opposer à leurs familles.

L’amour extérieur au mariage implique également la femme et l’homme, mais les pièces de théâtre ne font, généralement qu’énoncer le thème, sans en suivre une évolution dramatique. L’amour extraconjugal devient le centre du texte dans la pièce Kir Zuliaridi
(Monsieur Ziliaridi) (1852), adapté par Vasile Alecsandri selon Un tigre de Bengal de Edouard Brisebarre et Marc Michel ; le personnage principal, extrêmement jaloux, soupçonne sa femme d’avoir une liaison extraconjugale avec le voisin Papă-Lapte. Finalement, au moment où l’homme est guéri de sa jalousie, Papă-Lapte et Afrodita commencent à planifier une escapade.

On peut rencontrer des propositions d’amour à une femme mariée, refusées avec une riche imagination par celle-ci, parce que la mentalité de l’époque ne permettait pas une acceptation. Suzana, la femme du dignitaire Toader Buimăcilă, fait l’objet de l’attention de Tachi Răsvrătescu et Ion Galusceus, qui la courtisent. (Vasile Alecsandri, Rusaliile (Les Pentecôtes), 1860).

Une tentative d’amour extérieur au mariage a Mândica, la seconde femme d’Anastasi Scărlătescu, qui tombe amoureuse de Jean, le professeur de guitare de la fille de son mari. Mândica a compris d’une manière erronée le comportement délicat de Jean et, en se voyant refusée par celui-ci, elle réagit violemment : « Mais bien, misérable, pourquoi as-tu profiter de mon amour, de mon innocence, de mon cœur, ce cœur fait seulement pour aimer, ce cœur chanté par les jeunes hommes du faubourg, ce cœur que j’ai méprisé seulement pour toi, ingrat ! » (Costache Caragiale, O soare la mahala (Une soirée dans le faubourg), 1847).

Malgré la mentalité de la période, il existe des pièces qui traitent l’adultère. La seconde femme de Zamfirache Zăpăceanu, Manda Vrăjbeanca (40 ans), trompe son mari dans leur maison avec deux amants simultanément, tous les deux étant très jeunes qui, en fait, prétendent l’aimer pour l’argent de son mari. L’un pense : « elle a de nouveau commencé son maquillage […], mais ne m’importe pas : combien du temps elle me donnera d’argent, je lui dirai que je l’aime ». Quand le mari rentre plus tôt, il croit que les deux amants sont des voleurs et sa femme le convainc qu’il est malade. (Ioan M. Bujoreanu, Cuconu Zamfirache (Monsieur Zamfirache), 1857).

Vers la fin du siècle, la conception sur l’adultère n’est plus si stricte et permet aux auteurs de théâtre comique de l’aborder dans leurs textes. Un adulte devenu habitude commet Veta, la femme de Jupân Dumitrache, avec le servante Chiriac. Tout le monde connaît la situation, seulement le mari trompé n’a aucune idée (Ion Luca Caragiale, O noapte furtunoasă (Une nuit orageuse), 1879). Une autre femme adulte, Zoe, trompe son mari, Zaharia Trahanache, un homme politique, âgé et occupé, avec le meilleur ami de celui-ci,
Ştefan Tipătescu (I. L. Caragiale, *O scrisoare pierdută (Une lettre perdue)*, 1884).

Il n’existe pas dans le théâtre de conséquences légales pour les personnages adultrins. L’adultère devient une bonne blague.

**Le divorce**

Le mariage du théâtre peuvent devenir un calvaire pour les deux mariés, mais jusqu’au divorce il était chemin long. La femme peut tyranniser son mari, mai celui-ci la supporte, sans avoir l’idée du divorce. Le personnage Durosel présent mieux cette femme : « Madame Penșon qui parle, crie, commande, fait tourner et virer tout le monde, en commençant avec son mari imbécile ». (Costache Bălăcescu, *Găina cântă (C’est elle qui porte la culotte)*, 1878). Le divorce n’est pas un choix extraordinaire pour le genre comique qui a besoin des situations conflictuelles qui finissent bien, ce que le divorce ne l’offre pas d’habitude.

Puis, la rareté du divorce reflète une réalité sociale : l’émancipation des femmes se produit plus tard ; pour le moment, bien des femmes sont éduquées pour le but du mariage et elles doivent accepter tout ce que se passe dans cette relation de famille.

En conclusion, les aspects juridiques qui concernent le mariage pendant le XIXᵉ siècle dans le théâtre comique sont des artifices, des choses particulières qui mérite d’être connues pour leur valeur documentaire qui met en évidence une mentalité de l’époque.

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DIVERSIFICATION AND CONFLICTS IN WOMEN’S ROLES IN THE LATE 19TH CENTURY SOCIETY

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ABSTRACT. The latter half of the 19th century in Romania was a time of unprecedented change and emancipation for women in regard to political engagement, legal status, access to higher education, and their entrance into the professions and public life. In addition, their visibility in the professional world of literature and arts enabled them to start forging a tradition of their own. Their evolution corresponded to the economic and political development of Romania. The present article examines 19th century cultural impact on women’s changing social status and diversification and the reshaping of their lives.

Keywords: 19th century Romanian society, women’s emancipation, civic responsibility, social struggle

The 19th century is marked by the fact that women are regarded as objects in all the social categories. They are condemned to resign themselves and to become what social institutions based on moral and religion expect them to be. The society not only represents the background for women but also a powerful force that tries to make them obey. The images of a woman and her feminine nature, presented and required by the society, are very old: her images as a wife and as a mother. But the alienation of women is more relevant as they accept these images and do not intend to change anything.

But, with the beginning of the 19th century, women consider that their intellectual inferiority is generated by their deficient in education, and they accuse both the society and men for keeping them in ignorance, in order to dominate them better. In this respect, in her article “Starea femeilor și mijlocul prin care se vor putea emancipa”
The Woman’s Status and the Means Through Which She Could Emancipate], Sofia Nădejde outlines the fact that “the education given so far to the woman was always dictated by fashion, and never by logic,” and condemns the prejudice that “most important of all, a girl must know how to make herself beautiful and attractive. In order to achieve these, it is necessary that she knows how to dance, to sing, and to stammer in French.”¹ N. I. Trofin adds more reasons: “Men, that are very willing to dominate women, stopped them learning. But they made a mistake and continue making huge mistakes! Because, if well educated and bred, a woman would respect her husband and she would love him more, and would not cheat on him. An ignorant and therefore ungrateful woman, becomes easily guilty to her husband, because she is very much blinded by the greediness for money and for other earthly things, which could confuse and determine her to sell her body and spirit only to fulfill her greed and lust for an ephemeral life.”²

The maintaining of the woman in a state of intellectual inferiority is also reflected in the education system. The rural and urban elementary and secondary schools for girls were in a smaller number than those for boys. This fact reflects the large number of illiterate women. In a poll regarding the cases in which women have signed matrimonial documents, it has been established that, between 1870 and 1890, only 35 out of 100 women in the cities, and 4-5 out of 100 women in the villages signed this type of documents.

The public schools for girls were just a few and the people who were working in them were all men, sometimes priests. The state of cultural inferiority of women was also the consequence of structuring the school curriculum for the secondary schools for girls in a different way than in the case of the schools for boys. After 1864, the curriculum for the elementary school was identical for boys and girls (the girls attended also courses of housekeeping education) in the secondary schools, the girls’ education being guided towards literature, art and domestic economy in order to prepare them for family life.

In the rural environment, the girls’ education is oriented only towards domestic life. They learn to cook, to spin, to sew, to go with the animals to the pasture, to take care of the house and to obey to the family’s rules. Even in the case of the bourgeois young lady, who can enjoy a complete education, the issue of attending upper education is not yet taking into consideration. The feminine secondary
education, either that is taking place in an academy for young ladies (in 1831, in Iassy, it is open a French academy for young ladies, “demoiselles, boyars’ daughters,” and in 1854 it is founded The Central School, the first institution for girls) or, after 1880, in a high school, it has never focused on training the schoolgirls for the school-leaving examination which is the first condition to be fulfilled in order to be accepted in the higher education system. After graduating the secondary studies, a young lady can obtain the certificate for graduating the elementary studies or the certificate for graduating the secondary studies.

The girls belonging to the high society spent five or six years in an academy for young ladies. They learned to sing, to dance, to speak foreign languages, but they were not educated for the family life. Constantin Eraclide considers that this kind of education is wrong and that many mothers “instead of getting their daughters accustomed to be gentle, kind, modest, obedient to the advice of their superiors, as well as skilled in everything related to the discipline and the economy of the household, they bring up their poor girls in the spirit of coquetry, which is in the spirit of a measureless wish to be pleasant and to seduce or to be adored by many admirers. In the end, the same mothers bring accusations to their daughters when, in fact, the young ladies, like docile schoolgirls, execute the lesson that they were being taught.”

Saint-Marc Girardin noticed that “the education of girls consists in teaching them French, music, and dancing. When they know all these, we consider them to have completed their education and marry them off ... Once married, our women do nothing, spend their time wallowing on couches, adorn themselves, pay and receive calls. The more active ones read novels ... from these they learn how to behave ... And yet, they are better than we are and much superior to us. This is generally the case in a not fully civilized society, either because women are more capable of adopting civilized customs, because their weaker nature is more flexible, or because they need only half-civilization, as the addition of their delicacy lifts them without delay to the highest level of civilization.”

The woman’s juridic-civil status and her inferior role were emphasized by the adoption of the The Napoleonean Civil Code, in 1865, that granted men a superior position and limited women to a passive role of being only a mother, tutor and administrator of the family’s income. The adoption of this code meant a regress for the
woman’s civil role in Romanian Principalities. Even if The Calimach Code, 1817 in Moldavia and The Caragea Code, 1818, in Wallachia situated the family under man’s authority, they also granted women little autonomy in family.

In 1890, after the national census, Romania’s population numbered five million inhabitants, out of which 2,500,000 were women. Moreover, two million of them were countrywomen. In the seventh decade of the 19th century, when debates, conferences, and public lectures regarding woman’s situation in the political activity took place, representatives of bourgeoisie and landed gentry agreed that a woman must be “only wife, mother, and administrator of the house.”

The first constitutional acts in Wallachia and Moldavia, the Organic Regulations, referred to the equality of all the citizens towards the law. But the poor culture of that time showed the absence of social aspirations on the part of women, even though there was a considerable feminine participation in the 1848 revolution. This is confirmed in the Islaz Proclamation, which stipulated the equal right to education for both sexes. In 1866, when the Constitution of modern Romania was proclaimed, the struggle of the women caused the question of political rights for women, to be raised in connection with universal suffrage.

The 1923 Constitution stipulated principles concerning women’s emancipation: “Special laws, passed with a two third majority, will lay down the conditions in which women are allowed to exercise political rights.” (Art. 6, par II). “The civil rights of women will be established on the basis of full equality of the sexes. (Art. 6, par III). But these provisions remained only promises. The 1926 electoral law reserved the right to vote to men alone. The exercise of the right to vote demands certain intellectual and spiritual qualities, which women lack. The constitutional provision, concerning the extension of the right to vote to women, was applied only in the 1939 law, in respect to the organization of local administration. But only limited categories of women were granted the right to vote or to be elected to county councils.

The women’s intellectual inferiority was considered indisputable and, therefore, their participation in the political life wasn’t allowed. They did not participate either as electors or eligible persons. Also, they were not allowed to occupy a position in the state’s administration, a fact that was clearly mentioned in “Chapter 1” of the Caragea Code: “only men can become boyars, judges, and public
rulers,” while “women are moved away from all the political ordeals, masteries and political positions.” The preconceptions of those times requested the woman only “to like,” and the woman with political rights could not be liked. Later, she would have wanted to be chosen as deputy or senator, which was difficult to be accepted by men. And, because of this exercise of her right to vote, the woman would have lost “her loveliness, grace, kindness, charm, femininity.” Because she is “passionate,” her spirit of justice will be divided between sympathies and antipathies.

In the Romanian Society, many masculine voices were heard defending women and asking equal rights for men and women. As I. Voiculescu notices that “only the fact that the woman has the gift to be a <<mother>> , would be enough to give her the right be alike man, because if she is not totally capable to fulfill his role, he is also incapable fulfill the role of the woman” (op. cit., p. 31).

While C.A. Rosetti in The First Letter Addressed to High Class Society Women urges women not to get discouraged by the fact that the Revolution in 1848 was not “radical” and “did not solve everything” and to fight for their emancipation that, in the end, would lead to the emancipation of the country, Grigore Gurita, in The Political rights of the woman considers that giving political rights to women “is a social danger meant to destroy the man’s possibility of existence with natural and familial obligations.” The one that must rule is the man, because nature “imposed him certain obligations, which as much as the woman would try to satisfy, her creative power won’t allow her to perform,” and, therefore, woman must “fulfill her natural role, taking care of the household and focusing all her energy on bringing up her children in the interest of developing a productive and healthy society.” He also considers that women must avoid the pleasure of making politics, because this fact would bring them only troubles, because “of their bumptious, and many times ridiculous character. What deception would be for her if, as a candidate for a mandate in the House or Senate, the electors would wake up her sense of reality, sending her home instead of the Parliament? And it won’t be impossible that, because of the political customs, she would be exposed to the gravest humiliations! (p. 13).

During a Conference at The Reunion of the Women’s League in Iassy, Eliza Popescu states that women need the right to vote and that Romanian people must follow other countries example: “In different places of the civilized world women have rights – on wealth,
and in America also the right to vote [but only in certain states]. Only in Romania the idea of emancipation, the wish of equality of the political rights with those of men, is regarded lightly, with a vanity, with a passing and unsustainable revolt, created with the intention of imposing, destroying and displaying pride (...).”

Another voice that opposes with vehemence is the one of Simeon Botizanu that says about women that “would be totally monstrous” in the role of men. “The matter of political emancipation might work in America, the country of extremes, but it mustn’t find shelter in our country. We are not in France, or in England and so much the less in America, where even the most chimerical ideas could receive an air of possibility, winning the votes and applause of some daft geniuses through the false civilization.”

The women were excluded from any political right. Their role in this matter remains that of an ideal or of a muse. The French people had their Marianne, whose personification enlivens the Revolution. The Republic is represented by a young woman, full of energy, a flag of the vestals or of the Roman Chastity. The Romanian painters, seized with the revolutionary fever, will often inspire themselves from the French paradigm (C.D. Rosenthal – *The Revolutionary Romania, Romania Breaking its Chains on the Field of Liberty*). In literature, through the character Zoe Trahanache (*A Lost letter*), I.L. Caragiale demonstrates – as later Ion Agarbiceanu does with his character Olimpia Grecu (*The Law of Body*) or Grigore Marunteanu with Zinica (*Ambition*), whose “golden dream is to see herself as the wife of a deputy” - that although women had no right to vote, they played the most important role in the political intrigues. Zoe says to Tipatescu: “I did what I thought I must do. If you are not going to support Catavencu, if you don’t want to elect him in order to save me, I, who want to be saved, am going to support him, to elect him.

Tipatescu: “How?”

Zoe: “Yes, I’m going to elect him. I support Catavencu, and my husband with all his votes must support Catavencu. Finally, who fights against Catavencu fights against me!”

In the moment of woman suffrage and in the myriad reform moments at the turn of the twentieth century, women reformers exercised a degree of political power previously unknown in Romanian society. Women founded many feminist societies. In 1886, in Iassy, Cornelia Emilian initiated the feminist movement setting up the society *Reuniunea femeilor române* (*The Reunion of the Romanian
Women). Later, in 1895, she founded Liga femeilor române (The League of the Romanian Women), the first Romanian society with statutes and a printed bulletin Buletinul Ligii femeilor (The Bulletin of the Women’s League), that urged women to fight for their political rights. In 1896, on Liga femeilor de la Iaşi (The League of the Women from Iassy)’s suggestion, more than 500 women signed a petition addressed to the Deputies Assembly where they demanded the married woman to have the right to administrate her property by herself” Dezbaterile Adunării Deputaţilor (Deputy Assembly’s Debates), session 1895-1896.

Buletinul Ligii femeilor (The Bulletin of the Women’s League) that appeared in Iassy, in 1895 shows how women reformers and gender-specific issues they were championing helped advance class-specific issues during a time of fundamental social, economic, and political transition.

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